October 10, 2023

Submitted via regulations.gov

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

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

Dear Mr. Windmiller:

The Center for WorkLife Law 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.[1]

WorkLife Law congratulates the EEOC for its clear, detailed, and effective proposed rule to implement the Pregnant Workers Fairness Act. The EEOC's proposed rule would effectively advance PWFA's purpose of ensuring employees impacted by pregnancy, childbirth, and related medical conditions are able to maintain a healthy pregnancy and earn an income. Our comments are submitted to strengthen and clarify the proposed rule.

WorkLife Law, a research and advocacy organization headquartered at the University of California College of the Law, San Francisco, has spent more than 25 years assisting employees, employers, attorneys, government enforcement agencies, journalists, and others with issues related to pregnancy and lactation accommodation. We have deep experience applying the Pregnancy Discrimination Act, the Americans with Disabilities Act, and state laws that require pregnancy accommodation in the workplace. In the three months since the PWFA became effective, our legal helpline has provided direct assistance to scores of employees seeking assistance requesting accommodations and challenging denials. We have also fielded questions from scores of employers, journalists, lawyers, and researchers about the law. Our

[1] 88 Fed. Reg. 54714.

comments are informed by these experiences as well as our thought leadership in the broader field of caregiver discrimination.

Our comments below cover a variety of topics, including much of what has been working well for employees impacted by pregnancy and their employers since the PWFA effective date. We are already seeing tremendous value in the clarity provided by the proposed rule, which employers have been relying on for their understanding of how to effectively implement the new law in their workplaces. We particularly appreciate the Commission's considered guidance on the PWFA's novel approach of temporarily excusing essential functions.

Our suggestions for strengthening the proposed rule focus largely on two related themes that have emerged on the WorkLife Law legal hotline as we have assisted employees seeking PWFA accommodations: **unnecessary delay** and demands for **excessive supporting documentation**. Most of the workers who call the hotline with issues related to the PWFA do so after making a clear request for accommodation and not receiving an approval or denial after weeks of waiting. These employees are typically very distressed because, while they wait, they must continue to perform duties that put their health and the health of their pregnancies at risk so they can earn a paycheck and maintain their health insurance. Others call us in crisis and running out of money after being forced out on unpaid leave following a modest accommodation request.

It is common for the workers who call our hotline to have been told that they must complete paperwork designed for requests under the Americans with Disabilities Act or the Family and Medical Leave Act, including detailed medical questionnaires that must be completed by a healthcare provider. As we discuss in our comment, much of the information required by these forms is not relevant to PWFA accommodations. This employer practice has placed a huge burden on pregnant workers and their overloaded healthcare providers who have to fill out these forms. Workers often have to wait for weeks or longer to get a medical appointment, and many are assessed fees by their providers for completing the paperwork. Doctors are forced to parse through detailed job descriptions and lengthy lists of essential functions to give their opinion on the workers' ability to do each one of them, and to what degree. **We have provided as an appendix to our comments several examples of the lengthy forms that workers have been required to complete after requesting a PWFA accommodation in recent months.**

Once the workers submit their paperwork to the human resources department or a third-party administrator for "processing," weeks go by, and when the workers request a status update, they hear that the request is still being processed. Many of those who weren't forced out on leave when they initially submitted their requests find at this point that, because they unable to safely do their jobs, they have no choice but to go out on unpaid leave, often putting their health insurance coverage, housing, and access to adequate nutrition at risk. Some have been fired while waiting because they weren't able to do all of their job duties without an accommodation.

Although these challenges around processing delays and burdensome medical certification have all occurred since the PWFA effective date, we have also witnessed on our hotline the incredible promise of the Pregnant Workers Fairness Act. Workers in states like Florida and Texas who previously would have had no option to receive even modest accommodations that are critical for their pregnancy health are now receiving them without question. These workers are incredibly grateful to have the support of the law during what is often a physically and economically trying time in their lives. Many tell us they don't know what they would have done without it. As the regulations are finalized and more employers

become aware of their new legal obligations, the PWFA will make a lifechanging difference in the health and economic security of workers impacted by pregnancy, childbirth, and related medical conditions. Our comments, which are rooted in our experiences supporting employees and employers in the early months of PWFA implementation, are driven by this important and worthwhile statutory goal.

We would like to thank the EEOC for its thoughtful work in creating the PWFA proposed rule and interpretive guidance. We appreciate this opportunity to present our comments, which appear below in an order that follows the sections of the proposed rule.

WorkLife Law's Comments to PWFA Proposed Rule and Interpretive Guidance

1636.3(a)(2) Definition of Limitation. We commend the Commission for recognizing that pregnancy-related impediments or problems may be modest, minor, and/or episodic. This is an important statement that highlights a key difference between the PWFA and ADA. We urge its continued inclusion in the final rule because some employers and medical care providers who are used to accommodating pursuant to the ADA are reluctant to accept that non-severe problems are deserving of accommodation.

1636.3(b) Definition of Pregnancy, childbirth and related medical conditions. We applaud the proposed regulation's definition of related medical conditions, which comes directly from case law and the EEOC's longstanding interpretation of the meaning of "related medical conditions" in the pregnancy context.

We strongly support the inclusion of termination of pregnancy, including by abortion, in the enumerated examples of "related medical conditions" that may require accommodation. In addition to comprising an essential component of reproductive health care[2] needed by hundreds of thousands of people in the U.S. every year,[3] abortion's place among the full range of statutorily protected "related medical conditions" is rooted in decades of legislative, administrative, and judicial authority. At the time the PWFA was passed, it was widely understood that it would cover abortion.[4] In enacting the Pregnancy Discrimination Act, Congress expressly confirmed its intent that the statute protect workers from discrimination for obtaining abortion care.[5] As the Commission notes in the proposed Interpretive

[2] *Facts Are Important: Abortion Is Healthcare*, The American College of Obstetricians and Gynecologists, https://www.acog.org/advocacy/facts-are-important/abortion-is-healthcare (last visited Sept. 18, 2023).

[3] Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, Pew Research Ctr. (Jan. 11, 2023), https://www.pewresearch.org/short-reads/2023/01/11/what-the-data-says-about-abortion-in-the-u-s-2/.

[4] *See* Christopher Jacobs, *Sen. Bill Cassidy Is The Left's Useful Idiot On Abortion*, The Federalist (Sept. 13, 2023), https://thefederalist.com/2023/09/13/sen-bill-cassidy-is-the-lefts-useful-idiot-on-abortion/.

[5] *See* H.R. Conf. Rep. No. 95-1786, at 4 (1978) ("Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."). *See also Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Introduction (1979) ("A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion.").

Guidance, courts consistently have found that the PDA's protections encompass the right to be free from discrimination on the basis of contemplating or obtaining abortion care.[6]

Additionally, we appreciate the EEOC's comprehensive listing of the circumstances in which medical conditions are "affected by" pregnancy or childbirth.

> **Recommendation:** We encourage the EEOC to specifically include in the proposed regulation examples of conditions that are exacerbated by pregnancy or childbirth. Including additional examples will clarify that employees might need accommodations to mitigate an existing condition, chronic illness, or disability that is aggravated by pregnancy or childbirth or that is aggravated because the employee must discontinue their usual treatment or medication due to pregnancy. For example, an employee with irritable bowel syndrome (IBS) that is exacerbated by morning sickness should be allowed to take longer lunch breaks to avoid triggering an IBS flare-up (regardless of whether their IBS was already being accommodated in other ways), and an employee who has to stop taking their usual medication for ADHD while pregnant should be eligible for accommodations related to any ADHD symptoms they experience. We also encourage the Commission to include conditions that are not medical diagnoses, but that are common pregnancy symptoms, such as increased bodily pain, fatigue, changes in thirst and appetite, headaches, lightheadedness, mood changes, heartburn and indigestion, and leg cramps.

We commend the EEOC's inclusion of "menstrual cycles" as a "related medical condition" that employers are obligated to accommodate. Employees' reproductive lives last for decades, and their needs will differ at various points during those years, not to mention from pregnancy to pregnancy.

> **Recommendation:** Consistent with that reality, we urge the EEOC to add perimenopause and menopause to the list of "related medical conditions." While we recognize that the list of examples is non-exhaustive, and that both of these conditions fall within a reasonable construction of "menstrual cycles," the documented dismissiveness perimenopausal and menopausal women face from their employers demands making those conditions' inclusion explicit. Recent studies confirm what most of us already know: that perimenopause and menopause symptoms can last for years, and can interfere with work in myriad ways.[7] Like menstruation, infertility, and the use of birth control – all of which are specifically included in the regulation – perimenopause and menopause are related to a worker's capacity for pregnancy,

[6] 88 Fed. Reg. 54774 & n.11.

[7] *See*, *e.g.*, Stephanie S. Faubion, *et al.*, *Impact of Menopause Symptoms on Women in the Workplace*, 98 Mayo Clinic Proc. 833 (2023) (among study participants, roughly 15 percent had either missed work or reduced their hours because of menopause symptoms, with Black women and Latinas reporting the worst symptoms and adverse work outcomes); Carrot Fertility, *Menopause in the Workplace* (Sept. 27, 2022), https://content.get-carrot.com/rs/418-PQJ-171/images/Carrot%20-%20Menopause%20in%20the%20workplace.pdf (20 percent of study participants reported losing work hours because of menopause symptoms, and 70 percent had considered some form of work change, such as switching to a part-time schedule or retiring early, due to menopause symptoms).

and their explicit inclusion will provide valuable guidance to employers and the millions of affected workers.

We appreciate the EEOC's inclusion of 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.

> **Recommendation:** We recommend adding to the proposed regulation "inability to pump milk." An inability to pump can arise due to nipple conditions, breast trauma, milk supply issues, amongst other causes.

Gender inclusivity in lactation. We appreciate that the EEOC is careful to use gender neutral language throughout the proposed rule.

> **Recommendation:** 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. 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.

1636.3(c) Definition of Employee representative. 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.[8] We support that the proposed regulation defines "employee representative" to include a family member, friend, and health care provider.

> **Recommendation:** We suggest the EEOC add "union representative" to this list. We also request 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 needs accommodation (not their representative).

1636.3(d) Definition of Communicated to employer. The proposed regulation's definition of "communicated to the employer" includes the qualifier that the employee or applicant "has made the request for an accommodation to the covered entity." We are concerned that this language may be construed as requiring a higher employee burden than required by the plain statutory text, which is clear that the employee need only "communicate" the limitation. The statute in no way requires that the employee or applicant "make a request." Indeed, the Commission has provided several helpful examples of situations where an employee has effectively communicated a limitation without "making a request."[9] It makes sense that the statute would not impose an affirmative burden on employees to "make a request," as many employees are unaware of their legal rights, and demanding that the worker convey a "need" for a modification similarly assumes that the worker believes they are entitled to have their

[8] 42 U.S.C. 2000gg(4).

[9] 88 Fed. Reg. 54722 ("I'm having trouble getting to work at my scheduled time because of morning sickness").

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

> **Recommendation**: We suggest removing from the proposed regulation's definition of "communicated to the employer" the qualifier that the employee or applicant "has made the request for an accommodation to the covered entity."

