CENTER FOR PUBLIC JUSTICE

Pregnant Workers Fairness Act

Policy Brief

Families Valued Program **October 2022**

In 1978, Congress enacted the Pregnancy Discrimination Act ("PDA") [1] to prevent pregnant women from losing their jobs or being denied work opportunities because of their pregnancy. Nevertheless, pregnant workers in America continue to experience working conditions that place their incomes and health at risk.

Common-sense changes to workplace duties and conditions -- reassignment away from intensive physical tasks, provision of space and time to rest, access to water and restroom breaks -- would allow many who choose to work to continue in their jobs safely.

Protecting Pregnant Workers Protects Life and Family

Faith leaders and pro-life advocates have long supported pregnancy protections as consistent with the protection of life in its most vulnerable stages and the recognition of the vital role of the family in a healthy society. Pregnancy discrimination produces the kinds of economic pressures that could discourage women from carrying their pregnancy to term. As noted in the legislative debate over the PDA, one fundamental purpose of preventing pregnancy discrimination is "to prevent the tragedy of needless and unwanted abortions forced upon a woman because she cannot afford to leave her job without pay to carry out the full term of pregnancy." [2] Then-Senator Biden noted that, because of denial of safe work, "many women, especially low-income women, may be discouraged from carrying their pregnancy to term." [3]

The threat of job loss or mandatory leave without pay for pregnant workers could wreak havoc with family finances. Longitudinal data demonstrate a drop in the average American family's income before and after a child's birth. Gross household income, a measure that includes earned income, cash transfers, and tax credits, at the time of a child's birth is 10 percent of a household's income 12 months before.[4] The economic strain around childbirth is even more pronounced for households where mothers are the sole or primary source of income, as is the case for 40 percent of all households with children under 18.[5]

As families increasingly rely on women's income, pregnancy protections are even more vital to their ability to bear and raise children.

The absence of reasonable accommodation at work can also adversely affect women's health and the viability of their pregnancy. Research indicates that intensive physical work during pregnancy, such as heavy lifting or standing for long periods, correlates with adverse health outcomes for infants.[6] However, to avoid income loss or separation from employment-based health insurance, pregnant women may agree to work even though working conditions pose risks to their health and their child's health.

Faith leaders and pro-life advocates have long supported pregnancy protections as consistent with the protection of life in its most vulnerable stages and the recognition of the vital role of family in a healthy society.

Why is the PWFA necessary? Existing laws do not fully protect pregnancy in the workplace.

Recent reporting has documented numerous cases in which an employer's refusal to accommodate pregnant workers led to pregnancy complications and miscarriages. Women have been required to lift heavy items and stand for long periods at a retail station or warehouse packing line rather than receiving temporary assignments to less strenuous positions.[7] Reports also describe pregnant women being forced to take leave without pay, leading to significant economic stress in the months before and after pregnancy - a period many families find economically vulnerable.

Neither the Pregnancy Discrimination Act ("PDA") nor the Americans with Disabilities Act ("ADA")[8] have proved sufficient to secure reasonable accommodations for all pregnant women. The ADA provides an explicit right to reasonable accommodations to workers with an impairment that substantially limits one or more major life activities. But this right has had limited application related to pregnancy. Although some impairments that result from pregnancy may qualify a worker for protection under the ADA, the limitations and changes in physical condition that accompany a normal pregnancy do not. As a result, the ADA has done little to promote even simple accommodations that would prevent injury or harm during pregnancy, such as placing limits on weight lifting or allowing more frequent rest and restroom breaks.

The PDA was enacted as an amendment to Title VII of the Civil Rights Act of 1964, expanding the law's prohibition of employment discrimination based on sex, which includes "pregnancy, childbirth, or related medical conditions."[9] The PDA's anti-discrimination framework has generated barriers for pregnant workers seeking accommodation and confusion among employers about their obligations. Following the typical pattern in cases of discrimination on the basis of sex, race, religion, or national origin, workers bringing a claim under the PDA must show that their employer denied a pregnant worker accommodation while providing accommodation to nonpregnant employees "not so affected but similar in their ability or inability to work." [10]

In cases of employment discrimination based on sex, race, or other characteristics, the presentation of comparators reveals an employer's discriminatory intent. Discrimination, here, consists of employer action made on the basis of sex, race, etc., in circumstances in which those characteristics are irrelevant. In pregnancy cases, however, pregnancy is a relevant component of employer decision-making. Regular breaks, light duty, or other workplace accommodations should be tailored to the specific circumstance of pregnancy, not offered despite their pregnancy condition.

The PDA's comparison-dependent framework also fails to provide relief to workers whose employers refuse accommodation to all employees or with too few employees to have established an accommodation track record with which to compare pregnancy accommodation. In all pregnancy accommodation cases, employers and courts face the conundrum of comparing pregnancy to worker circumstances that are, by definition, not pregnancy.

