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## Towards Reasonable: The Rise of State Pregnancy Accommodation Laws

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TOWARDS REASONABLE: THE RISE OF STATE  
PREGNANCY ACCOMMODATION LAWS

*Stephanie A. Pisko\**

ABSTRACT

*In light of the recent Supreme Court decision Young v. UPS, pregnancy accommodation in the workplace is once again at the forefront of employment law. Pregnancy is not considered a disability under the ADA, nor is it within the scope of Title VII protections, but states are passing their own pregnancy accommodation laws. These laws will affect employers and employees alike, but exactly how is uncertain. Perhaps the most natural (and obvious) result of the explosion of state pregnancy accommodation laws will be a federal law, or an amendment to the ADA categorizing pregnancy as a disability. But there are reasons that the seemingly minimal accommodations for pregnant workers have not been met with overwhelming support. Some fear the increased cost to employers. Others fear the stigma of equating pregnancy with a disability.*

*Nevertheless, employers will have to grapple with increased state protections supplementing the already-existing scheme of Title VII. Young adds another complication by lessening the burden to prove an employer's duty to accommodate. For multinational corporations, tailoring their pregnancy policies to each state might prove costlier than uniformly implementing the plan of the most generous state. Employers are already accommodating disabled employees in the same manner. And these accommodations are by definition "reasonable." Employers might not only avoid needless liability by providing accommodations to pregnant workers—even when not required—but might also gain numerous benefits, such as: increased morale; lower attrition rates; more productive workers; and better reputations. Accommodating pregnant workers seems uncontroversial, but every federal bill introduced to do so has been strongly opposed and stopped. States may now be leading the way and, ultimately, pregnancy accommodation laws will create positive benefits for women.*

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## INTRODUCTION

Despite the presence of pregnant women and women of childbearing age in the workforce, pregnancy discrimination was not a recognized form of sex discrimination under Title VII of the 1964 Civil Rights Act until the passage of the Pregnancy Discrimination Act (PDA) in 1978.<sup>1</sup> Thirty-six years later, the Supreme Court is still grappling with the proper scope of the PDA; it recently decided *Young v. United Parcel Serv., Inc.*,<sup>2</sup> concerning how the PDA's prohibition on discrimination applies to employers' accommodation plans.<sup>3</sup> The PDA defines pregnancy discrimination and requires employers to treat pregnant workers, for all employment-related purposes, the same as non-pregnant workers who are similar in their "ability or inability" to work.<sup>4</sup> Unlike the Americans with Disabilities Act (ADA), the PDA does not require employers to provide *accommodations* to pregnant workers.<sup>5</sup> However, the Court in *Young* had to decide the extent to which this general non-duty to accommodate changes when the employer provides accommodations for other employees.<sup>6</sup> The analysis partly turned on whether the non-pregnant employees receiving accommodations were similarly situated to pregnant workers.<sup>7</sup> In some instances this is an easy analysis. For example, if an employer provides extra water breaks and light-duty assignments for workers with non-job related back pain, then the employer would be required to provide the same accommodation for pregnant women with back pains. But *Young* was not such an easy case because it was unclear whether the pregnant workers and the classes of non-pregnant workers being provided accommodations were similarly situated.<sup>8</sup>

In *Young*, the plaintiff, who had been an employee of UPS since 1999, became pregnant and was medically restricted from lifting over 20 pounds;<sup>9</sup> her job required her to lift packages weighing between 70 and 150 pounds.<sup>10</sup> UPS informed her that she could not continue as a driver because she was unable to perform the lifting requirement of her position.<sup>11</sup> The PDA does not necessarily require UPS to make an accommodation to Young, but the company made accommodations to other employees in three

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1. See *infra* Part I.A for a detailed history of the Pregnancy Discrimination Act.

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

3. *Young*, 135 S. Ct. 1338.

4. 42 U.S.C. § 2000e(k) (2012).

5. *Id.*

6. *Young*, 135 S. Ct. at 1342.

7. *Young*, 135 S. Ct. at 1347.

8. *Young*, 135 S. Ct. at 1348.

9. *Young*, 135 S. Ct. at 1344.

10. *Young*, 135 S. Ct. at 1344.

11. *Young*, 135 S. Ct. at 1344.

different scenarios: (1) temporary light-duty transfers for employees injured during the course of their job; (2) transfer of jobs for drivers who lost their driver's licenses (pursuant to the collective bargaining agreement); and (3) employees who qualified as disabled under the ADA.<sup>12</sup>

The district court granted summary judgment in favor of UPS and the Court of Appeals for the Fourth Circuit affirmed, holding that there was no duty to accommodate, despite the accommodations provided to other employees.<sup>13</sup> The court found that the other accommodated employees were not appropriate comparators and therefore not similarly situated.<sup>14</sup> The Supreme Court granted certiorari to settle possible interpretations of the PDA regarding who is a proper comparator.<sup>15</sup> UPS argued that the PDA's sole purpose is to define pregnancy as a form of sex discrimination and not to give special status to pregnant women by requiring accommodations.<sup>16</sup> Young, conversely, argued that the PDA requires "an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work."<sup>17</sup>

The Court rejected both interpretations<sup>18</sup> and, instead, adopted an intermediate approach.<sup>19</sup> It examined the EEOC guidelines, which specifically addressed the *Young*-type situation.<sup>20</sup> The guidelines provided an ex-

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12. *Young*, 135 S. Ct. at 1344.

13. *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 451 (4th Cir. 2013), *rev'd*, 135 S. Ct. 1338 (2015).

14. *Young*, 707 F.3d at 450.

15. *Young*, 135 S. Ct. 1338.

16. Brief for Respondent at 25, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 5512140.

17. Brief for Petitioner at 23, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 4441528.

18. *Young*, 135 S. Ct. at 1349 ("We cannot accept either of these interpretations.").

19. *Young*, 135 S. Ct. at 1353-54.