Related, in § 1636.3(d)(3), the proposed regulation states that to request 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."[10] Employees should not be required to state that they need an adjustment or change at work. An employer's obligation to accommodate is triggered when an employee has communicated a limitation, and the employer knows that it is related to pregnancy, childbirth, or a related medical condition. We urge the Commission to modify the regulatory language to avoid erecting unnecessary procedural hurdles that will disproportionately burden non-native English speakers and low-wage workers.

> **Recommendation:** We suggest revising § 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 <u>that</u> (ii) <u>Necessitates</u> an adjustment or change at work.*"

Employer representatives. The proposed interpretive guidance 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)—does not accurately capture as broad of a range of individuals to whom the employee may communicate their limitation. We suggest that the Commission revise the proposed regulation's list of employer representatives to whom the employee may communicate their limitations.

> **Recommendation:** We suggest replacing in 1636.3(d) the phrase "who has supervisory authority" with "who plays a supervisory role."

Communication by "other means." The proposed regulation appropriately provides that communication can be made orally, in writing, or by other effective means.

> **Recommendation:** We suggest providing an example of "other effective means" that demonstrates an employee communicating by actions or obviousness. Possible examples include a pregnant employee who faints in front of her supervisor, an employee who calls in sick every day for two months after giving birth, or a pregnant employee who is observed being unable to reach equipment due to the size of her abdomen.

[10] Similarly, the proposed interpretive guidance states that an employee must indicate that they "need an adjustment or change at work." 88 Fed. Reg. 54775.

Use of forms. The proposed interpretive guidance states that employers can ask the employee to fill out a form but cannot ignore or close the initial request because the initial request has placed the employer on notice.[11] We applaud this important point because we have seen many instances of employers routinely requiring all pregnancy accommodation requests to be made on a form that then must be "processed" by the employer or a third-party administrator.[12] Often the forms include a section to be completed by the employee's healthcare provider and cannot be processed until the medical certification section is completed. In our experience, it is not unusual for it to take weeks or even months for forms to be processed. See the Appendix to this comment for examples of forms employers are requiring employees to use to request a PWFA accommodation. We would like to draw your attention to the following practices:

- Asking employees whether they have consulted with a healthcare provider about their accommodation request, and if so, on what date they were consulted, and asking the employee to describe the healthcare provider's recommendations on the employee's ability to perform the essential functions of the job (in addition to requiring the employee to have their healthcare provider fill out a form asking for the same information).
- Asking employees seeking leave as a reasonable accommodation under PWFA to check "yes" or "no" in response to the question of whether they have already exhausted their FMLA leave entitlement, with no option to answer "I don't know."
- Requiring employees seeking telework as a reasonable accommodation under PWFA to first apply for telework through the "Flexible Work Location" program that is available to all of the employer's workers; and instructing employees to wait to receive a denial through the Flexible Work Location program before applying for a PWFA accommodation, as well as directing the employee to upload as part of their PWFA request the explanation they received for the Flexible Work Location denial.
- Stating "On average, it takes 30 business days from the date the [employer] receives all required documentation to complete a request."

  Recommendation: In light of this, we suggest that the proposed interpretive guidance to paragraphs (d)(1) and (2) be revised to include that if an employer chooses to ask an employee or applicant to fill out a form, the form should be a simple one that does not deter the employee from making the request and does not delay the provision of an accommodation (name, contact information, date, limitation related to pregnancy, childbirth, or related medical condition, and accommodation sought). We also suggest that the proposed interpretive guidance include a cross-reference to the discussion of interim accommodations in section 1636.3(h)[13] and a statement that for many accommodations that are easy to provide, no form should be necessary.

[11] 88 Fed. Reg. 54775.

[12] Examples of forms are presented in the Appendix.

[13] 88 Fed. Reg. 54781.

1636.3(f)(1) – Qualified employee or applicant when the reasonable accommodation of leave is requested. As we discuss below, leave provided as an accommodation under PWFA can be a lifeline to many who would have otherwise been fired for seeking basic medical care or taking time to recover from childbirth. We appreciate the Commission's careful consideration of this important accommodation.

The proposed interpretive guidance suggests that employers can use a different and lesser standard for establishing an undue hardship when deciding whether to provide leave as a reasonable accommodation. The proposed interpretive guidance states, "Of course, if an employer can demonstrate that leave would pose an undue hardship, for example, due to the length, frequency, or unpredictable nature of the time off that was requested, it may lawfully deny the request."[14] This sentence suggests that any one of these factors alone is sufficient to establish undue hardship, which is contrary to the principles of undue hardship explained elsewhere in the proposed regulation and appendix[15] and as understood in connection with the ADA.[16] Undue hardship considerations for reasonable accommodations of leave should be determined in the same manner as undue hardship for any other reasonable accommodation, requiring an individualized assessment of multiple factors. For example, frequency of leave should be considered in light of the employer's overall financial resources; frequent leave may not be an undue hardship for a well-resourced company that can hire a temporary replacement or that has a flexible workforce.

> **Recommendation:** We suggest that the sentence quoted in the paragraph above be revised to delete "for example, due to the length, frequency, or unpredictable nature of the time off that was requested."[17] Alternatively, we suggest that a clause be added to recognize that none of these factors is dispositive: "as part of a case-by-case assessment that considers the resources and needs of the employer as discussed in 1636.3(j)."

Additionally, footnote 22 in the interpretive guidance to section 1636.3(f)(1) states that an employer can consider FMLA leave already taken when determining whether leave under the PWFA would cause an undue hardship. The footnote references two examples from the EEOC's 2016 Technical Assistance on Employer-Provided Leave.[18] Those examples, however, say that the employer can consider the *impact* on the employer's operations of leave previously taken, not just the fact that leave was previously taken.

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[14] 88 Fed. Reg. 54776.

[15] 1636.3(j) and proposed interpretive guidance beginning at 88 Fed. Reg. 54784.

[16] 29 C.F.R. 1630.2(p).

[17] This suggested revision would be consistent with the discussion of undue hardship in [2016 technical assistance on leave], which states that factors such as length, frequency and predictable "may" be considered. It also states, in the context of indefinite leave that is equally applicable to other factors, "None of these situations will necessarily result in undue hardship, but instead must be evaluated on a case-by-case basis."

[18] EEOC, *Employer-Provided Leave and the Americans with Disabilities Act,* Communication After an Employee Requests Leave (2016), *https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act*.

This is important because several periods of leave strung together could equal a lengthy leave but if the employee's absence is not causing serious harm to the employer's business, there can be no undue hardship. It is the impact of the leave, not the length, that matters.

> **Recommendation:** We urge the Commission to add to footnote 22 in the interpretive guidance to section 1636.3(f)(1) that the employer may consider "the impact" of leave that the employee has already used.

Furthermore, the referenced examples in the 2016 Technical Assistance present situations in which the previous leave and the additional leave were taken for the same disability and the additional leaves were merely extensions of the original leave. Footnote 22 does not contain such a linkage. Pregnant employees often need several periods of leave for very different reasons – infertility treatment, morning sickness, preeclampsia, recovery from birth – and employers should not be able to deny leave for a limitation related to any one of these simply because the employee took a previous leave related to a different limitation.

> **Recommendation:** We request that the Commission add at the end of footnote 22 in the interpretive guidance to section 1636.3(f)(1) that in determining whether leave under the PWFA causes an undue hardship, an employer may consider the impact of leave already taken only when the leave previously taken was for the same limitation for which the employee has requested leave.

1636.3(f)(2)(ii) In the Near Future. We commend the Commission for recognizing that a definition of "in the near future" shorter than 40 weeks during pregnancy would run counter to the central purpose of PWFA.

> **Recommendation:** While we agree with the 40-week analysis for the pregnancy period, we urge the EEOC to consider different timeframes for the postpartum period and the lactation period that more closely match the needs of employees and the statutory purpose of promoting health. For the postpartum period, we suggest one year based on studies of that show risks to maternal health continue during the first year after giving birth.[19] The Commission recognizes that these risks last for a year.[20] Allowing a temporary excusal of an essential function for generally one year

[19] See Roni Caryn Rabin, "Complications After Delivery: What Women Need to Know" (New York Times, May 28, 2023), https://www.nytimes.com/2023/05/28/health/maternal-complications-symptoms.html (complications related to pregnancy can emerge up to a year after childbirth, including hypertensive disorders, diabetes, blood clots, depression, and anxiety; Black women are twice as likely as white women to have serious complications); Institute for Healthcare Policy & Innovation (Univ. of Mich.), "Maternal health risks linked to childbirth persist throughout postpartum year" (Dec. 8, 2021), https://ihpi.umich.edu/news/maternal-health-risks-linked-childbirth-persist-throughout-postpartum-year (racial and ethnic disparities in severe maternal morbidity rates up to a year after delivery; conditions include anxiety, depression, cardiovascular disease, heart attack, eclampsia, blood clots); The Commonwealth Fund, "Maternal Mortality in the United States: A Primer" (Dec. 16, 2020), https://www.commonwealthfund.org/publications/issue-brief-report/2020/dec/maternal-mortality-united-states-primer (noting that half of pregnancy-related deaths occur after birth within one year of the end of pregnancy, Black mothers are more likely to die than white mothers, and maternal mortality is rising).

[20] Proposed interpretive guidance, 88 Fed. Reg. 54777.

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.[21] For lactation, we suggest two years based on the recommendation from the American Academy of Pediatrics that children should be breastfed for at least two years.[22] Rather than focus on consistency in setting the definition at 40 weeks for all types of conditions as proposed in the interpretive guidance, we would urge the Commission to match the time periods to the condition at issue (pregnancy, childbirth, or lactation).

We strongly support the EEOC's proposed 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.

Recommendation: We strongly urge the EEOC to state this principle in the regulation itself, not only in the proposed Interpretive Guidance.

Recommendation: We also urge the Commission to apply the "restarting" principle to accommodations needed for lactation or other related medical conditions.

Additionally, the discussion about the "restarting" principle in the proposed Interpretive Guidance states: "the determination of 'in the near future' shall be made *when the employee asks* for each accommodation that requires the suspension of one or more essential functions." We are concerned that this language will create a perverse incentive for employees to wait to disclose information about anticipated needs, and will penalize employees who share the full range of their anticipated needs early on.

Recommendation: We suggest replacing the language quoted in the paragraph above with the following: "the determination of 'in the near future' shall be made based on when the employee will need the accommodation that requires the suspension of one or more essential functions, considering the periods of pregnancy, postpartum, lactation, or other related medical conditions separately." This modified language will clarify how to determine "in the near future" in a situation where a pregnant employee shares their anticipated needs for postpartum and/or lactation, before those needs are truly known to the employee. For example, an employee may need to be excused from the essential function of working with toxic chemicals while pregnant and anticipates needing the same excusal again later when breastfeeding. If the employee makes its employer aware of its current need during pregnancy, as well as its anticipated future need related to lactation, our proposed modified language would make clear that the employer must still consider these two accommodation requests separately when determining whether the employee could perform the essential function in the near future. The Commission's rationale for treating pregnancy separately from the postpartum period - that it is difficult for

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[21] *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.

