RESOLVED, That the American Bar Association urges Congress to enact the Pregnant Workers Fairness Act or similar legislation that:

1. guarantees pregnant workers the right to reasonable accommodations, so they can continue working without jeopardizing their pregnancy, unless doing so poses an undue burden on an employer’s business; and

2. prohibits employers from: denying pregnant workers employment opportunities based on the employer’s need to make reasonable accommodations; retaliating or taking other adverse employment actions against pregnant workers for requesting a reasonable accommodation; or forcing them to take paid or unpaid leave if another reasonable accommodation is available; and

3. provides pregnant workers the same rights and remedies as those established under Title VII of the Civil Rights Act of 1964, including lost pay, compensatory damages, and reasonable attorneys’ fees.
Physicians often recommend that pregnant workers avoid or limit certain workplace risks such as heavy lifting, extended hours, prolonged sitting or standing, and overnight work to maintain a healthy pregnancy. However, many workers, particularly Black, Latinx, and immigrant workers who are overrepresented in low-wage, inflexible, and physically demanding jobs, are forced to endure these risks because they lack access to reasonable accommodations such as a stool to sit on, more frequent bathroom breaks, a water bottle, or restricting the weight that a worker can lift. These workers are forced to choose between a healthy pregnancy and a paycheck—an impossible choice.

Although both the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA) provide some protections for pregnant workers, currently no federal law explicitly and affirmatively guarantees all pregnant workers the right to reasonable accommodations that allow them to continue working without jeopardizing their health or paycheck. Accordingly, this resolution urges Congress to enact the Pregnant Workers Fairness Act (PWFA) or similar legislation that: (1) guarantees pregnant workers the right to a reasonable accommodation, so they can continue working without jeopardizing their pregnancy, unless doing so poses an undue burden on an employer’s business; (2) prohibits employers from: denying pregnant workers employment opportunities based on the employer’s need to make reasonable accommodations, retaliating or taking other adverse employment actions against pregnant workers for requesting a reasonable accommodation, or forcing them to take paid or unpaid leave if another reasonable accommodation is available; and (3) provides pregnant workers the same rights and remedies as those established under Title VII of the Civil Rights Act of 1964 (Title VII), including lost pay, compensatory damages, and reasonable attorneys’ fees. Such legislation not only takes steps towards eliminating discrimination, but also promotes women’s health, fetal and child health, and economic security by ensuring reasonable accommodations for those workers whose ability to perform their job functions are limited by pregnancy, childbirth, or a related medical condition.

I. Background

In recent years, more women in American households are the primary wage earners. As

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4 42 U.S.C. §12101 et seq.
a result, an increasing number of women are working later into their pregnancies to maintain their family’s financial security.7 According to the most recent data, 88 percent of first-time mothers worked during their last trimester.8

Unfortunately, despite the protections of the PDA and the ADA, workers continue to face pregnancy discrimination, which can include being fired, being denied reasonable accommodations, and not being hired initially.9 Neither law gives pregnant workers an explicit right to accommodations to maintain a healthy pregnancy.10 Pregnancy discrimination is commonplace; according to a recent survey, 62 percent of workers have witnessed pregnancy discrimination on the job.11 In a 2018 report, the New York Times reviewed thousands of legal documents and court records of pregnant women whose requests for temporary modifications were rejected, and who suffered miscarriages or went into premature labor due to the absence of clear, strong, and commonsense protections for pregnant workers.12

II. Need for Resolution

Currently, there is no federal law that guarantees all pregnant workers the right to reasonable accommodations so they can continue working without jeopardizing their health and economic security. There is no right under Title VII of the Civil Rights Act of 1964, as amended by the PDA, to workplace pregnancy accommodations. Reasonable accommodations under the ADA are available only to qualified individuals with disabilities, including those disabilities related to pregnancy. Further, although many states have adopted laws requiring reasonable accommodations, the patchwork of state and local laws leaves many pregnant workers with no protections. Accordingly, there is a need for the PWFA or similar legislation to fill the gaps left by the PDA, the ADA, and state laws.