20. *Young*, 135 S. Ct. at 1351. In July 2014 the EEOC released guidelines stating that employers should provide workplace accommodations. *See infra* note 35. The EEOC also addressed the situation in which some employees receive lifting accommodations but not pregnant employees. The guidelines stated:

An employer has a policy or practice of providing light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20-pound lifting restriction related to her pregnancy. The employer denies the light duty request.

2 EEOC Compliance Manual § 626-I(A)(5), p. 626:0013 (July 2014). The Court did not adopt these guidelines because it had reservations about the timing, consistency, and thoroughness of the consideration. It noted that the EEOC's latest position contradicted its long-standing interpretation that would not require such an

ample of an employer having a policy to provide light-duty for temporarily disabled employees but not providing the accommodations for pregnant workers.<sup>21</sup> The EEOC contended that would be a violation of the PDA under a disparate treatment theory.<sup>22</sup> However, the Court gave the guidelines only *Skidmore* deference,<sup>23</sup> and found such a broad interpretation of the PDA unpersuasive.<sup>24</sup> Likewise, the Court rejected UPS' theory because it would fail to comport with Congress's objective of treating pregnant workers equal to similarly-situated employees.<sup>25</sup> The Court held that a pregnant employee could establish a discrimination claim under the PDA by making a prima facie case under *McDonnell Douglas* (showing that she belonged to the protected class, she sought an accommodation, she was denied the accommodation, and other similarly-situated employees were granted an accommodation).<sup>26</sup> Then, the employer can offer a legitimate non-discriminatory reason for denying her accommodation.<sup>27</sup> Next, the plaintiff has the opportunity to show that the proffered reason was pretext.<sup>28</sup> Unlike ordinary *McDonnell Douglas* burden shifting,<sup>29</sup> the plaintiff can prove pretext,

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accommodation. Furthermore, it questioned the basis of the EEOC's latest interpretation.

21. 2 EEOC Compliance Manual § 626-I(A)(5), p. 626:0013 (July 2014).

22. *Young*, 135 S. Ct. at 1352.

23. There are two types of deference given to administrative interpretations. The first type is *Chevron* deference, which applies a two-step analysis. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Under *Chevron*, the initial question is whether Congress has specifically addressed the issue at hand. If Congress has addressed the interpretation or ambiguity, the court must give full deference to congressional intent. On the other hand, if Congress has not addressed the issue at hand, the court will ask whether the administrative agency's interpretation is a reasonable construction of the statute. If so, the court will defer to the agency when it is clear that Congress delegated authority to the administrative agency to interpret the law and provide regulations. Express authorization of interpretative power indicates that *Chevron* deference is proper. *Chevron*, 467 U.S. at 842-43. Second, there is *Skidmore* deference, which provides that the "rulings, interpretations and opinions of the Administrator . . . , while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

24. *Young*, 135 S. Ct. at 1352.

25. *Young*, 135 S. Ct. at 1353.

26. *Young*, 135 S. Ct. at 1354.

27. *Young*, 135 S. Ct. at 1354.

28. *Young*, 135 S. Ct. at 1354.

29. In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court recognized that an employer could discriminate against an employee for mixed reasons (one of which was discriminatory), and the discrimination did not have to be the sole motivating factor ("but-for" causation). Thus, a mixed-motive jury instruction is a lower evidentiary burden because a plaintiff must prove discrimination was a motivating factor but not the sole factor. However, in order to get a mixed-motive jury instruction, the

and thus submit the case to the jury, by showing “that the employer’s ‘legitimate, nondiscriminatory’ reasons are not *sufficiently strong to justify the burden*, [and]—when considered along with the burden imposed—give rise to an inference of intentional discrimination.”<sup>30</sup>

The Court effectively created a new burden-shifting scheme for certain PDA claims regarding accommodations. Now, a plaintiff can create a jury issue by showing that the employer’s legitimate, non-discriminatory reason imposes a significant burden on her, and that such burden cannot be justified, which in turn gives rise to an inference of discrimination.<sup>31</sup> Accordingly, the judgment in *Young* was vacated and remanded to the Fourth Circuit.<sup>32</sup> This new standard may help plaintiffs in PDA claims by eliminating the need for direct evidence of discrimination in order to prove pretext in a mixed-motive case. Moreover, the new standard takes into account the burden imposed by the employer’s non-accommodation and requires the employer to essentially justify it.

Although *Young* is a positive step and might provide great benefits to pregnant workers whose employers provide accommodation to other workers, its holding is limited. When companies do not provide accommodations to any of their workers, they are not obligated to provide any for pregnant workers either. Consequently, pregnant workers will not be legally entitled to workplace accommodations unless an employer provides extra accommodation benefits to workers, and pregnant workers are similarly situated to such workers.

Suppose a blue-collar woman works as a bank teller, earning a near minimum wage salary. She has limited means and no financial resources other than her income from the bank. As part of her job, company policy

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Court seemed to require direct evidence of discrimination. Absent direct discrimination, a defendant can avoid liability by proving it would have made the same decision anyway, regardless of the one potentially discriminatory reason. But, a plaintiff that relied on a “but-for” causation theory (ordinary *McDonnell Douglas*) needed to put forth only circumstantial evidence to overcome the employer’s proffered legitimate non-discriminatory reason and submit the case to the jury. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003). Thus, a distinction arose between mixed-motive and but-for discrimination cases until the 1991 Title VII Amendments. Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. In *Desert Palace, Inc.*, the Court interpreted the 1991 Amendment and held that a plaintiff did not have to show direct evidence in a mixed-motive case, and could use circumstantial evidence instead. *Id.* After *Desert Palace*, a plaintiff, seeking a mixed-motive instruction, would have to “present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for any employment practice.” *Id.* (quoting 42 U.S.C. § 2000e-2(m)).

30. *Young*, 135 S. Ct. at 1354–55 (emphasis added).