[22] American Academy of Pediatrics, https://www.aap.org/en/patient-care/newborn-and-infant-nutrition/newborn-and-infant-breastfeeding/#:~:text=For the best health outcomes,and beyond as mutually desired, Policy Statement: Breastfeeding and the Use of Human Milk, https://publications.aap.org/pediatrics/article/150/1/e2022057988/188347/Policy-Statement-Breastfeeding-and-the-Use-of?autologincheck=redirected (recommending breastfeeding for two years or more).

pregnant employees to predict their future needs - applies even when a pregnant employee attempts to give their employer notice of their anticipated postpartum and/or lactation needs. With the toxic exposure scenario, for example, it is possible that the employee will ultimately have difficulty establishing breastfeeding and will rely exclusively on formula instead, making the previously anticipated lactation accommodation unnecessary in the end.

1636.3(g)(2) Essential functions. This section is derived from the text of the ADA, which provides that an employee must be able to perform the essential functions of their job with or without accommodation in order to be considered qualified and entitled to an accommodation,[23] but the text of the PWFA contains no comparable provision. Rather, the PWFA departs significantly from the ADA in this respect, providing that employees are qualified and entitled to an accommodation even if they cannot perform the essential functions of their positions (assuming that the inability is temporary, the essential function can be performed in the near future, and the inability can be reasonably accommodated). Reinforcing this difference, the appendix to the ADA regulations observes that "The determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is qualified."[24] That is not the case with the PWFA. The determination of which functions are essential will rarely be critical to a determination of whether the employee is qualified.

Recommendation: We request that the Commission delete this section of the proposed regulation to avoid distracting employers from a key purpose of the PWFA. We propose that the Commission replace the language with the following:

Evidence of whether a particular function is essential includes, but is not limited to:

i. The amount of time spent on the job actually performing the task;

ii. The consequences of not requiring the incumbent to perform the task;

iii. The current work experience and judgment of incumbents (including the employee requesting the accommodation) and those in similar jobs;

iv. The employer's bona fide judgment as to which tasks actually are performed on the job.

1636.3(h) Reasonable accommodation - Interim accommodation. As we described at the outset of these comments, we have received many calls to the WorkLife Law hotline from employees who face delays of weeks and even months between the time they make a request and the time that their request is processed and approved or denied. During these delays, these workers are forced to choose between following the recommendations of their healthcare providers and keeping their jobs. Examples of what we have been told include employees who had to continue to lift, push, and pull heavy objects despite abdominal and back pain and weakness, drive when not fit to do so, work in crowded spaces that put

[23] 42 U.S.C § 12111(8). See also 29 C.F.R. § 1630.2(n).

[24] Appendix to part 1630 (regarding §1630.2(n)).

them at risk for viral exposure, and appear for in-person work when they have been told to remain in a reclined position.

> **Recommendation**. We suggest adding to the proposed regulation a sentence about interim accommodation**.** We suggest adding to the end of 1636.3(h)(5) the following sentence: "If the covered entity cannot provide immediately an employee's requested accommodation and an interactive process is necessary, it is a best practice for the covered entity to provide an interim accommodation to permit the employee to work safely and comfortably until a reasonable accommodation can be determined and implemented." Having this sentence in the regulation at the point where reasonable accommodation is explained will alert employers to the importance of providing interim accommodations. It provides a basis for the later mention of "interim accommodation" in the discussion of unnecessary delay.[25]
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> **Recommendation:** We also suggest adding a new section 1636.3(h)(6) to the proposed regulation that defines "interim accommodation." Many workers are experiencing delays of weeks or even months between their request for an accommodation and the employer's determination whether to provide one. During this delay, these workers often continue to work in unaccommodated, unsafe conditions, and when that isn't possible, they are forced out on unpaid leave, sometimes with dire economic consequences. Interim accommodations are therefore critical in effectuating the PWFA's purpose, and it is important to ensure that the meaning of the term is clear. We suggest the following definition:
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> > 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 considers the employee's request or implements a reasonable accommodation arrived at through the interactive process. An interim accommodation must meet the employee's need for accommodation and not constitute an adverse action against the employee, such as leave that the employee does not wish to take.

1636.3(h) Reasonable accommodation - *Proposed interpretive guidance*. We commend the Commission's detailed discussion of reasonable accommodation in the proposed interpretive guidance, which follows the ADA closely while noting areas in which the PWFA regulation must differ from the ADA to achieve the PWFA's purposes.

Particular Matters Regarding Leave as a Reasonable Accommodation. 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."[26] We encourage the Commission to recognize that this principle is grounded in the ADA's

[25] 1636.4(a)(1)(vi) (Prohibited practices).

[26] 88 Fed. Reg. 54780 & n. 49 (citing Equal Employment Opportunity Commission, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, at text accompanying n. 14 (2002),

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 functions can be temporarily suspended, so too must any production standards associated with suspended functions.

> **Recommendation:** We ask the EEOC to delete the reference to the ADA citation discussed in the paragraph above, or alternatively, note that it differs in the PWFA context.

> **Recommendation:** 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.

Ensuring that Workers Are Not Penalized for Using Reasonable Accommodations. The Commission seeks comment on whether there are other situations where ordinary workplace policies operate to penalize employees for using reasonable accommodations.

> **Recommendation:** 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. For example, an employee using a flexible scheduling accommodation due to morning sickness may be automatically penalized under a "no-fault" attendance policy.[27]

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."[28]

> **Recommendation:** 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

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http://www.eeoc.gov/laws/guidance/enforcementguidance-reasonable-accommodation-and-undehardship-under-ada).

[27] *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 (discussing story of pregnant worker who was terminated after leaving work to rush to the hospital due to bleeding and fearing she was miscarrying).

[28] 88 Fed. Reg. 54781.

breastmilk. The example might also point out that the employer is not required to purchase a breastmilk warmer for the employee's home, as that would be strictly for personal use.

Interim accommodation. We appreciate the Commission's discussion of "interim accommodation."[29] In our experience with callers to the WorkLife Law hotline, many employers respond to all requests for accommodation with a form and instructions to all a third-party administrator to determine if their request can be approved. It is not unusual for this process to take several weeks. In the meantime, the employee typically continues to work despite risks to their health and the health of their pregnancy.

> **Recommendation:** We recommend strengthening the Commission's discussion on "interim accommodation" by adding a sentence that says that upon receiving an accommodation request, the covered entity should consider whether it can grant the accommodation immediately and if it cannot, then it would be best practice to provide an interim accommodation.

1636.3(i) Examples. We thank the Commission for the very thoughtful examples of reasonable accommodation in both the proposed regulation and interpretive guidance. Based on the situations presented to WorkLife Law's employee hotline, we suggest revising some of the examples and adding additional examples to more directly address the issues employees are facing.

In proposed regulation 1636.3(i)(2), the example "adjustments to allow an employee or applicant to work without increased pain or increased risk" is qualified with "due to the employee's or applicant's known limitation." This second clause is unnecessary. No other example in the paragraph is limited by similar language, 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.

> **Recommendation:** We urge the EEOC to delete the clause "due to the employee's or applicant's known limitation" from the example "adjustments to allow an employee or applicant to work without increased pain or increased risk" in 1636.3(i)(2).

1636.3(i)(3) Leave-related accommodations. 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. 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.

[29] 88 Fed. Reg. 54781.

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.

> **Recommendation:** We urge the EEOC to modify its treatment of these leave-related accommodations by deleting the comparative reference to other employees.[30] 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.

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."[31]

> **Recommendation:** We suggest deleting from 1636.3(i)(2) the reference to how other employees are treated with regard to parking spaces.

1636.3(i)(3)(iv) Employer concerns about leave. As noted above, leave as a reasonable accommodation is critical to achieve the PWFA's statutory purpose, for example to allow time off to medically recover from childbirth. We commend the EEOC for stating in 1636.3(i)(3)(iv) that an employer's concerns about the length of leave is a question of undue hardship. However, we strongly urge the EEOC to provide additional clarification by explicitly stating in the regulation that extended leave can be a reasonable accommodation under the PWFA. This is an important clarifying point, as some courts have found that extended leave is categorically not a reasonable accommodation under the ADA.

> **Recommendation:** We urge the EEOC to add an introductory sentence to 1636.3(i)(3)(iv) so it reads as follows: "Extended leave can be a reasonable accommodation under the PWFA. A covered entity's concerns about the length, frequency, or unpredictable nature of leave requested as a reasonable accommodation are questions of undue hardship."

Accommodating limitations related to commuting and traveling. We recommend that the Commission add to 1636.3(i)(2) accommodating a known limitation involving commuting. We are aware of situations in which pregnant employees have been advised by their doctors not to drive (due, for example, to pregnancy-related vision problems or pregnancy-related leg numbness) or to commute a lengthy distance, for example due to morning sickness and pain exacerbated by the commute or to stay nearby the hospital at which they plan to deliver. Employers have denied requests to work from home or at a

[30] Of course, if other employees receive a particular accommodation, that may be evidence of no undue hardship.

[31] 88 Fed. Reg. 54779.

closer location under such circumstances on the ground that commuting is not part of "work" and thus need not be accommodated. Courts have held otherwise in the ADA context.[32]

> **Recommendation:** We request that the following be added to section 1636.3(i)(2): "changing work sites, permitting remote work, or making other adjustments if the employee or applicant is limited in their ability to commute or travel."

> **Recommendation:** We also request that an example be added to the interpretive guidance that illustrates a situation in which a known limitation related to pregnancy, childbirth, or a related medical condition affects the employee's ability to commute and must be accommodated absent undue hardship.

Modifications to alleviate pain and reduce risks. We appreciate the EEOC's highlighting in the proposed appendix the critical nature of accommodations that alleviate increased pain and health risks.[33] We suggest that the EEOC make this category of accommodation more prominent in the regulation 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.[34] 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,[35] and to have their employers and healthcare providers underestimate their pain and apply higher levels of risk tolerance toward them.[36]

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[32] *See, e.g*., U.S. Equal Employment Opportunity Commission v. Charter Communications LLC, 75 F. 4th 729, 732 (7th Cir. 2023) (citing cases; "[I]f an employee's disability interferes with his ability to get to work, the employee *may* be entitled to a work-schedule accommodation if commuting to work is a prerequisite to an essential job function, such as attendance in the workplace, and if the accommodation is reasonable under all the circumstances.").

[33] 88 Fed. Reg. 54779.

[34] *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).

[35] 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.

[36] 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 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.

Recommendation: We urge the EEOC to add a new subsection to 1636.3(i) of the proposed regulation 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."

Recommendation: We encourage the EEOC to 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.[37] Certain chemicals, such as lead, can get into breast milk and be toxic to babies. 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.