a. Pregnancy Discrimination Act of 1978 and Young v. UPS

The PDA amended Title VII to prohibit sex discrimination on the basis of pregnancy, childbirth, or related medical conditions.13 In 2019, the American Bar Association passed a resolution urging Congress to pass legislation that explicitly affirms that discrimination because of because of sexual orientation, gender identity/expression, sex stereotyping, or pregnancy is sex discrimination prohibited by the Civil Rights Act of 1964 and other federal statutes.14 Specifically, employers are prohibited from considering pregnancy in hiring, firing, and promotion decisions. Congress also sought to make clear that "[p]regnant women who are able to work must be permitted to work on the same

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7 Id.
9 FACT SHEET, supra note 6.
10 Id.
11 Id.
14 See 19M114.
conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working."¹⁵

Under the PDA, pregnant employees must be treated the same, and receive the same benefits, as non-pregnant employees who are similar in their ability or inability to work—a unique and high burden of proof in the reasonable accommodation analyses.¹⁶ In other words, employers must provide accommodations for pregnant workers when employers do so for other employees who are similarly limited in their ability to perform job functions. This provision has resulted in a lot of litigation, raising issues as to what counts as “similar” and what types of benefits employers should provide.¹⁷ Pregnant women must prove that others who are similar in ability are being treated differently. Accordingly, pregnant workers’ rights will often depend on whether an employer already accommodates a large percentage of non-pregnant workers, while denying accommodations to a large percentage of pregnant workers.

In 2015, the U.S. Supreme Court issued a landmark decision in *Young v. United Parcel Service, Inc.*¹⁸ allowing pregnant workers to sue for reasonable accommodation discrimination under the PDA. Nonetheless, pregnant workers are still being denied accommodations due to *Young’s* unreasonably high standard for proving discrimination. Workers must show that their employers accommodated non-pregnant workers with similar limitations, which is extremely difficult in most circumstances. As a result, in two-thirds of cases after *Young*, courts have ruled against pregnant workers who were seeking accommodations under the PDA.¹⁹

Despite the longstanding protection of the PDA and the *Young* ruling, from 2015 to 2019, the U.S. Equal Employment Opportunity Commission (EEOC) received roughly 3,000 pregnancy discrimination complaints from women per year.²⁰ Nearly 31,000 pregnancy discrimination charges were filed with the EEOC and state-level fair employment practice

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¹⁵ S. Rep. No. 95-331, at 4 (1977), *as reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources), at 41 (1980). The PDA was enacted to supersede the Supreme Court’s decisions in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (excluding pregnancy-related disabilities from disability benefit plans did not constitute discrimination based on sex absent indication that exclusion was pretext for sex discrimination), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (policy of denying sick leave pay to employees disabled by pregnancy while providing such pay to employees disabled by other non-occupational sickness or injury does not violate Title VII unless the exclusion is a pretext for sex discrimination).


²⁰ *Id.*
agencies between Oct. 2010 and Sept. 2015.\textsuperscript{21} Denial of workplace accommodations for pregnancy—such as sitting instead of standing, carrying a water bottle, restricting the weight that a worker can lift, or permitting more frequent bathroom breaks—accounted for more than 650 of the pregnancy discrimination charges filed with the EEOC in 2015 alone.\textsuperscript{22}

Yet EEOC charges do not paint a complete picture. Most workers who have experienced discrimination do not report it. A 2013 study estimated that 250,000 women per year were denied reasonable accommodations needed and requested during pregnancy, and that many more failed to ask for the reasonable accommodations needed.\textsuperscript{23}

\textbf{b. ADA and the ADA Amendments Act of 2008 (ADAAA)}

The ADA prohibits discrimination against qualified individuals with disabilities. Title I of the ADA requires an employer to provide reasonable accommodations to qualified applicants and employees with disabilities unless doing so poses an undue hardship on the employer.\textsuperscript{24} Under the ADA, however, pregnancy itself is not a covered disability, meaning a pregnant worker who has no complications but seeks an accommodation in order to avoid a complication is not entitled to a reasonable accommodation.\textsuperscript{25} However, pregnancy-related conditions that substantially limit a major activity or the operation of major bodily functions constitute a disability. These may include anemia, sciatica, gestational diabetes, preeclampsia, morning sickness, swelling in the legs, depression, or other impairments.