31. *Young*, 135 S. Ct. at 1354–55.

32. *Young*, 135 S. Ct. at 1356.

requires that she stand at the bank counter (supposedly to appear more professional to customers). While still working, she becomes pregnant and develops related minor medical complications, such as swollen feet and high blood pressure. To help with her condition, her doctor recommends sitting on a stool, instead of standing at work. She requests an accommodation from her employer, which is denied. The employer further tells her that if she is unable to stand, she will lose her job just as any other employee would (excluding qualified individuals under the ADA).

Under the PDA, the employer is not required to provide such an accommodation, even though it appears minimally burdensome for the employer.<sup>33</sup> The pregnant bank teller would have a valid Title VII claim in only two situations: if the employer directly discriminated against her because of her pregnancy and not because of her inability to stand, or if the employer was treating similarly-situated employees more favorably.<sup>34</sup> In other words, if the employer would fire an employee, who, for example, broke his leg and could not stand, then the employer would be fully justified in firing the pregnant bank teller. This gap in the law has been costly for pregnant women in the workplace.<sup>35</sup> Despite the EEOC's suggestion

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33. See *infra* Part II.A.

34. 42 U.S.C. § 2000e(k) (2012).

35. See *Enforcement Guidance: Pregnancy Discrimination and Related Issues*, EEOC, available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm#dissta](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#dissta) (last visited Mar. 19, 2015). In example 19, the EEOC states:

Pregnancy-Related Impairment Constitutes ADA Disability Because It Substantially Limits a Major Life Activity.

In Amy's fifth month of pregnancy, she developed high blood pressure, severe headaches, abdominal pain, nausea, and dizziness. Her doctor diagnosed her as having preeclampsia and ordered her to remain on bed rest through the remainder of her pregnancy. This evidence indicates that Amy had a disability within the meaning of the ADA, since she had a physiological disorder that substantially limited her ability to perform major life activities such as standing, sitting, and walking, as well as major bodily functions such as functions of the cardiovascular and circulatory systems. The effects that bed rest may have had on alleviating the symptoms of Amy's preeclampsia may not be considered, since the ADA Amendments Act requires that the determination of whether someone has a disability be made without regard to mitigating measures.

*Id.* See also Brigid Schulte, *States Move to Ensure Pregnant Workers Get Fair Chance to Stay on Job*, WASH. POST: SHE THE PEOPLE (Sept. 8, 2014), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/09/08/states-move-where-congress-wont-to-ensure-pregnant-workers-get-fair-shot-to-stay-on-job/> ("In recent years, a rising number of lawsuits and discrimination claims filed with the Equal Employment Opportunity Commission show that pregnant women have been fired for requesting to carry a water bottle to stay hydrated, on their doctors' orders. Many who have asked for lighter duty, a break from heavy lifting or a desk job instead of

that employers provide reasonable accommodations,<sup>36</sup> courts have never interpreted Title VII to require that.

Such a narrow reading of the PDA limits women's participation in the workforce and has particularly negative consequences for women of lesser socio-economic status.<sup>37</sup> Women who are not provided paid leave and are financially unable to take unpaid leave (even if they are eligible) have no choice but to continue working during their pregnancies. Thus, a pregnancy-accommodation provision is vital for women with lower-socio-economic status to remain at their jobs.

Federal bills that would require an accommodation for pregnant workers have repeatedly failed in Congress.<sup>38</sup> But recently, states have been enacting their own legislation requiring just that.<sup>39</sup> In 2014, New Jersey enacted the Pregnant Worker's Fairness Act, which amended the State's discrimination law and added protections for pregnant women.<sup>40</sup> The act requires employers to make affirmative accommodations for pregnant workers.<sup>41</sup> Other

driving or going out on patrol as a police officer, have been terminated or forced to use up all their paid and unpaid leave before giving birth.”).

36. See *supra* note 35 and accompanying text. See also Brigid Schulte & Nia-Malika Henderson, *EEOC to Employers: Stop Discriminating Against Pregnant Workers*, WASH. POST (July 15, 2014), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/07/15/eec-to-employers-stop-discriminating-against-pregnant-workers/> (“This is an enduring problem in America’s workplaces—we’re not where we need to be with regard to fair, equal treatment of pregnant workers. We’re just not.”). See e.g., *EEOC Releases Demanding New Pregnancy Discrimination Guidance*, JACKSON LEWIS (Aug. 21, 2014), <http://www.jacksonlewis.com/resources.php?NewsID=4935> (noting that the suggested accommodations constituted “controversial” guidance).
37. See Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 444, 454 (2012) (“These ‘gaps in the law for pregnant women’ . . . frequently affect women in low-income work, where rigid work rules restrict workers’ ability to consume water, vary their working positions, and curtail repetitive, physically demanding activities. In these industries, women able to fully conform to employer expectations oriented around male norms during the rest of their work lives predictably lose their jobs when they become pregnant.”).
38. See, e.g., Pregnant Workers Fairness Act of 2013, H.R. 1975, 113th Cong. § (2013); Pregnant Workers Fairness Act of 2012, H.R. 5647, 112th Cong. § (2012).
39. See Amanda Haverstick, *Proliferating State & Local Pregnancy Accommodation Laws Make Modifying ADA/FMLA Procedures a Must for Most Employers*, FORBES (June 17, 2014, 2:15 PM), <http://www.forbes.com/sites/theemploymentbeat/2014/06/17/proliferating-state-local-pregnancy-accommodation-laws-make-modifying-adafmla-procedures-a-must-for-most-employers/>; Schulte, *supra* note 35.
40. Lauren Khouri, *He Signed It! New Jersey Expands Protection for Pregnant Workers*, NAT’L WOMEN’S LAW CTR. (Jan. 22, 2014), <http://www.nwlc.org/our-blog/he-signed-it-new-jersey-expands-protection-pregnant-workers>; N.J. STAT. ANN. § 10:5-12(s) (2014).
41. N.J. STAT. ANN. § 10:5-12(s) (2014).

states have passed similar laws as well.<sup>42</sup> The development of new laws brings new questions: How far will employers have to go to provide accommodations for pregnant workers? What will be the implications for pregnant workers' long-term success in the workplace? Will the state law developments push Congress to pass the federal Pregnant Workers Fairness Act?