Recommendation: We suggest that the EEOC provide additional examples of reasonable accommodation to alleviate pain or reduce risk. We suggest adding to the proposed interpretive guidance the following examples of reasonable accommodation to alleviate increased pain and discomfort or to avoid increased risk to health: 1) a farmworker being temporarily transferred to an indoor position to avoid the risks of falling in a slippery field and exposure to toxic pesticides, (2) a secretary experiencing pelvic pain being allowed to work remotely to alleviate pain that would be exacerbated by the commute and sitting upright all day; (3) a warehouse worker being given a portable cooling device to avoid pregnancy risks from excessive heat; and (4) a security guard being temporarily reassigned from nighttime to daytime shifts to avoid increased fatigue and the health risks (miscarriage and preterm birth) associated with working at night.

Continuation of health insurance benefits during leave. 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.[38] This interpretation is supported by the intent of the PWFA,[39] which not only has the goal of continued employment, but also the goal of promoting maternal and child health.[40] Indeed, the House report on the PWFA clearly stated

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[37] Fed. Reg. 54780.

[38] 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.

[39] H.R. Rep. No. 117-27, at 22-24 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf.

[40] 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), 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

that pregnant people "want, and oftentimes need, to keep working during their pregnancies, both for income and to retain health insurance."[41] 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,[42] as well as state laws that require continued health benefits during leave taken for pregnancy or other health reasons.[43]

> **Recommendation:** We request that the Commission add "continuation of health insurance benefits during the period of leave" to 1636.3(i)(3) as another potential leave-related accommodation that must be provided absent undue hardship.

1636.3(i)(4) 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 focused on providing reasonable break time and private space for only one year following the birth of an employee's child.[44] 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.

> **Recommendation:** 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."

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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.

[41] H.R. Rep. No. 117-27, at 24 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf.

[42] Family and Medical Leave Act, 29 U.S.C. § 2614(c); 29 C.F.R. § 825.209.

[43] 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).

[44] Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117–328 Division KK).

1636.3(i)(4)(i)-(ii) Reasonable accommodation related to lactation. The language about pumping accommodations in the proposed regulation may inadvertently suggest 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 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.

> **Recommendation:** Make the following two modifications to 1636.3(i)(4)(ii) in the proposed regulation:
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> 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.

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 focused on providing reasonable break time and private space for only one year following the birth of an employee's child. 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 lactation accommodations that are unrelated to pumping. We recommend that the Commission expand the examples of reasonable accommodation for lactation.

> **Recommendation:** 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."
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> **Recommendation:** 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, we ask the EEOC to 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.

1636.3(j)(2) Factors to be considered in determining undue hardship.

Recommendation: We request that subsection (v) of the proposed regulation be modified to remove from consideration "the impact on the ability of other employees to perform their duties." This factor is taken from the ADA regulations but, unlike the other factors in the ADA regulations, does not appear in the text of the ADA itself.[45] It is also not discussed in the Appendix to the ADA regulations.

We expect that many reasonable accommodations will involve making changes to the job duties of other employees, and employers will use this factor to deny the accommodations. The job duties of other employees – including type of work or amount of work – is a factor that is completely within the control of the covered entity. An employer should not be able to avoid its obligation to accommodate a pregnant employee because, for example, a manager decided to give another employee job duties that a pregnant employee cannot do, rather than hiring a temporary replacement or finding another alternative. If this factor is not removed from the proposed regulation, we request that explanatory content be added to the interpretive guidance to clarify that the impact on coworkers to perform their duties will not ordinarily be relevant to the undue hardship inquiry, and that it is a consideration only in the rare situation when the pregnant employee has unique skills or knowledge that cannot be replaced, such that providing the accommodation would prevent other employees from carrying out the covered entity's business operations.

1636.3(j)(2) Proposed interpretive guidance. Example 1363.3 #31/Undue Hardship illustrates clearly our concern. It features an employer denying a request for part-time work accommodation because it would increase another employee's workload beyond his ability to handle it. We propose that the example be revised to state that the employer must consider other means of providing the requested part-time schedule, such as by making up the labor shortfall by hiring temporary help or splitting up work that is not time-sensitive among several workers on different shifts. This approach is consistent with the proposed regulatory factors for determining undue hardship (e.g., overall financial resources, number of persons employed).

This example also gives us pause because it could be interpreted by employers to effectively eliminate part-time work as an accommodation, given that moving to part-time hours will almost always involve the employee doing less work and the undone work almost always getting passed

[45] Compare 42 US § 12111 (10) (enumerating factors but not including the impact on the ability of other employees to perform their duties) with 29 CFR § 1630.2 (p)(2)(v) (including the clause; no explanatory statements about why the provision was included or how it is to be applied).

on to other employees. Giving other employees more work rather than outsourcing or hiring temporary help is a management decision and should not become a tool for denying accommodation.

1636.3(j)(4) Predicable assessments. We support the proposed regulation'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.

Recommendation: 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 16 healthcare appointments related to pregnancy or childbirth

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

1636.3(j)(5) Others requesting accommodations. Subsection (5) of the proposed regulation states that employers cannot establish undue hardship based on "a mere assumption or speculation that other employees might seek a reasonable accommodation, or even the same reasonable accommodation, in the future." We support this principle and ask that it 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.

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. Indeed, we have seen on the WorkLife Law legal hotline in recent months that it is common for employers to deny a pregnant employee's request for a telework accommodation on the grounds that the employer has been denying other employees' telework requests, and if it grants the

accommodation for the pregnant person, it will have to do so for other employees in the future. Unless this subsection is revised as suggested above, employers could attempt to deny on these grounds all accommodations that would be desirable for other employees, or responsive to their needs, too, including closer parking, leave for employees not covered by the FMLA, part-time work, additional rest breaks, and more.

> **Recommendation**. We suggest including in 1636.3(j)(5) that the potential for future requests for accommodation from other employees cannot be the basis for denial of an accommodation, regardless of employer certainty that future requests will be made. Adopting our proposal that expected future accommodation requests—whether speculative or certain—cannot serve as a basis for denial would comport with the proposed interpretive guidance's "related" point that numerous requests received at the same time – *i.e.*, actual requests – cannot be denied because of processing volume or because all requests cannot be granted.[46]

Proposed interpretive guidance to 1636.3(j)(5). We urge the EEOC to reconsider this sentence: "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."[47] Allowing an employer to deny a pregnancy accommodation because it had previously granted accommodations to others would contravene the statutory purpose of PWFA, as well as the central holding of *Young v. United Parcel Service*, that pregnancy discrimination could be found in the fact that the employer accommodated many employees who were not pregnant but refused to accommodate a pregnant employee.[48]

> **Recommendation:** We ask the Commission to delete the sentence quoted above and replace it with: "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."
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> **Recommendation:** We request that three additional points be added to the proposed interpretive guidance:
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> 1. Other employees' fear or prejudice regarding the employee's pregnancy, childbirth, or related condition, or the possibility that the accommodation would negatively impact other employees' morale, cannot constitute an undue

[46] 88 Fed. Reg. 54786.

[47] 88 Fed. Reg. 54786.

[48] 575 U.S. 206, 231 (2015) ("why, when the employer accommodated so many, could it not accommodate pregnant women as well?").

hardship. This is similar to examples included in the ADA's Interpretive Guidance.[49]

2. The PWFA intentionally avoided including "direct threat" language from the ADA, and the proposed interpretive guidance should make clear that any claims of undue hardship based on claims of direct threat are invalid.[50]

3. The fact that an employee currently has or previously has 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.

Proposed interpretive guidance to section 1636.(k), Interactive Process. In the last few months on WorkLife Law's legal hotline, we have seen employers use their ADA interactive process policies to determine requests for pregnancy-related accommodations under the PWFA. In our experience, this practice has led to lengthy delays and, usually, to denials. Some employers have directed all pregnant employees to use online systems for requesting and documenting the need for accommodations. Others have required pregnant employees to fill out lengthy ADA forms and complete medical certifications about whether they can perform all of the many functions listed in their job descriptions, how much time they spend performing each function, etc. We have spoken with many employees waiting for several weeks, with some employees waiting for more than two months, for their "ADA" forms to be "processed." The result of this "processing" is sometimes a request for more information, and sometimes a denial without explanation – and with no conversation about what the employer could provide. In the meantime, these pregnant women risk their health and the health of their pregnancies so they can earn a paycheck, or they forgo work and pay and fall behind in their bills, some facing food insecurity and homelessness.

Recommendation. To address these problems that arise when employers apply their formal ADA processes to PWFA accommodation requests, we recommend the following changes to the proposed interpretive guidance under the heading "Step-by-Step Process"[51]:

1) Change "Step-by-Step Process" to "Suggestions for an Interactive Process." This will make it clear that employers and employees do not need to rigidly follow these steps.

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[49] 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).

[50] *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).

[51] 88 Fed. Reg. 54786.

2) In the sentence that ends "the covered entity, using a problem solving approach, should. . . ," replace the word "should" with "may."

3) Repeat at the outset that the interactive process can be informal and is to be cooperative.

4) Note at the outset that the interactive process for PWFA requests will almost always be shorter and require less documentation than the interactive process for ADA requests because PWFA requests do not involve establishment of a disability and typically do not require discussion of essential functions.

5) State at the outset that frequently the interactive process for PWFA requests will consist of only a request and approval.

6) Delete paragraph a., "Analyze the particular job involved and determine its purpose and essential functions." This will rarely be necessary for a PWFA request, and directions like this are what lead to healthcare providers being asked to fill out multiple pages of assessments of an employee's ability to do specific tasks, even when that information is completely irrelevant to the accommodation request at hand.

Recommendation: We further request that in a paragraph after the step-by-step process, the Commission reference proposed regulation 1636.4(a)(1) regarding delay and the interactive process, reminding employers that the PWFA prohibits unnecessary delay. We also recommend referencing interim accommodation and advising that employers provide interim accommodations if the interactive process is not quick.

Recommendation: Finally, we request that the appendix include an example of the interactive process that illustrates how quick and informal the interactive process can be in the PWFA context. We suggest the following, which is modeled on the example of the reasonable accommodation process in the ADA appendix:

Interactive Process Illustrated

Saundra is experiencing persistent nausea and vomiting due to pregnancy. She notifies her supervisor of her limitation and requests that her shift begin two hours later, a time at which she typically feels better. Her supervisor agrees and implements her new schedule immediately. Their informal request-and-approval conversation is an interactive process as defined by the PWFA.

The next month, Saundra's condition worsens and her healthcare provider recommends that she work from home to address her fatigue as well as her nausea and vomiting. She makes her new limitation known to her supervisor, who responds that it will be difficult for the department if she works from home full time and schedules a time with her at the end of the week to talk about how her limitations can be accommodated. The supervisor tells Saundra to work from home pending the meeting as an interim accommodation. At the meeting, the supervisor and Saundra discuss which of her job duties have to be done in person and which can be done from home, how frequently the in-person duties must be

done, and Saundra's ability to work in person in a limited way. They agree that Saundra will come to the workplace two afternoons per week and work from home the other days, and the arrangement is implemented immediately. Their meeting is an interactive process as defined by the PWFA, and the employer's provision of an interim accommodation while the interactive process was pending ensured that Saundra was not harmed by the delay.