In 2015, the Supreme Court took a step away from a comparison-based framework for analyzing pregnancy discrimination. In Young v. UPS, [11] the Court indicated that a pregnant worker could infer intentional discrimination if their employer's failure to accommodate imposed a "significant burden" on pregnant workers and the employer lacked sufficient justification for its policy. But this shift, though helpful, has not been sufficient to assure pregnancy accommodation for all women who need it.

In the years after Young was decided, several cases illustrate how pregnant women continue to be denied accommodation without good reason. Cassandra Adduci, a former Fed-Ex employee, compiled a list of 261 other FedEx employees who received a temporary work assignment of the type she had requested and was refused.

A District Court denied Adduci's claims under the PDA, finding that she had not provided sufficient information on other employees' ability or inability to work to establish comparisons between their situation and hers.[12] In another case, Janasia Wadley, a daycare teacher whose doctor deemed her at risk of uterine tract infection during her pregnancy, was fired for requesting additional bathroom breaks. A court dismissed her PDA case because no other employees had comparable conditions.[13]

The PWFA builds a legal framework that better protects women in situations like Adduci's and Wadley's. The PWFA would specify that failure to reasonably accommodate workers based on the known pregnancy conditions is an unlawful employment practice unless the accommodation poses an undue hardship on the employer. The mandate to provide reasonable accommodation would apply unless it imposed undue hardship on business operations. When the employer denies such reasonable accommodation for no good reason, it should not simply allow a judge or jury to find liability if they wish; it should constitute a violation of the law. Making the standard explicit will give real protection to employees—and clearer guidance to employers—just as the ADA has done with respect to disabilities.

The PWFA shifts pregnancy toward the center of an analysis that had previously been about pregnancy's relationship to other conditions. This shift is long overdue. Women of childbearing age make up a quarter of the U.S. labor force.[14] 62 percent of women with a birth in the previous year were employed or looking for work, indicating that most women who are pregnant are in the labor force.[15] Pregnancy is a normal condition for those who are working in the United States. And given the centrality of healthy children and families to our nation's well-being, pregnancy should be considered an important aspect of adult life.

The PWFA shifts pregnancy toward the center of an analysis that had previously been about pregnancy's relationship to other conditions.

The Supreme Court's reasoning in the 2022 landmark case, Dobbs v. Jackson Women's Health, and subsequent state decisions to restrict access to abortion relies, in part, upon a vision of the United States as a hospitable place for pregnant women and their families. Making work safe for all pregnant women through the Pregnant Worker Fairness Act would bring the United States a step closer to making the vision of pregnancy hospitality a reality.

Endnotes

1. 42 U.S.C. Section 2000e(k)(2012)

2. Statement of Senator Williams, 123 Cong. Rec. 29,657 (Sept. 16, 1977)

3. Statement of Senator Biden, 123 Cong. Rec. 29,635 (Sept. 16, 1977)

4. Alexandra B. Stanczyk, Working Paper, "The Dynamics of Household Economic Circumstances Around a Birth," Washington Center for Equitable Growth, October 2016.

5. Wendy Wang, Kim Parker, Paul Taylor, "Breadwinner Moms," Pew Research Center, May 29 , 2013.

6. Dhaval M. Dave, Muzhe Yang, "Maternal and Fetal Health Effects of Working during Pregnancy," National Bureau of Economic Research Working Paper No. 26343, October 2019.

7. Jessica Silver-Greenberg, Natalie Kitroeff, "Miscarrying at Work: The Physical Toll of Pregnancy Discrimination," The New York Times, October 21, 2018.

8. 42 U.S.C. Section 12101-12213 (2012).

9. 42 U.S.C. Section 2000e(k)

10. Id.

11. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).

12. *Adduci v. Fed. Express Corp.*, 298 F. Supp. 3d 1153, 1156 (W.D. Tenn. 2018).

13. Wadley v. Kiddie Acad., Int'l, (E.D. Pa. Oct 1, 2018). Cited in Dina Bakst, Elizabeth Gedmark, Sarah Brafman, "Long Overdue: It's Time for the Pregnant Workers Fairness Act," A Better Balance, May 2019.

14. U.S. Bureau of Labor Force Statistics, Labor Force Statistics from the Current Population Survey, Table 3. Employment Status of the civilian noninstitutional population by age, sex, and race. Modified January, 22, 2020. Author's analysis to identify labor force participation, women ages 16-44. Childbearing age is typically defined as 15 to 44.

15. Lindsay M. Monte & Renee R. Ellis, U.S. Census Bureau, Fertility of Women in the United States: 2012, Population Characteristics, Table 3, "Women who had a birth in the past 12 Months."