This Article proceeds as follows. Part II of this Article provides the history and background of federal protections for pregnant workers. It discusses the requirements of Title VII and the PDA, and available pregnancy leave under the Family and Medical Leave Act. It also explains the accommodation requirements of the ADA, and speculates about what state pregnancy accommodation laws might require. Part III explores recently enacted state accommodation laws, with a particular focus on the New Jersey Pregnant Worker's Fairness Act. Part IV first examines the opposition to pregnancy accommodations and the potential economic costs to employers. Then, it discusses how such feared costs are exaggerated and how pregnancy accommodations could actually *benefit* businesses. Part V argues in favor of states adopting accommodation laws to achieve a critical mass of states and, ultimately, a federal law that uniformly protects pregnant workers. In particular, it focuses on how the rise in pregnancy accommodation laws might change employers' practices and guidelines. Finally, Part VI concludes in favor of the continued adoption of state pregnancy accommodation laws.

## I. HISTORY & BACKGROUND

Before the passage of Title VII, pregnant women did not have any job protections in the workplace. Women generally did not have equal rights in, and access to, the workplace, which allowed employers to exclude female workers.<sup>43</sup> Assumptions and stereotypes about women's physical capabilities

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42. See *infra* notes 131, 132 and accompanying text.

43. See Lise Vogel, *Debating Difference: Feminism, Pregnancy, and the Workplace*, 16 FEMINIST STUD. 9, 12 (1990) (arguing that sex-segregation in the market excluded women from many jobs in the workplace). Vogel also explains that in the early twentieth century many states had explicit laws forbidding pregnant women from the workplace. *Id.* See also Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 72–73 (2013) (“Vestiges of this regime [protective legislation] lingered long into the twentieth century, as a wide variety of state laws and employer policies restricted occupations, job duration, and benefits based on sex, pregnancy, childbirth, childrearing, or a combination thereof, all designed to reinforce (white) women’s prescribed maternal roles.”); Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 22 (2009) (“The twentieth century witnessed a dramatic change in the regulation of pregnancy and work. Against a long history of exclu-

severely limited their advancement.<sup>44</sup> Given the perceived physical weakness of women,<sup>45</sup> pregnancy further restricted women's employment opportunities.<sup>46</sup> Women were excluded even from serving on juries, and working as lawyers<sup>47</sup> and bartenders, because of their childbearing capabilities.<sup>48</sup> Prior to World War II, positions that women were eligible to occupy in the workforce were often limited and remedial.<sup>49</sup> Cases prior to Title VII routinely cited women's physical limitations as a justification for exclusion.<sup>50</sup> Many of those laws, that purported to protect women's maternal functions, actually served to relegate women to lower positions and minimize their ability to advance in the workplace;<sup>51</sup> thus, protective legislation preserved women's roles in the personal sphere.<sup>52</sup>

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sion . . . policies that survived challenge, a new legal regime emerged to protect pregnant workers against discrimination beginning in the 1970s.”)

44. Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 963 (2013) (“These laws [employment policies] relied upon overbroad stereotypes regarding women’s physical weakness and normative judgments regarding women’s proper sphere . . .”).
45. *Id.*
46. *Id.* (“Pregnancy, and motherhood more generally, was once a primary justification for laws limiting *all* women’s employment rights.”). *See also* Katharine T. Bartlett, *Pregnancy and the Constitution: the Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1532 (1974) (“That women may and do become pregnant is the most significant single factor used to justify the countless laws and practices that have disadvantaged women for centuries.”). Additionally, once working women became pregnant, there was an expectation that they would cease their employment to raise their children. *See* Catherine Albiston, *Institutional Inequality*, WIS. L. REV. 1093, 1112–24 (2009).
47. *See* VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* (1998); D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870–1890*, 28 J. LEGAL EDUC. 485 (1977).
48. *See* KATHARINE T. BARTLETT, DEBORAH L. RHODE & JOANNA L. GROSSMAN, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 173 (6th ed. 2013) (describing the biological differences of men and women as a justification for discrimination based on sex).
49. *See* Thomas H. Barnard & Adrienne L. Rapp, *The Impact of the Pregnancy Discrimination Act on the Workplace—From A Legal and Social Perspective*, 36 U. MEM. L. REV. 93, 98–99 (2005).
50. *Id.* *See, e.g.*, *Muller v. Oregon*, 208 U.S. 412, 421–23 (1908) (“[W]oman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . . . This difference justifies a difference in legislation.”).
51. Brake & Grossman, *supra* note 43, at 72 (“But this ‘protection’ was often a pretext for preserving better jobs for men and did not affect all women equally.”).
52. Vogel, *supra* note 43, at 12 (“Over time, special treatment for women through protective legislation not only reinforced sex segregation in the labor market, but it also increasingly became the basis for policies and practices that harmed women workers. In the name of protection, special—but often unfavorable—treatment of pregnant workers thus became a norm that was still in place in the early 1970s.”). *See* Brake & Grossman, *supra* note 43, at 72.

The legal landscape changed in the 1960's when Title VII was passed, forbidding employers from discriminating against employees on account of sex.<sup>53</sup> The prohibition on sex discrimination seemingly encompassed pregnancy discrimination, considering that pregnancy is sex specific—but that presumption was false.