1636.3(l) Supporting Documentation. We appreciate the EEOC's inquiry as to whether the supporting documentation framework the Commission sets out in proposed regulation 1636.3(l) strikes the right balance between the needs of workers and employers. Based on WorkLife Law's experience serving employees on our legal helpline, both under the PWFA since its effective date as well as for more than a decade under state-level equivalents, we strongly believe that the proposed supporting documentation framework will impose unnecessary burdens on workers that will contribute to delay and wrongful denials, as well as deter employees from seeking even the most modest accommodations they need.

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.[52] 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.[53] Furthermore, women of color, particularly Black women, often face medical racism that may inhibit or delay their ability to secure supporting documentation.[54] 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.[55] We regularly speak with employees on our legal

[52] 88 Fed. Reg. 54787 & n.87.

[53] *See, e.g.*, C. Brigance 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 (noting that 4.7 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).

[54] *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.").

[55] Kimberly Danebrock, *Charging Patients for Completing Forms*, Cooperative of American Physicians (Apr. 15, 2014), https://www.capphysicians.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/octorschargeeforfmlacertifications.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-

hotline facing these barriers, causing them significant stress, financial hardship, and negative health implications during an already challenging time in their lives. The level of resources and persistence that is often required to obtain the medical certification demanded by many employers is overwhelming. We urge the EEOC to relieve employees of this burden in situations where it is not necessary to effectuate the PWFA's purpose, and instead serves to undermine it.

We applaud the Commission for making clear that employers cannot seek supporting documentation for accommodations needed for lactation or pumping.[56] Even short delays in providing accommodations can threaten a lactating worker's milk supply. Several of the callers to the WorkLife Law hotline have had their requests for lactation accommodation held up because they were told to complete disability accommodation paperwork and/or get a doctor's note. One recent caller had her request denied because she had not returned her "disability" paperwork. She was able to complete the required paperwork and get the required doctor's note saying that she needed an accommodation to pump, but she still waits for a determination of her lactation accommodation request. She has been waiting now for more than seven weeks since her initial request.

WorkLife Law also has a long history of partnering closely with healthcare professionals who provide care during pregnancy, postpartum, and lactation, as well as the professional associations that represent their interests. We have heard countless times that employer-mandated accommodation paperwork imposes significant burdens on these professionals, who are already overworked and struggling with staffing and other resource constraints. We have learned that added administrative paperwork directly impacts their ability to provide quality care to their patients. And we have heard from some providers that they hesitate to write accommodations recommendations unless the need is dire, for fear that they will become obligated to engage in a lengthy back-and-forth with their patient's employer to defend their recommendations and to provide additional information that is unnecessary to providing the recommended accommodation.

The PWFA recognizes the importance of workers obtaining accommodations in a timely fashion to protect their health. We address below several aspects of the proposed regulation that would unfortunately impose unnecessary financial, physical, and mental burdens on workers; contribute to substantial delay in receiving reasonable accommodations; and ultimately deter workers from seeking the accommodations they need for their health and wellbeing.[57]

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hopkins-mychart-messaging-fees-7HJ6GX7NGNE7NPYQQ7E7C5EHXE/ (discussing health care systems charging for My Chart messages).

[56] 1636.3(l)(1)(iv).

[57] 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

1636.3(l)(1)(i). 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 gendered and racialized stereotypes about what pregnant or postpartum people "obviously" need, or that the proposed regulation 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.

> **Recommendation:** 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."
>
> **Recommendation:** 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 pregnant employee self-attests to regular vomiting and requests temporary relocation of their workstation closer to the bathroom, the need for accommodation is "obvious" because the employer knows, or should have known, that the employee needs easy bathroom access. Similarly "obvious" would be a police officer who self-attests to pregnancy and whose uniform and bulletproof vest no longer fit due to her physical changes and asks for larger sizes.
>
> **Recommendation:** 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."

1636.3(l)(1)(iii). We applaud the Commission for making clear that employers cannot seek supporting documentation for certain straightforward accommodation requests.[58]

> **Recommendation:** We urge the EEOC to expand the list to also include:[59]

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").

[58] 88 Fed. Reg. 54769 (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).

[59] 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

- Time off, up to 8 weeks, to recover from childbirth.[60]
- Time off to attend healthcare appointments related to pregnancy, childbirth, or related medical conditions, including, at minimum, at least 16 healthcare appointments.[61]
- Flexible scheduling or remote work for nausea[62]
- 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.

Reproductive Health Decisions 10 (2021), https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2021.pdf.

[60] *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.

[61] 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 (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 (recommending at least two postpartum care appointments, with ongoing care as needed).

[62] *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.").

1636.3(l)(2): We commend the EEOC for making clear that employers may demand only "reasonable documentation." This is critical. On the WorkLife Law hotline during the early months of PWFA implementation, we have seen some employers impose extremely onerous documentation requirements, similar to those under the FMLA and ADA, that far exceed "reasonable."[63] Please see the appendix to this comment for several examples of onerous documentation requirements that have come through our helpline. We would like to draw your attention from these examples to several unreasonable yet common practices:

- Requiring employees to authorize their doctor to release all of their medical records to the employer;
- Requiring employees to authorize the employer to contact the doctor to discuss the doctor's assessments and opinions;
- Requiring completion of lengthy medical forms of up to 9 pages asking healthcare providers a series of complex and irrelevant questions that make reference to legal concepts that care providers are unlikely to be familiar with (e.g., instructing that 14 employer-provided medical questions "should be answered 'item by item' on your healthcare provider(s) office letterhead" and that "failure to provide a full and timely response to the [14 questions] may delay the process or result in denial of the requested accommodation(s).");
- Requiring employees to have their doctors complete and return medical certification forms by deadlines that are not possible in many cases for reasons outside of the employee's control (e.g., within 15 days of receiving the form from their employer);
- Asking healthcare providers to describe medical conditions/diagnoses and to "be as specific as possible" (e.g., "describe the nature and severity of your patient's medical condition, including relevant medical facts related to the condition (e.g., symptoms, diagnosis, and regimen of treatment)");
- Asking healthcare providers to comment on whether the employee can perform each of the essential functions listed in their job description, and to state how frequently they can perform each one;
- Asking healthcare providers to comment on whether the employee can perform dozens of different activities (e.g., balancing, crawling, kneeling, organizing, concentrating, etc.) and to state how frequently each can be performed (e.g., never, rarely, occasionally, frequently); and
- Asking as the first question on a PWFA medical certification form whether the employee has a disability that limits a major life activity, with a directive to the healthcare provider, "If you respond 'NO' to question Number 1, please sign and return this questionnaire; there is no need to answer the remaining questions."

[63] Several examples of accommodation request forms are attached to this comment in the appendix. Additional examples are on file with the Center for WorkLife Law & A Better Balance.

As a result of such onerous and unnecessary certification paperwork, many employees have not received the accommodations they need in a timely manner, if at all. We strongly encourage the agency revise the proposed regulation to ensure employers request only "reasonable" documentation:

Recommendation: 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 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 a medical appointment related to a miscarriage, but can simply state that the employee needs to attend a medical 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.

This approach would protect patient privacy and deter employers from second guessing the judgement of a pregnant person's medical care provider. Unlike under the ADA, where employers are entitled to enough information about the employee's medical condition to make a determination of whether the employee has a qualifying disability, employers evaluating PWFA accommodation requests need to understand only the employee's limitation requiring accommodation, and the fact that the limitation is related to pregnancy, childbirth, or a related medical condition. Requests for any additional information serve only to delay the accommodation process, burden healthcare providers, and invade employee privacy.

Recommendation: Make clear in the proposed regulation or interpretive guidance 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. On WorkLife Law's legal hotline, we regularly see employees request an accommodation by submitting to their employer a letter written by their doctor, only to be told that they must instead have their doctor fill out the employer's accommodation that seeks the same information. We have also spoken with many employees who have been required to have their doctors fill out lengthy ADA paperwork that seeks detailed information about their medical history and ability to perform the many essential functions listed in their job description. For examples of the onerous medical documentation that callers to our hotline have been required to submit, see the appendix to these comments.

Recommendation: We urge the EEOC to clarify in the proposed regulation or interpretive guidance 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.

1636.3(l)(3) Health care providers. We applaud the EEOC for its comprehensive, albeit non-exhaustive, list of licensed 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. This occasionally has arisen on our legal hotline when, for example, an employer will not accept medical documentation related to postpartum depression from an obstetrician-gynecologist on grounds that they are not qualified to treat mental health conditions.[64]

> **Recommendation:** We 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). We also note, as described above, that employers should not be allowed under the PWFA to seek a specific medical diagnosis or symptoms requiring accommodation, such that the employer would be in a position to determine whether the licensed healthcare professional is "appropriate." If a *licensed* healthcare provider recommends an accommodation, employers should not be given the discretion to second guess their professional judgement.
>
> **Recommendation:** We also urge the EEOC to make clear in the proposed regulation or proposed appendix that employers must accept documentation from telehealth care providers. Telemedicine is widely regarded and an important technology to promote access to medical care, including prenatal and postpartum care, as well as medical abortion care, particularly for people in rural areas whose reproductive health needs are underserved due geographic limitations.[65]

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.

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[64] *See* Caffrey, Mary, "Obstetricians Are Well-Positioned to Diagnose, Treat Postpartum Depression, Speakers Say," American Journal of Managed Care, Apr. 28, 2018, available at https://www.ajmc.com/view/obstetricians-are-well-positioned-to-diagnose-treat-postpartum-depression-speakers-say.

[65] "ACOG Statement Regarding Telemedicine Abortion," The American College of Obstetricians and Gynecologists, June 19, 2015, available at https://www.acog.org/news/news-releases/2015/06/acog-statement-regarding-telemedicine-abortion and https://www.acog.org/news/news-articles/2020/06/acog-seeks-to-expand-access-increase-quality-and-improve-outcomes-for-maternal-health-in-rural-communities

Finally, we appreciate that the EEOC mentioned in the proposed interpretive guidance that it is a best practice for employers to provide interim accommodations if an employee is delayed in obtaining supporting documentation.[66]

> **Recommendation:** We suggest the EEOC strengthen the interim accommodation provision cited in the paragraph immediately above 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.

1636.4(a)(1) 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."[67] On the WorkLife Law hotline, we often see employers delay providing accommodations for weeks or even months, even for modest modifications that could be easily provided with a simple conversation. Delays adversely impact the health of workers and/or the health of their pregnancies, a concern that the PWFA was meant to address. To ensure workers are able to get the accommodations they need without unnecessary delay, we recommend that the EEOC make several changes to the proposed regulation to strengthen the "Unnecessary Delay" provisions.

> **Recommendation:** We urge the EEOC to clarify that unnecessary delays at any point during the accommodation process may result in violation, not just delays in "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.

We also appreciate the EEOC's inclusion in § 1636.4(a)(1) of a variety of factors to be considered when evaluating unnecessary delay.

> **Recommendation:** We encourage the EEOC add one additional factor to the list in § 1636.4(a)(1): "The urgency of the requested accommodation." In some cases, pregnant people who do not receive immediate relief can face tragic consequences, such as employees who are denied permission to seek emergency medical care, and as a result, experience complications or

[66] 88 Fed. Reg. 54787 ("[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…").