The ADA Amendments Act of 2008\textsuperscript{26} was enacted to create a less demanding standard for qualifying as disabled. Thus, in theory employers should provide accommodations for

\textsuperscript{22} Id.
\textsuperscript{25} See Dina Bakst, Congressional Testimony at 15, \textit{Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab., 116th Cong.} (2019) [hereinafter Bakst Congressional Testimony], https://edlabor.house.gov/download/10/22/2019/baksttestimony102219 (citing, e.g., Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 553 (7th Cir. 2011) (citing EEOC guidance, that remains in place to this day in holding “[c]ourts that consider these regulations consistently find that pregnancy, absent unusual circumstances, is not a physical impairment”); Brown v. Aria Health, No. CV 17-1827, 2019 WL 1745653, at *4 (E.D. Pa. Apr. 17, 2019) (“A routine pregnancy is not considered a disability within the meaning of the ADA.”); Hannis-Miskar v. N. Schuylkill Sch. Dist., No. 3:16CV142, 2016 WL 3965209, at *3 (M.D. Pa. July 22, 2016) (“Because plaintiff fails to assert complications with her pregnancy, she has failed to plead a disability under the ADA.”); Selkow v. 7-Eleven, Inc., No. 11-456, 2012 WL 2054872, at *14 (M.D. Fla. June 7, 2012) (“Absent unusual circumstances, pregnancy is not considered a disability . . . .”); see also 29 C.F.R. pt. 1630 app. (“Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments.”).
\textsuperscript{26} Pub. L. No. 110-325, 122 STAT. 3553 (Sept. 25. 2008).
workers with pregnancy-related disabilities. However, courts have interpreted the ADA Amendments Act in a way that does little to expand coverage, even for those pregnant workers with serious health complications. As one court recently concluded in 2018, “[a]lthough the 2008 amendments broadened the ADA’s definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions.”

Thus, even in scenarios where pregnant workers have presented very serious complications related to pregnancy, courts have found that the complication did not amount to an “impairment,” and/or that their pregnancy complication did not substantially limit a major life activity or major bodily function.

c. State Laws

Although many states have adopted laws requiring reasonable accommodations, a patchwork of state and local laws leaves many pregnant workers with no protections. As of December of 2020, only 30 states, the District of Columbia, and four cities required employers to provide accommodations to pregnant workers.

III. The Pregnant Workers Fairness Act

The PWFA was first introduced in 2012 and has been reintroduced in the House in almost every legislative session since then. As discussed above, the need for this legislation could not be greater. This or similar federal legislation would provide pregnant workers

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27 EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, No. 915.003 (June 25, 2015), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues (“The expanded definition of "disability" under the ADA also may affect the PDA requirement that pregnant workers with limitations be treated the same as employees who are not pregnant but who are similar in their ability or inability to work by expanding the number of non-pregnant employees who could serve as comparators where disparate treatment under the PDA is alleged.”).


with more protection than they currently have under either the PDA or the ADA; avoid the patchwork of state and local laws; create a clear, predictable nationwide rule; and promote family economic security by allowing women to continue working during their pregnancy while gaining seniority on the job.

Under the PWFA private sector employers with more than 15 employees, as well as public sector employers, must provide reasonable accommodations for employees and job applicants with known limitations related to pregnancy, childbirth, or related medical conditions, except if doing so would impose an undue hardship on the operation of the business. Pregnant workers would not have to meet the high burden of proof under the PDA, or show that they have a covered disability under the ADA. However, similar to the ADA, the PWFA would require an interactive process between employers and pregnant workers to determine appropriate reasonable accommodations.

Further, under the PWFA a covered employer would be prohibited from: denying pregnant workers employment opportunities based on the employer’s need to make reasonable accommodations; retaliating or taking other adverse employment actions against pregnant workers for requesting a reasonable accommodation; or forcing them to take paid or unpaid leave if another reasonable accommodation is available. In addition, the act provides pregnant workers the same rights and remedies as those established under Title VII of the Civil Rights Act of 1964, including lost pay, compensatory damages, and reasonable attorneys’ fees.

IV. Conclusion

Pregnancy discrimination remains all too common place. Pregnant workers are frequently faced to make a choice between their health and a paycheck. The PWFA or similar legislation is a commonsense answer. This act makes employers’ obligations and employees’ rights crystal-clear, potentially avoiding costly litigation. Without a standard, federal rule employers are left to navigate the patchwork of existing laws. The PWFA is long overdue.