#### A. *Title VII and the Pregnancy Discrimination Act*

Even after the passage of Title VII, employers were free to discriminate on the basis of pregnancy. Because discrimination on account of pregnancy still was not considered discrimination on the basis of sex, employers continued to hire and promote non-pregnant women over pregnant women and exclude pregnant women from company benefits.<sup>54</sup> The first Supreme Court case to address pregnancy discrimination, twelve years after the passage of Title VII, was *General Electric Co. v. Gilbert*.<sup>55</sup> In *Gilbert*, female employees brought a Title VII action alleging discrimination because the company's health plan excluded disabilities arising from pregnancy.<sup>56</sup> The plan provided 60% of normal earnings to employees with non-occupational sickness or injury as a result of an accident.<sup>57</sup> The Supreme Court held that an employer did not violate Title VII by having its disability plan exclude coverage for pregnancy-related disabilities.<sup>58</sup> In a perplexing analysis, the Court reasoned that women were not less protected than men under the plan and stated, "the program divides potential recipients into two

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53. 42 U.S.C. § 2000e (2007).

54. Grossman & Thomas, *supra* note 43, at 23 ("It remained common for employers in the 1960s and 1970s to overtly impede pregnant women's access to new or continued employment, even as women were gaining statutory and constitutional protection against sex discrimination . . . . [M]any employers continued to refuse to hire pregnant women, to require them to leave before a certain point in their pregnancies, to exclude them from certain jobs, or to deny them fringe benefits like insurance, disability coverage, or leave.") (emphasis added); Widiss, *supra* note 44, at 963 ("Until the 1970s, however, public and private policies that provided health insurance, sick days, and benefits for employees with illnesses or injuries routinely excluded "normal" pregnancies.").

55. 429 U.S. 125 (1976). The Court decided two cases prior to *Gilbert* concerning pregnancy discrimination, but those were decided on due process grounds and not under Title VII. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (invalidating a public school policy that forced women to take unpaid maternity leave once they reached the fourth month of their pregnancies); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (validating a California law that excluded pregnancy from the comprehensive list of disabilities covered under the state insurance policy). The reasoning in *Geduldig* was later applied in *Gilbert* to conclude that pregnancy discrimination was not a form of sex discrimination.

56. *Gilbert*, 429 U.S. at 127–28.

57. *Gilbert*, 429 U.S. at 128.

58. *Gilbert*, 429 U.S. at 145–46.

groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes.”<sup>59</sup> Thus, the Court held that Title VII did not cover pregnancy discrimination because pregnancy discrimination was not “because of sex.”<sup>60</sup> The Court recognized that while it is true that both men and women could be non-pregnant, only women could become pregnant. Despite this, the Court declared that pregnancy discrimination is not because of sex, because non-pregnant persons can be men and women.

Congress responded to *Gilbert* in 1978 by passing the PDA, which overruled the Court’s decision.<sup>61</sup> The PDA amends Title VII and specifically categorizes pregnancy discrimination as a form of sex discrimination.<sup>62</sup> An employer cannot fire an employee simply because she is pregnant.<sup>63</sup> However, it can terminate the employment of a pregnant employee if she is unable to perform the core functions of the job description, and the employer would have treated a similarly-situated employee equally.<sup>64</sup> For example, suppose a plaintiff was fired because her morning sickness made her late to work. The employer, stating that her pregnancy and encompassing tardiness was unacceptable, fired her.<sup>65</sup> In order to succeed on her claim, the plaintiff would have to prove that the employer would not have fired a male employee who, for example, had insomnia and was often late to work. This can be difficult to prove absent concrete comparative examples.<sup>66</sup> That precise issue is why many scholars argue that the PDA did not go far enough and should include an accommodation provision; currently, it has no such provision, despite the EEOC’s newly issued guidelines.<sup>67</sup>

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59. *Gilbert*, 429 U.S. at 135 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)).

60. *Gilbert*, 429 U.S. at 140.

61. See generally Brake & Grossman, *supra* note 43 (surveying recent case law under the Pregnancy Discrimination Act).

62. 42 U.S.C. § 2000e(k) (2012).

63. See *id.*

64. See *Maldonado v. U.S. Bank & Mfrs. Bank*, 186 F.3d 759, 762–63 (7th Cir. 1999).

65. See, e.g., *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994) (holding that the PDA does not require an employer to treat an employee afflicted with morning sickness better than an employee who was tardy for any other health reason).

66. For a more in-depth examination of how comparators affect proof structures in discrimination cases, see Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191 (2009).

67. See *infra* Part V for discussion of scholars arguing for pregnancy to be defined as a disability. See also *supra* note 35 for EEOC guidelines.

### B. Family and Medical Leave Act

In addition to the PDA, which protects pregnant women from discrimination, the Family Medical Leave Act of 1993 (FMLA) provides another benefit in the form of unpaid leave for pregnant workers.<sup>68</sup> The law allows employees (subject to certain threshold requirements)<sup>69</sup> to take twelve weeks of unpaid leave because of a qualifying medical condition, or to care for a family member with a qualifying medical condition.<sup>70</sup> Pregnancy is a qualified condition under the FMLA.<sup>71</sup> The Act allows employees to take leave without fear of losing their jobs, continue receiving benefits throughout the leave, and return to the same position they held prior to taking leave.<sup>72</sup>

Despite this available protection, some workers still slip through the cracks. Women working for smaller business are not covered by the FMLA.<sup>73</sup> Similarly, women who work in informal labor sectors are not covered by the FMLA because they are not statutory employees, and women who are self-employed or independent contractors are also not covered.<sup>74</sup> Further, women who work part-time or full-time for multiple employers but not the requisite hours for one single employer are ineligible for unpaid leave.<sup>75</sup> As a result of these carve-outs, two-thirds of steadily employed mothers are not covered by the FMLA.<sup>76</sup>

Additionally, because FMLA leave is unpaid, the law disproportionately burdens pregnant workers of lesser socio-economic status because they cannot afford to take unpaid leave.<sup>77</sup> Some women may be afraid to take leave

68. Family and Medical Leave Act of 1993, 29 U.S.C. § 2612 (2012).

69. In order for an employee to qualify, the FMLA requires that she work for an employer with more than fifty employees and has worked for the employer for more than twelve months and for 1250 hours during the preceding year. 29 U.S.C. § 2611(2)(B)(iii).