[67] 88 Fed. Reg. 54789 & n. 98.

loss.[68] 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."[69]

Finally, with respect to 1636.4(a)(1)(vi), we thank the Commission for reminding covered entities that they should provide interim accommodations during the interactive process if the employee's requested accommodation 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.

> **Recommendation:** We recommend that the EEOC delete the sentence "If an interim reasonable accommodation is offered, delay by the covered entity is more likely to be excused" from 1636.4(a)(1)(vi).

1636.4(a)(4) Choosing Among Possible Accommodations. We appreciate that the EEOC highlights in the proposed regulations that employers should consider equal employment opportunity in choosing between different accommodations that would not impose undue hardship. We strongly encourage the EEOC to also include a second factor employers must consider. The PWFA's statutory purpose extends beyond providing equal employment opportunity to people impacted by pregnancy, childbirth, and related medical conditions, to also include promoting their health and the health of their pregnancies and children.[70] As such, in selecting between accommodations, employers must also take into account which accommodation would most effectively meet the pregnancy-related health needs identified by the employee or their representative.

> **Recommendation**. We suggest adding the additional factor employers should consider in choosing between different reasonable accommodation by revising 1636.4(a)(4) as follows: "When choosing between accommodations that do not cause an undue hardship, the covered entity must choose an option that most effectively meets the employee or applicant's needs related to pregnancy, childbirth, or a related medical condition (as communicated to the covered entity by the employee or applicant or their representative) and provides the employee or applicant equal employment opportunity."
>
> **Recommendation:** We also urge the EEOC to revise the proposed interpretive guidance to incorporate this suggested change to the proposed regulation. Specifically, we encourage the

[68] *See, e.g.*, A Better Balance, Long Overdue: It is Time for the Pregnant Workers Fairness Act 8, 11 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf (citing examples of workers who fainted and needed emergency care or experienced pregnancy loss as a result of not being accommodated).

[69] *See* 88 Fed. Reg. 54789 & n.97.

[70] *See, e.g.*, H.R. Rep. No. 117-27, at 22 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf ("According to the American College of Obstetrics and Gynecologists (AGOG), providing reasonable accommodations to pregnant workers is critical for the health of women and their children"); at 23 ("When simple accommodations like those suggested by ACOG are not provided, the impacts on a workers health and pregnancy can be deadly."); and at 24 ("Guaranteed reasonable accommodations could be pivotal in pregnant workers maintaining healthy pregnancies both during COVID-19 and beyond.");

Commission to include an example like the following, which is similar to scenarios we have seen on the WorkLife Law legal hotline:

> A pregnant employee's doctor writes a note requesting that the employee be excused from working with a particular toxic chemical that she routinely uses in the course of performing one of her job duties. The employer identifies two potential accommodations, neither of which imposes an undue hardship:
>
> 1. Completely excuse the pregnant employee from the task by reassigning it to two other employees, one of whom is happy to help, and one of whom says she doesn't want to do it.
>
> 2. Significantly reduce the number of times the employee must engage in the task by reassigning a large portion of it to the other employee who says they are happy to help.
>
> The employer must select the first accommodation. While the second accommodation would address the employee's health needs in large part by significantly reducing exposure to the toxic chemical, it would not address the pregnancy-related health needs *as effectively* as the first accommodation option, which eliminates toxic exposure. While the employer may prefer to provide the accommodation that doesn't go against the wishes of a coworker, it must provide the accommodation that most effectively meets the pregnant employee's health needs, since it can be provided without undue hardship.

With regard to equal employment opportunity, we appreciate the important concept expressed in 1636.4(a)(4) but have concerns about its use of a comparator standard. The standard in the proposed regulations states: "The accommodation should provide the employee or applicant with equal employment opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges as are available to the average similarly situated employee without a known limitation." Historically, workers have faced difficulties in court when demonstrating that they were not given an equal employment opportunity.[71] Many courts have required them to present evidence of similarly situated comparators, and over time have required those comparators to be more and more similar to the workers themselves for the evidence to be relevant, to the point that identifying comparators similar enough to the employee became nearly impossible.

> **Recommendation**. To ensure employers and courts do not default to requiring near-identical comparator evidence, we urge the EEOC to provide guidelines for determining whether an accommodation provides the employee or applicant with equal employment opportunity. We request that the Commission add to 1636.4(a)(4) a discussion of how equal employment opportunity is to be shown:
>
> The question of whether an employer has provided an accommodation that provides the employee or applicant with equal employment opportunity to attain the same level

[71] *See* Suzanne Goldberg, *Discrimination By Comparison,* 120 YALE L.J. 728 (2011) (comparator requirement has undermined discrimination cases).

of performance, or to enjoy the same level of benefits and privileges, as are available to the average similarly situated employee without a known limitation, can be determined based on evidence of the opportunities that would have been available to the employee seeking accommodation had they not identified a known limitation or sought accommodation or any other evidence that tends to demonstrate that the accommodation provided to the employee or applicant provided or did not provide an equal employment opportunity. Evidence of opportunities available to other specific individual employees is not required. "Similarly situated" does not mean similar in all respects, but only in all material respects.

1636.4(b) Requiring Employee or Applicant to Accept an Accommodation. In the proposed interpretive guidance, the EEOC presents a very clear explanation of regulation § 1636.4(b).

Recommendation. We suggest only that in the example 1636.4 #39,[72] the Commission delete the final sentence ("The Commission recognizes that the relief in this situation may be limited to requiring the employer to engage in the interactive process with the employee."). Even without decreased earnings, an employee could be entitled to emotional distress damages if, for example, the unwanted accommodation caused humiliation, stress due to fear for her health or the health of her pregnancy, social isolation, and the like. No mention is made of relief for other violations in section 1636.4, so deleting the sentence will not omit essential information.

1636.5(f)(2) Prohibition against coercion.

Recommendation. We urge the EEOC to provide an additional example in the proposed interpretive guidance 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 which–if not immediately and effectively addressed by the employer–would constitute unlawful coercion under PWFA.

1636.5(g) Limitation on monetary damages.

Recommendation: We urge the EEOC to make clear that, as under the ADA,[73] the good faith defense to monetary damages is limited to damages for a covered entity's failure to make reasonable accommodations under 1636.4(a). The EEOC should clarify that the good faith defense to monetary damages is *not* available for other violations of the PWFA, including requiring an employee or applicant to accept an accommodation other than one arrived at through the interactive process (1636.4(b)); denying employment opportunities based on the need or potential need to make a reasonable accommodation (1636.4(c)); requiring an employee to take leave if another reasonable accommodation can be provided (1636.4(d)); taking adverse actions on account of an employee, applicant, or former employee requesting or

[72] 88 Fed. Reg. 54790 - 54791.

[73] Foster v. Time Warner Entertainment Co., L.P., 250 F.3d 1189, 1198, (8th Cir. 2001) (good faith defense to damages not applicable to ADA retaliation claim).

using a reasonable accommodation (1634.4(e)). Likewise, the EEOC should clarify that the good faith defense to damages is not available for claims brought under the prohibition against retaliation (1636.5(f)).

Recommendation: Furthermore, we strongly recommend the EEOC make clear that a good faith defense to monetary damages will rarely be available in cases where an employer has failed to provide an accommodation under PWFA, given the predictable and time-limited nature of most accommodations needed for pregnancy, childbirth, and related medical conditions, and the potential health implications of unnecessarily delaying and/or failing to provide an accommodation.

1636.7(b) - Rule of Construction. The EEOC correctly recognizes that, since its enactment nearly 60 years ago, Section 702 of Title VII of the Civil Rights Act allows religious employers to preference workers who share the employer's religious beliefs without facing liability for religious discrimination but does not insulate those employers from claims of discrimination based on other protected characteristics. Consistent with this textual scope, the inclusion of Section 702 in PWFA likewise permits a religious employer, when faced, for instance, with the circumstance of a coreligionist and a worker of another faith seeking the same accommodation, to preference the coreligionist. It does not excuse the employer from the statutory obligation to reasonably accommodate the other worker, unless doing so would impose an undue hardship, as is true for nonreligious employers. It also does not permit the employer to deny the other worker a reasonable accommodation based on religious belief or any other characteristic protected by Title VII.

Amendments that would have broadly exempted religious employers from the requirements of the PWFA were rejected in both the House and the Senate, demonstrating that Congress' intent was not to exempt religious entities from the PWFA.[74] The EEOC correctly recognizes that nothing in this provision categorically exempts religious employers from the requirements of 42 USC 2000gg-1.

Thank you for the opportunity to comment on the proposed PWFA regulations and interpretive guidance.

Center for WorkLife Law
Liz Morris, Deputy Director
Cynthia Thomas Calvert, Senior Advisor

Attachment:
Appendix of accommodation request forms

[74] *See* Markup of H.R. 1065, Pregnant Workers Fairness Act, Before the H. Comm. on Educ. & Lab., 117th Cong. (Mar. 24, 2021) (substitute amendment offered by Rep. Russ Fulcher (R–ID)), https://docs.house.gov/meetings/ED/ED00/20210324/111413/BILLS-117-HR1065-A000370-Amdt-2.pdf; S. Amdt. 6577, 117th Cong. (2022), https://www.congress.gov/amendment/117th-congress/senate-amendment/6577/text.

APPENDIX

Contents

[Employer Logo Redacted]

Confidential

06/26/2023

[Prenatal Care Provider Name and Address Redacted]

Re: [Employee Name Redacted]

Dear [Healthcare Provider Name Redacted],

The above-named person is an employee of [Employer Name Redacted] and is being sent to you for an assessment of **his/her** ability to perform the essential functions of a [Job Title Redacted] for [Employer Name Redacted]. I have enclosed the essential functions for your review.

I have enclosed a signed **Consent to Discuss Medical Information**, which permits you to review any enclosed medical records, to discuss your assessment with [Employer Name Redacted], and to release your records and opinions to me as [Employer Name Redacted]' Human Resources representative. I have also enclosed a **Healthcare Provider Questionnaire** for you to complete.

Please forward the completed certification and all other pertinent information to my attention within one week of your assessment. You may forward the information to the Employee Services Center (ESC) via Email, Fax, or Mail.

- [Employer Contact Information
- Redacted]
-

Once we receive the completed Questionnaire, we can better determine which accommodation, if any will allow the employee to perform his/her job.