Respectfully submitted,

Christopher Brown, Chair
Young Lawyers Division

Denise Avant, Chair
Commission on Disability Rights

August 2021

33 Id.
1. Summary of the Resolution(s).

This resolution urges Congress to enact the Pregnant Workers Fairness Act or similar legislation that: (1) guarantees pregnant workers the right to reasonable accommodations, so they can continue working without jeopardizing their pregnancy, unless doing so poses an undue burden on an employer's business; and (2) prohibits employers from: denying pregnant workers employment opportunities based on the employer's need to make reasonable accommodations; retaliating or taking other adverse employment actions against pregnant workers for requesting a reasonable accommodation; or forcing them to take paid or unpaid leave if another reasonable accommodation is available; and (3) provides pregnant workers the same rights and remedies as those established under Title VII of the Civil Rights Act of 1964, including lost pay, compensatory damages, and reasonable attorneys’ fees.

2. Indicate which of the ABA’s Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This resolution addresses Association goals 1 through 4. Our members interests’ are advanced when they are served in an equitable and inclusive manner in the legal profession, and this resolution seeks to eliminate barriers that could hinder our members and other lawyers in their careers, improving our profession. Creating a level playing field in the law and in society also furthers the Rule of Law.

3. Approval by Submitting Entity.

Young Lawyers Division: February 19, 2021; Commission on Disability Rights: March 2021.

4. Has this or a similar resolution been submitted to the House or Board previously?

The American Bar Association has a long tradition of actively opposing discrimination on the basis of classifications including race, gender, national origin, disability, age, and sexual orientation. It has approved many resolutions to that effect. However, the Young Lawyers Division believes that neither this nor similar resolutions have been submitted to the House or Board previously.
be affected by its adoption?

19M114 urges Congress to pass legislation that explicitly affirms that discrimination because of sexual orientation, gender identity/expression, sex stereotyping, or pregnancy is sex discrimination prohibited by the Civil Rights Act of 1964 and other federal statutes.

18M302 urges all employers, and specifically all employers in the legal profession, to adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity. The current resolution reinforces the principles in this earlier resolution.

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

7. Status of Legislation.

H.R. 1065 passed the House of Representatives on May 14, 2021. On May 17, 2021, it was received in the Senate and referred to the Committee on Health, Education, Labor and Pensions.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

The submitting entities plan to work with ABA GAO to develop a strategy for calling on our members to advocate for this legislation.

9. Cost to the Association. (Both direct and indirect costs)

N/A

10. Disclosure of Interest. (If applicable)

N/A

11. Referrals.

Business Law Section
Center on Children and the Law
Commission on Racial & Ethnic Diversity in the Profession
Commission on Sexual Orientation and Gender Identity
Commission on Women in the Profession
Commission on Youth at Risk
12. Name and Contact Information

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13. Name and Contact Information. (Who will present the Resolution with Report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

This resolution urges Congress to enact the Pregnant Workers Fairness Act or similar legislation that: (1) explicitly and affirmatively guarantees pregnant workers the right to reasonable accommodations so they can continue working without jeopardizing their pregnancy, unless doing so poses an undue burden on an employer's business; (2) prohibits employers from: denying pregnant workers employment opportunities based on the employer’s need to make reasonable accommodations; retaliating or taking other adverse employment actions against pregnant workers for requesting a reasonable accommodation; or forcing them to take paid or unpaid leave if another reasonable accommodation is available; and (3) provides pregnant workers the same rights and remedies as those established under Title VII of the Civil Rights Act of 1964, including lost pay, compensatory damages, and reasonable attorneys’ fees.

2. Summary of the issue that the resolution addresses.

Although both the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA) provide some protections for pregnant workers, currently no federal law explicitly and affirmatively guarantees all pregnant workers the right to reasonable accommodations that allow them to continue working without jeopardizing their health and a paycheck.

3. Please explain how the proposed policy position will address the issue.

This resolution urges federal legislation that would expand the same rights and remedies under Title VII of the Civil Rights Act of 1964 to those who are pregnant, making explicitly clear what is required for reasonable accommodations in the wake of Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015). Specifically, the policy clarifies that employers are required to make reasonable accommodations for pregnancy-related work restrictions. The PWFA or similar legislation would end discrimination against pregnant workers who are forced out of their jobs and denied reasonable accommodations that would enable them to continue working and supporting their families. The Pregnant Workers Fairness Act would help end this discrimination and promote healthy pregnancies and protect the economic security of pregnant women and their families.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None known.