70. 29 U.S.C. § 2601.

71. 29 U.S.C. § 2611.

72. 29 U.S.C. § 2614.

73. The FMLA applies only to employers with 50 or more employees, thus it does not apply to smaller businesses. 29 U.S.C. § 2611(2)(B).

74. Rona Kaufman Kitchen, *Eradicating the Mothering Effect: Women as Workers and Mothers, Successfully and Simultaneously*, 26 WIS. J.L. GENDER & SOC'Y 167, 186–87.

75. The FMLA defines an eligible employee as one who has been employed for at least 1,250 hours of service with one employer during the previous 12-month period. 29 U.S.C. § 2611.

76. Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 2 (2005) (“Coverage limitations mean that only about half of all workers, and less than one third of steadily employed new mothers, receive these protections.”).

77. See Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC'Y 1, 8 (2012).

under the FMLA for fear of retaliation or negative consequences.<sup>78</sup> While the Act contemplates this fear to some extent by including an anti-retaliation provision,<sup>79</sup> in practice, workers are still wary.<sup>80</sup> Women also may be unable to take FMLA leave during pregnancy if they need to save their twelve weeks for leave after the child is born. Thus, the FMLA is a limited federal benefit for pregnant workers because of statutory and practical exclusions.

### C. Americans with Disabilities Act

The PDA protects pregnant women from discrimination, and the FMLA provides unpaid leave for pregnant workers, but no federal law provides workplace accommodations for pregnant workers. However, the recent passage of state pregnancy accommodation laws may grant pregnant employees similar protection as the ADA. The ADA, passed in 1990, prohibits discrimination against employees on the basis of their disability.<sup>81</sup> Unlike other federal discrimination protections, the ADA requires employers to make reasonable accommodations for the protected class—disabled employees.<sup>82</sup> Disability is one of only two protected classes under Title VII that require workplace accommodations.<sup>83</sup> However, employers do not have to provide accommodations if doing so would create an undue hardship on the employer.<sup>84</sup> Despite a strong argument for its inclusion, pregnancy is not per se a qualifying disability under the ADA.<sup>85</sup>

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78. See Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in the Workplace Mobilization of Civil Rights*, 39 L. & SOC'Y REV. 11, 23–27 (2005).

79. Retaliation claims are assessed under the same framework as Title VII claims. See, e.g., *Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 64 n.2 (1st Cir. 2002). Moreover, the employer can assert an affirmative defense by arguing that it would have taken the same adverse employment action regardless of whether the employee took leave.

80. Albiston, *supra* note 78, at 23 (“Some respondents worried that being fired would not only deprive them of a job, but also harm their ability to find future employment.”).

81. Americans with Disabilities Act of 2008, 42 U.S.C. 12112 (2009).

82. *Id.*

83. Employers requesting religious accommodation also have protection under Title VII, but that is not relevant for this analysis.

84. 42 U.S.C § 12112(b)(5A) (2009).

85. 29 C.F.R. app. §1630.2(h) (2011). Sheerine Almazdeh explained why pregnancy has been historically excluded under the ADA:

As a health condition, pregnancy has long been denied per se designation as a disability under the Americans with Disabilities Act (ADA). The reasons for this exclusion include common law depictions of pregnancy as a “natural physiological condition,” Equal Employment Opportunity Commission

Because courts interpreted the ADA narrowly, Congress amended the statute with the Americans with Disabilities Amendments Act of 2008 (ADAAA), expanding the definition of disabled.<sup>86</sup> But in expanding the coverage, Congress did not extend the ADA to include the large contingencies of pregnant workers. Since the 2008 ADA Amendments, courts have generally favored finding a disability under the expanded definition of disability.<sup>87</sup> Except, of course, in cases of pregnancy.

Yet there can be some circumstances in which pregnancy causes a qualifying disability.<sup>88</sup> For example, in *Cerrato v. Durham*,<sup>89</sup> the district court noted that “pregnancy-related conditions including spotting, leaking, cramping, dizziness, and nausea” may qualify as disabilities under the ADA.<sup>90</sup> Some courts have distinguished between “normal,” uncomplicated pregnancies and complicated pregnancies.<sup>91</sup> But, most courts have concluded, despite the EEOC regulation to the contrary, that pregnant women can never claim ADA protection.<sup>92</sup> Some scholars argue that pregnancy *itself* should be treated as a disability, and, as a result, pregnant women should

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(EEOC) guidelines that explicitly rule out pregnancy as a disability, and historical reticence in the feminist community to advocate for a pregnancy rights framework grounded on the premise that pregnant women are disabled persons.

Almzadeh, *supra* note 77, at 3.

86. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 2(b), 122 Stat. 3553 (2008).
87. See MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 521 (Aspen 8th ed. 2012) (“Individuals who would previously have been unlikely to have been deemed disabled are finding a very different reception from the courts under the amended statute. The overwhelming trend in the cases interpreting the ADAAA has been to find a disability.”).
88. See *Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 975 (2002) (noting that “no court currently maintains that pregnancy is *per se* a disability under the ADA”).
89. *Gorman*, 209 F. Supp. 2d at 975 (noting that some conditions resulting from pregnancy can trigger ADA protection even if EEOC guidelines state that pregnancy is not a disability because it is not an impairment). See also Amanda G. Wachuta, Note, *The ADA Gets Even More Complicated: Analyzing Pregnancy With Complications as a Disability*, 52 *DRAKE L. REV.* 471, 479 (2004) (noting that most cases addressing disabilities as a result of pregnancy depend on whether the impairment is substantially limiting).
90. *Cerrato v. Durham*, 941 F. Supp. 388, 389 (S.D.N.Y. 1996).
91. *Cerrato*, 941 F. Supp. at 393.
92. See *Patterson v. Xerox Corp.*, 901 F. Supp. 274, 278 (N.D.Ill. 1995) (holding that a plaintiff with prior back pain which was aggravated and worsened by her pregnancy could be considered disabled under the ADA); *Garrett v. Chicago Sch. Reform Bd. of Trs.*, 1996 WL 411319, at \*3 (N.D.Ill. 1996) (holding that severe morning sickness resulting from pregnancy could be considered a disability under the ADA).