[Employer Name Redacted] greatly appreciates your cooperation in this matter. If you wish to discuss any of the information above, please contact me at . [Employer Phone Number Redacted]

Sincerely,

[Employer Representative Name Redacted]

CC: **ESC ADA Team**
Enclosures:
Signed Consent for Release for Medical Information
Physician Certification Form

Revision: April 3, 2023

[Employer Logo Redacted]

Confidential

Employee Disability Accommodation Request Form
(Completed by Employee)

For HR Only: **PeopleSoft ID:**	[redacted]	**Work Location (State):**	[redacted]
PeopleSoft Job Title:	[redacted]		
Employee Name:	[redacted]	**Supervisor:**	[redacted]
Line of Business:	[redacted]	**Date:**	[redacted]

1. Describe the accommodation(s) you think would enable you to perform the essential functions of your job:	
[redacted]	
Requested Accommodation begin date	[redacted]
Duration of requested Accommodation	[redacted]
2. Have you requested this accommodation(s) before?	[redacted]
If so, please provide the date	Click here to enter a date.
3. Have you consulted with a Health Care Provider regarding your request?	[redacted]
If so, please provide the date	Click here to enter a date.
4. If applicable, please describe your Health Care Provider's recommendations concerning your ability to perform the essential functions of your job:	
[redacted]	

Preferred Phone Number:	[redacted]
Preferred Email Address:	[redacted]

Employee Signature:	[redacted]	**Date:**	[redacted]

We are gathering the information needed to help us respond to your request. Your cooperation in this process is indispensable. Please forward any information you believe will assist us in responding to your request. Please be aware that additional medical information may be required from your Health Care Provider. As we initiate the interactive process to address your request, we encourage you to complete and return this form to Human Resources within three (3) business days or as soon as possible.

[Employer Logo Redacted]

Disability Accommodation Request
Consent to Discuss Medical Information

Employee Name:	[redacted]
Last 4 Digits of SSN:	[redacted]

[Employer Name Redacted]

This form gives [redacted] authorization to discuss with or receive medical information from (if necessary) your Health Care Provider (e.g., care, treatment, medication, or condition) related to your request for an accommodation. This authorization is valid for the duration of your accommodation request. In certain circumstances, your refusal to consent may result in the denial of your request for an accommodation. [redacted] will not disclose any medical information to your manager. We will only discuss the functional limitations/ work restrictions with your manager, as needed.

Health Care Provider's name:	[redacted]
Facility name (if applicable):	[redacted]
Facility Address:	[redacted]
City, State, Zip Code:	[redacted]
Office phone number:	[redacted]
Office fax number:	[redacted]
Office email address:	[redacted]

Employee Signature:	[redacted]	Date:	[redacted]

[Employer Logo Redacted]

Job Accommodation Request
Essential Job Functions and Health Care Provider Questionnaire

JOB DESCRIPTION AND ESSENTIAL FUNCTIONS
(Part 1 – Completed by Employee's Supervisor)

PSID#: (HR Use Only)	[redacted]	**Job Code:**	[redacted]
Employee Name:	[redacted]	**Supervisor Name:**	[redacted]
Job Title:	[redacted]	**Supervisor Duties** (Yes or No):	[redacted]
Business Unit:	[redacted]	**Work Location** (State):	[redacted]
Prepared by:	Click here to enter text.	**Date:**	Click here to enter a date.

Essential Job Function(s) generally meets at least one of the following criteria:

1. The reason the position exists is to perform this duty. Removing this function would fundamentally change this position.
2. A limited number of employees are available to do the function.
3. The person must have expertise to perform this duty.

Position Summary [Provide a general overview of the position]**:**

[redacted]

List the essential functions to perform the job. Refer to the job description and consider frequency, amount of time spent, and consequences if the function is not performed. Begin with action verbs and describe the results. Please indicate the frequency required for **each essential function [Frequency = Never, Rarely, Occasionally, Frequently]**

Essential Function	Frequency
• [Job Function #1 Redacted] [redacted]	Frequently
• [Job Function #2 Redacted] [redacted]	
• [Job Function #3 Redacted] [redacted]	
• [Job Function #4 Redacted] [redacted]	
• [Job Function #5 Redacted] [redacted]	
• [Job Function #6 Redacted] [redacted]	
• [Job Function #7 Redacted]	

[Employer Logo Redacted]

[redacted] • [Job Function #8 Redacted]	
Click here to enter text.	Choose an item.
Click here to enter text.	Choose an item.
Click here to enter text.	Choose an item.
Click here to enter text.	Choose an item.
Click here to enter text.	Choose an item.
Click here to enter text.	Choose an item.

ESSENTIAL FUNCTIONS AND FREQUENCY
(Part 2 – Completed by Supervisor and Health Care Provider)

SUPERVISOR: **Please indicate the required frequency to perform the functions applicable to this position:**	**HEALTH CARE PROVIDER:** **Please validate the Employee's ability and frequency to perform any and all functions listed below.**

Frequency = Never, Rarely, Occasionally, Frequently

Work Related Physical Activities:	Supervisor	**HCP**
Bending/Stooping/Crouching	[redacted]	
Lifting up to Click here to enter text. **lbs.**	[redacted]	
Reaching above shoulder level	[redacted]	
Reading	[redacted]	
Sitting	[redacted]	
Speaking	[redacted]	
Standing	[redacted]	
Walking	[redacted]	
Pulling	[redacted]	
Driving	[redacted]	
Pushing & Pulling	[redacted]	
Typing	[redacted]	
Kneeling	[redacted]	

[Employer Logo Redacted]

SUPERVISOR: Please indicate the required frequency to perform the functions applicable to this position:	HEALTH CARE PROVIDER: Please validate the Employee's ability and frequency to perform any and all functions listed below.

Frequency = Never, Rarely, Occasionally, Frequently

Work Related Physical Activities:	Supervisor	HCP
Climbing ladders	[redacted]	
Climbing poles	[redacted]	
Climbing stairs	[redacted]	
Crawling	[redacted]	
Flexing/Extending neck	[redacted]	
Twisting upper body	[redacted]	
Walking on uneven ground	Choose an item.	
Balancing	[redacted]	
Using hands repetitively	[redacted]	
Hearing	Choose an item.	
Hand use: power grasping/gripping/turning	[redacted]	
Other (please add): Click here to enter text.	Choose an item.	
Other (please add): Click here to enter text.	Choose an item.	
Other (please add): Click here to enter text.	Choose an item.	

Work Related Non-Physical Activities:	Supervisor	HCP
Problem Solving	[redacted]	
Decision Making	[redacted]	
Supervising	[redacted]	
Interpreting Data	[redacted]	
Organizing	[redacted]	
Writing Process	[redacted]	
Planning	[redacted]	
Concentrating/focusing	[redacted]	
Other: (please add): Click here to enter text.	Choose an item.	
Other: (please add): Click here to enter text.	Choose an item.	

[Employer Logo Redacted]

Work Related Non-Physical Activities:	Supervisor	HCP
Other (please add): Click here to enter text.	Choose an item.	

Health Care Provider (HCP) Questionnaire
(Part 3 – Completed by HCP)

The above Employee has requested a job accommodation related to an impairment or condition. Please provide complete responses to all of the questions below so that [redacted] can evaluate the Employee's job accommodation request. Refer to the attached job description and/or the information captured above as needed to complete the below.

Employee's Last Examination Date:	

1. Please list and describe any impairments or conditions that affect the Employee's ability to perform an essential job function. Do not answer this Question if the Employee has a plainly visible and obvious medical condition, such as an amputated limb.

2. Please list and describe any side-effects resulting from your treatment of the impairment or condition listed in response to Question 1 that may affect the Employee's ability to perform an essential job function.

3. When did each impairment or condition listed in response to Question 1 commence?

4. How long have you treated the Employee for each impairment or condition listed in response to Question 1?

5. What is the expected duration of each impairment or condition and side-effect listed in response to Questions 1 and 2?

[Employer Logo Redacted]

6. If you are unable to provide an expected duration of each impairment or condition and side-effect, please explain why you are unable to do so at this time.
7. Which of the Employee's job function(s) is affected by the impairment, condition or side effect listed in response to Questions 1 and 2?
8. How does the impairment, condition or side effect listed in response to Questions 1 and 2 affect the Employee's ability to perform the job function(s)?

9. Please (1) specify each and every job accommodation that you believe will allow the Employee to perform the essential functions of the Employee's job as listed above, and (2) the length of time the accommodation will be needed. Please explain the rationale for the length of time indicated. [Employer Name Redacted] [Please note that [redacted] may not be able to provide the exact accommodation you identify in every instance, but [redacted] will continue to engage in the interactive process in an effort to identify a reasonable accommodation.]

10. Please provide any other information that [redacted] should consider concerning the Employee's request for an accommodation and ability to perform the essential functions of the job.

[Employer Logo Redacted]

Next Examination Date (if applicable):	

Print Health Care Provider's Name:	**Specialty:**
Street address, city, state, zip code	**Phone:**

Management reserves the right to add or change job duties and requirements at any time. The above information has been designed to indicate the general nature and level of work performed by employees within this classification. It is not designed to contain, or be interpreted as a comprehensive inventory of all duties, responsibilities and qualifications required of employees assigned to this job.

[redacted]

October 6, 2023

Dear [redacted]:

I would like to follow up with you regarding your reasonable accommodation request. To properly respond to your request and to discuss this matter, the Agency requires information and supporting medical documentation from you and your health care provider(s).

Please have your healthcare provider(s) answer the following questions and provide the information to me within **fifteen (15)** calendar days or by **October 20, 2023**. This request for information and the below questions should be answered "item by item" on your healthcare provider(s) office letterhead. The responses should apply specifically and only to the disability or medical condition for which you are requesting a reasonable accommodation:

1. **What is the employee's diagnosis**?

2. **Does the employee's medical condition affect any major life activities? If so, describe what major life activities are affected, how, and to what degree.** [Major life activities are defined as activities that most people in the general population can perform with little or no difficulty. They include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, reaching, sitting, and interacting with others. A major life activity can also include the operation of a major bodily function, such as functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions].

3. **What are the employee's physical and mental limitations caused by the medical condition? Please be very specific** (i.e. cannot sit or stand more than 2 hours at a time without pain, cannot lift more than 30 pounds, cannot concentrate if the workplace is noisy, cannot walk for more than .5 miles without pain or risk of injury, has periods of tearfulness approximately 3 times a day for 20 minutes at a time where the employee is completely incapacitated)

4. **How long do you anticipate the employee will have these physical or mental impairments/limitations**?

<u>If ability to perform one or more essential job functions is at issue, please respond to Questions 5 and 6. Otherwise, please leave blank.</u>

5. **Based on your review of the employee's essential duty functions, performance work plan, and position description, please state if the employee is unable to perform any of these duties due to their medical condition, which duties the employee is unable to perform, and why**?

6. **Based on the employee's medical condition, what do you recommend as possible reasonable accommodation(s) to enable him/her to perform essential job functions listed in response to Question 5? Please state the duration and the effectiveness of the accommodation and the consequence of not providing the accommodation to the employee to perform the essential duties.**

If the employee can perform essential job functions, but requests to remain at their current duty location or to be reassigned to another duty location as a reasonable accommodation, please respond to Questions 7-11. Otherwise, please leave this section blank.

7. Does the employee's medical condition require the employee to remain at his/her current duty or geographic location? If so, please explain in detail the medical basis for that requirement.
8. If your response to Question 7 is based on adequacy of medical care or treatment in the current location as opposed to the new location to which the employee is to be reassigned, please explain your assessment in detail.
9. Does the employee's medical condition require the employee to be reassigned to a different duty or geographic location? If so, please explain in detail the medical basis for that requirement.
10. If your response to Question 9 is based on adequacy of medical care or treatment in the current location as opposed to the new location to which the employee is requesting to be reassigned, please explain your assessment in detail.
11. If the employee needs to be near family members who will provide support or assistance, please explain in detail what medical services/care these members will provide that is not available in the other location.