have similar workplace accommodations.<sup>93</sup> Additionally, there is no legislative history to suggest that the ADA was intended to exclude pregnancy.<sup>94</sup> The EEOC did not categorically exclude any other category that was not originally included in the ADA.<sup>95</sup> This Article explores pregnancy as a disability *infra*, but first analyzes the ADA to (1) examine the reasons that pregnancy is excluded and (2) provide a framework that states might adopt in implementing their pregnancy accommodation laws.

### 1. Definition of Disability

Employers must treat disabled employees equal to other similarly-situated employees and must accommodate disabled employees in certain situations.<sup>96</sup> There are three categories in which a person's impairment could be considered a disability under the ADA: first, being actually disabled; second, having a record of a disability; and third, being regarded as having a disability.<sup>97</sup> Courts consider three elements when determining if an individual is disabled under the statute: (1) whether the plaintiff's condition is a physical or mental impairment; (2) whether that impairment affects a major life activity; and (3) whether the major life activity is substantially limited by the impairment.<sup>98</sup> For the "actual disability" and "record of disability" categories, a plaintiff must meet all three elements.<sup>99</sup> However, for the "regarded as disability" category, a plaintiff does not need to meet the elements; an employer cannot discriminate against an employee because it believes she is disabled, regardless of whether that assumption is true.

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93. See, e.g., *Gudenkauf v. Stauffer Commc'ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996); *Villarreal v. J.E. Merit Constructors, Inc.*, 895 F. Supp. 149, 152 (S.D. Tex. 1995); *Tsetseranos v. Tech Prototype, Inc.*, 893 F. Supp. 109, 119 (D.N.H. 1995); *Byerly v. Herr Foods, Inc.*, 1993 WL 101196, at \*4 (E.D. Pa. 1993).

94. See, e.g., *Cox*, *supra* note 37, at 452 (arguing that the reluctance to associate pregnancy with disability has negatively affected pregnant workers). Cf. *Brake & Grossman*, *supra* note 43, at 70 (arguing that categorizing pregnancy as a disability would help, but there is still value in treating it as a distinct sex equality right).

95. *Alemzadeh*, *supra* note 77, at 13.

96. *Id.*

97. 42 U.S.C. § 12102(1) (1990). Under the statute there are three definitions of disability: a physical or mental impairment that substantially limit one or more of the major life activities of an individual; a record of such an impairment; or being regarded as having such an impairment.

98. *Id.*

99. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). See generally 42 U.S.C. §12102(2)(A) (illustrating major life activities: "caring for oneself, performing manual task, seeing, hearing, eating, walking, lifting, bending, speaking, breathing, reading, concentrating, thinking, communicating and working").

a. Actual Disability

The Act defines disability broadly to include physical and mental conditions.<sup>100</sup> It does not, however, include protection for persons with short-term disabilities.<sup>101</sup> Physical characteristics, such as height, weight, age, eye color, and general aging cannot be the basis of an impairment.<sup>102</sup> Character traits, such as literacy, socio-economic status, and common personality traits, are similarly excluded.<sup>103</sup> Voluntary conditions, such as pregnancy, are generally not considered impairments.<sup>104</sup> If an employee is actually disabled, then an employer cannot discriminate against her in hiring, firing, or conditions of employment, *and* must accommodate her disability.<sup>105</sup>

b. Record of a Disability

Under Section 3(2) of the ADA, a person with a “record” of an impairment that substantially limits a major life activity can be considered disabled.<sup>106</sup> The record includes employment records, medical records, and education records.<sup>107</sup> The impairment in the record must indicate that it would substantially limit one or more of the employee’s major life activities.<sup>108</sup> For example, the EEOC interprets the statute to protect former cancer patients from discrimination.<sup>109</sup> In such a situation, the EEOC states that employers must provide a continuous accommodation for the employee, even if her impairment no longer affects major life activities.<sup>110</sup> While this seems like a broad employer liability, the “record of” disability under the ADA has rarely been invoked.<sup>111</sup> Furthermore, because pregnancy

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100. 42 U.S.C. §12101 (1990). The ADA defines a physical or mental impairment as:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body system, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as intellectual disability (formerly termed ‘mental retardation’), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h) (2001) (pre-ADAAA version).

101. 29 C.F.R. § 1630.2(j)(ix) (2012).

102. 29 C.F.R. app. §1630.2(h) (2011).

103. *Id.*

104. *Id.*

105. 29 C.F.R. app. § 1630.2(h).

106. 29 C.F.R. app. § 1630.2(k).

107. 42 U.S.C. § 12102(1)(B).

108. *Id.*

109. 29 C.F.R. app. § 16320.2(k).