If on-site parking has been requested, please respond to Questions 12-14. Otherwise, please leave this section blank.

12. **Please state in detail why the employee's disability necessitates parking in her/her office building?**
13. **Please state whether the employee is able to take public transportation? If not, explain in detail the reasons and how the inability to take public transportation is related to the employee's disability.**
14. **Based on the employee's medical condition, what do you recommend as possible alternative reasonable accommodation(s)?**

A prompt and full response by your healthcare provider(s) to these above-mentioned questions "item by item" will allow the Agency to appropriately assess your request for reasonable accommodation. **Please note that failure to provide a full and timely response to the questions above may delay the process or result in denial of the requested accommodation(s).**

Note: You are responsible for any costs incurred in connection with providing this information. The medical questions should be answered on your healthcare provider(s) office letter head. Please return these documents via email to [redacted]

Sincerely,

[redacted]

[redacted]

Accommodation Request Medical Certification

This form (or a similar letter that addresses the information requested) must be completed and signed by the treating health care provider when an employee needs a workplace accommodation due to a qualifying disability. **Documentation should be faxed to Office of Human Resources at** [redacted] The information provided will be reviewed to determine what reasonable accommodations, if any, are appropriate.

SECTION 1: COMPLETED BY EMPLOYEE

Employee Name _____ Employee ID _____

Job Title _____ Department _____ Regular Work Schedule _____

Job Duties _____

SECTION 2: COMPLETED BY THE HEALTH CARE PROVIDER

1. Please describe the nature and severity of your patient's medical condition, including relevant medical facts related to the condition. (e.g. symptoms, diagnosis, and regimen of treatment) and functional limitations as it relates to their need for a workplace accommodation. *(A workplace accommodation is a modification to policy or practice, the provision of tools and software, or a modification to the environment that mitigates the impact of a disability to allow an employee to engage in work related tasks and activities.)*

   _____

   _____

2. Do you consider your patient's condition to be a disability? ❑ Yes ❑ No
   (Based on the Americans with Disabilities Act, a disability is defined as a mental or physical condition that substantially limits a major life activity compared to most people. "Substantial" in this context is somewhat subjective, but means that in your professional opinion there is a notable, significant, meaningful limit/difference to the manner in which the individual engages in the activity, the conditions necessary for them to engage in the activity, the duration for which they can engage in the activity, or the frequency which they engage in the activity. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working and the proper functioning of major bodily systems.)

3. Please describe your recommendations for restrictions, modifications or adjustments to the employee's job duties or work environment and explain how each will address the work-related limitation.

   _____

   _____

4. Please provide a timeline for these restrictions, modifications or adjustments listed above.

   ❑ Temporary: _____ ❑ Indefinite *(expected to last longer than 6 months)*:_____ ❑ Unknown:_____

   If temporary, please provide the estimated end date for the restrictions. _____

5. Additional Comments: _____

   _____

   _____

SECTION 3: HEALTH CARE PROVIDER INFORMATION

Health Care Provider's Name / Practice _____

Phone _____ Fax _____

Signature _____ Date _____

HUMAN RESOURCES AND EQUAL OPPORTUNITY AND COMPLIANCE

Equal Opportunity and Compliance

In an emergency, call 911

Requesting Accommodations

Questions

For any questions regarding accommodations for disability, pregnancy, or religion, please contact:

EOC Accommodations Team

accommodations@unc.edu

919-966-7545

EOC Accommodations Process

On average, it takes 30 business days from the date the EOC receives all required documentation to complete a request. Below is a series of steps to guide an individual through the process of requesting an accommodation related to disability, pregnancy or religion. Note: For student accommodations related to disability, please contact **Accessibility Resources & Service** by emailing **ars@unc.edu**.

University of North Carolina at Chapel Hill Policy on Accommodations

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What you need to know about this Policy

Policy statement

"The University will provide Reasonable Accommodations to qualified Students, Employees, and Applicants based on Disability, Pregnancy and Related Medical Conditions, and Religious Beliefs and Practices, as required by state and federal law. The University will not provide accommodations that eliminate an Employee's Essential Job Function(s); Fundamentally Alter academic or admissions standards or requirements essential to an academic program, activity, technical standard, or professional or licensing requirement; constitute an Undue Burden or Undue Hardship; or create a Direct Threat. Failure to implement an approved Reasonable Accommodation may constitute discrimination under the University's Policy on

Prohibited Discrimination, Harassment, and Related Misconduct. Retaliation for requesting or using Reasonable Accommodations is also prohibited under the Policy on Prohibited Discrimination, Harassment, and Related Misconduct."

The Policy applies to:

- Disability accommodations to Employees, Applicants for employment, and visitors to campus;
- Religious accommodations to Employees, Students, and Applicants; and
- Pregnancy and Related Medical Condition accommodations to Employees, Students, and Applicants.

A disability is:

A physical or mental impairment that substantially limits a major life activity,
a record of such impairment,
or being regarded as having such an impairment.

*The above is a summary of information in the Policy. See the **Policy** for full definitions and descriptions.*

Reasonable accommodations are:

A reasonable change to the work or academic environment, to an academic requirement, or to a University policy, procedure, or other requirement that allows a qualified employee to perform the essential functions of their position or allows a student to participate in their academic or extracurricular program.

Here are examples of reasonable accommodations that may be available:

- making the existing workplace accessible
- restructuring the employee's job
- modifying the employee's work schedule
- reassigning the employee to a vacant position
- buying equipment or devices
- changing training materials or policies
- providing readers or interpreters
- making a website or digital information accessible
- allowing leave as an accommodation

The University will not provide personal use items needed to accomplish daily activities *(i.e.* eyeglasses, hearing aids, prosthetic limbs, or a wheelchair).

The above is a summary of information in the Policy. Access the links below to read the full policies.

- **University of North Carolina at Chapel Hill Policy on Accommodations**
- **University Of North Carolina At Chapel Hill Procedure For Accommodations**

Privacy

The privacy of our employees is important. EOC will provide information about the request and accommodations only to those who have a need to know such information.

Resources, trainings, services, and events

EOC provides accommodation services, programs, trainings, information about helpful resources, and other University policies (*i.e.*, Animals on Campus) that can help employees and others at the University. **Learn more about Accommodations at UNC.**

- **Accommodations Request Form Accessible Text (Top of the Form)**
- **Accommodations Request Form Accessible Text (Bottom of the Form)**

eoc.unc.edu | accommodations@unc.edu | 919-966-3576

Accommodation Request Form

(For student academic and student applicant accommodations, please contact ars@unc.edu)

Consistent with the Americans with Disabilities Act of 1990, the Americans with Disabilities Amendments Act of 2008, Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the PUMP for Nursing Mothers Act, the Pregnant Workers Fairness Act, and related state laws, the University's Equal Opportunity and Compliance (EOC) is charged with determining reasonable accommodations and with facilitating the provision of those accommodations. Employees, Students, and Applicants may apply for accommodations by using this form.

By initiating the accommodation process and completing this request form, you give the University of North Carolina at Chapel Hill permission to explore reasonable accommodations. All information requested from medical examinations and inquiries will be consistent with business necessity and will be maintained and used in accordance with all applicable state and federal laws, or under the provisions of any similar and appropriate sections of succeeding state and federal laws. ADA-related medical files are kept separate from personnel files, and access is limited to personnel involved in the determination of reasonable accommodations.

Form Instructions:

This form is for UNC-Chapel Hill employees, students, and applicants who are requesting accommodations. Provide a response to each field that follows.

First Name:

Preferred Name:

Last Name:

UNC PID (Please enter "N/A" if not applicable):

Pronouns (if you choose to provide):

UNC Email (Please leave blank if not applicable):

Personal Email:

Preferred Contact Phone Number:

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- ○ Employee
- ○ Student
- ○ Applicant

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Position/Job Title:	
Department/Unit:	
Employment Status (SHRA, EHRA, EHRA non-faculty and full-time, part-time or temporary):	
Supervisor Name:	
Supervisor Email:	
HR Representative Name:	
HR Representative Email:	
Current Work Schedule/Shift:	

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Request Type:

- ○ Disability
- ○ Religion
- ○ Pregnancy/Lactation

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Pregnancy/Lactation:

Anticipated due date:

Please describe the current impacts experienced due to pregnancy or lactation.

Briefly describe your essential job functions or course requirements. Per the EEOC, Essential job functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation:

Describe limitations/restrictions experienced at work or in course work.

List any accommodation(s) or service(s) you are seeking related to pregnancy or lactation.

Next

Name of medical provider:

Phone number:

Fax number:

Email address:

Website of practice:

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Have you received accommodations at UNC in the past?

- ○ Yes
- ○ No

If so, what were they?

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Employee Accommodation Types

Additional Leave

Are you currently on Family Medical Leave Act (FMLA) or other medical leave?

- ○ Yes
- ○ No

If yes, when does your medical leave end?

Are you requesting additional leave as an Employee ADA or Pregnancy accommodation?

- ○ Yes
- ○ No

If yes, what is your requested return-to-work date?

If yes, have you exhausted your FMLA? (This means exhausting the full 12-week FMLA entitlement in the last year.)

- ○ Yes
- ○ No

Telework

Are you requesting telework (full-time or part-time) as an accommodation?

- ○ Yes
- ○ No

If yes, have you been approved for a Flexible Work Location through the University's Flexible Work Options program?

- ○ Yes
- ○ No

If so, what is your work location schedule? If you have not been approved for a Flexible Work Location through this program, and you are eligible for such a flexible work location based on your job code, you should work first with your department to request a flexible work location or, if your flexible work location request was denied by your department, attach your completed Work Location Form or other explanation for the denial to this request.

Work Location Form or Explanation upload

By submitting this request, you agree to the following:

If requesting a religious accommodation, you must submit documentation explaining the nature and tenants of the Religious Belief or Practice or other relevant supporting documentation as requested by the EOC.

If requesting an ADA accommodation, you must submit the Documentation of Disability form, completed by a health care provider, to the EOC before the interactive accommodations process can begin.

If requesting a pregnancy accommodation, you must submit the Documentation of Pregnancy or Related Medical Condition form, completed by an appropriate health care professional, documentation of medical appointments, or other documentation from a health care professional confirming the medical condition and need for accommodations as requested by the EOC.

You are responsible for ensuring that your health care provider provides sufficient information to the EOC to evaluate the medical necessity for accommodations.

For ADA and pregnancy accommodations only, you agree:

The EOC is permitted to share relevant information from my physician or other health care provider(s) related to workplace limitations with the supervisor(s) in my immediate work unit and other University offices that may be involved in assisting in the development of reasonable accommodations to assist me in completing my assigned work-related responsibilities. I understand that EOC will share only information about my workplace limitations, not my medical diagnosis.

The EOC has my permission to contact my physician or other health care provider(s) for additional information to assist in developing reasonable accommodations for me. I understand that it is my responsibility to obtain sufficient information from my medical provider and that EOC is not required to contact my provider for additional information.