110. *Id.*

111. *Id.*

is not an impairment under the statute in the first instance, accommodation relating to childbirth and parenting would not be covered under this prong.

c. Regarded as Having a Disability

The 2008 ADA Amendments substantially altered protections for Americans with disabilities by revamping the “regarded as” category under the definition of disability.<sup>112</sup> An employee will meet this requirement if she has been discriminated against because an employer accurately or inaccurately perceived her as having an impairment that limits a major life activity.<sup>113</sup> Notably, the employee does not have to have an *actual* disability. While an employee may not be discriminated against for being regarded as disabled, she is not entitled to an accommodation unless she has an actual disability or has a record of a disability.<sup>114</sup> For example, an employer could fire a left-handed employee because the employer perceived her to be disabled. The employee would have a viable discrimination claim under the ADAAA, but would not be entitled to an accommodation without an actual disability. That 2008 amendment to the ADA provides broad protection in the workplace for persons with (or perceived to be with) disabilities.<sup>115</sup>

2. Accommodation Requirements

If an employee is “qualified,” meaning she can perform the essential functions of the job, and she has a disability under any of the three previously defined disability prongs, then an employer may not discriminate against her on the basis of her disability.<sup>116</sup> This scheme intends to balance the autonomy of employers with the rights of disabled workers. Moreover, if the employee has an actual disability, the employer must provide reasonable accommodations to her.<sup>117</sup> However, the employer must know of that disability.<sup>118</sup> Accordingly, the employer has no affirmative duty to investigate whether an employee has a disability and needs an accommodation. If the

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112. See generally Alex B. Long, *(Whatever Happened to) The ADA's "Record Of" Prong (?)*, 81 WASH. L. REV. 669 (2006).

113. 42 U.S.C. § 12102(3)(A)–(B).

114. *Id.*

115. See generally Michael D. Moberly, *Letting Katz Out of the Bag: The Employer's Duty to Accommodate Perceived Disabilities*, 30 ARIZ. ST. L.J. 603 (1998).

116. *Id.*

117. See, e.g., *Wells v. Cincinnati Children's Hosp. Medical Ctr.*, 860 F. Supp. 2d 469, 478 (S.D. Ohio 2012) (holding that a plaintiff who underwent medical care but was otherwise fit for work put forth evidence to support a prima facie case of “regarded as” discrimination after being fired).

118. *Rogers v. CH2M Hill*, 18 F. Supp. 2d 1328 (M.D. Ala. 1998) (holding that employee's depression was not so obvious for the employer to have actual knowledge and thus trigger the duty to accommodate).

employee is having difficulty with her job, the employer may inquire into whether an accommodation is needed, but it is not required to do so.<sup>119</sup>

As discussed *infra*, states will have to determine the scope of their pregnancy accommodation laws' requirements and the ADA could provide an optimal framework for doing so. In particular, some state courts will have to determine whether there is an affirmative duty for the employee to ask for an accommodation. If states follow the ADA, then the laws will place the burden on pregnant employees to seek accommodations.

### 3. Employer Defenses

There are instances in which the employer would be free to discriminate on the basis of disability or would not be required to accommodate an individual with a disability. First, an employer does not have to hire an applicant with a disability if she is unable to perform the essential functions of the position with or without an accommodation.<sup>120</sup> Second, an employer does not have to provide a reasonable accommodation if doing so would create an undue hardship for the employer.<sup>121</sup>

Despite the ADA's exclusion of pregnancy,<sup>122</sup> the statute is vital to understanding the potential scope and procedures of the recently enacted state pregnancy accommodation laws. It will likely guide state courts in determining: when a pregnancy (akin to disability under ADA) disqualifies a worker from a position because she is unable to perform the essential functions of the job; what constitutes reasonable accommodations; what constitutes undue burden; and whether there is an affirmative duty to accommodate absent an employee's request.

#### *D. Proposed Pregnant Workers Fairness Act (Federal)*

As previously discussed, the PDA does not require accommodation for pregnant workers unless similarly-situated, non-pregnant employees receive such an accommodation. Although courts and the PDA regulations have held that pregnancy itself is not a disability, legislators have proposed enact-

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119. These accommodations might include: making existing facilities used by employees readily accessible, job restructuring, part-time or modified schedules, reassignment to a different position, and additional training. 29 C.F.R. app. § 1630.2(o). The ADAAA does not require accommodation of employees regarded as having a disability, it only prevents discrimination against those individuals. It does, however, require accommodation for employees with a record of disability. For instance, a cancer patient in remission with a record of impairment that needed to seek additional treatment or testing would probably qualify for an accommodation.

120. C.F.R. app. § 1630.9.

121. *Id.*

122. 42 USCA § 12101.

ing protections that would treat it as such. Congress has attempted multiple times to pass the Pregnant Workers Fairness Act.<sup>123</sup> The bill would require employers to make reasonable accommodations for their employees who have physical limitations because of pregnancy, childbirth, or related medical conditions.<sup>124</sup> For example, an employer might be required to allow an employee to take water breaks, to provide her a stool to rest (if possible), and reassign her from heavy lifting duties to lighter duties.<sup>125</sup> Similar to the ADA framework, the Pregnant Workers Fairness Act would not require employers to provide such accommodations if doing so would create an undue hardship for them. The law has been opposed by numerous Congresses.<sup>126</sup>

In sum, pregnant women are partially protected in the workplace under the current federal scheme but receive no added benefits or accommodations. The PDA prohibits employers from discriminating on the basis of pregnancy in hiring. In reality, an employer might still discriminate, but use a non-discriminatory justification in deciding not to hire a pregnant applicant. There are limits to which the law can prevent employers from hiding their discriminatory intent. Although the PDA prohibits an employer from firing a pregnant worker because she is pregnant, an employer is free to terminate the pregnant woman if her pregnancy is affecting her job performance—and the employer provides no accommodations to any other employee. The ADA provides accommodation to workers with physical disabilities, but that accommodation does not extend to pregnant workers with equal physical challenges, despite increased protections under the 2008 ADA amendments. The FMLA provides unpaid leave to pregnant workers; however, many women are financially unable to use the leave, or are saving it for after their children are born. Thus, pregnant workers of lower-socioeconomic status are most likely to be in need of a workplace accommodation, but currently no federal law providing such accommodations exists.

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123. *Id.*

124. Pregnant Workers Fairness Act of 2013, H.R. 1975, 113th Cong. § (2013); Pregnant Workers Fairness Act of 2012, H.R. 5647, 112th Cong. § (2012). *See also* NAT'L WOMEN'S LAW CTR., FACT SHEET, THE PREGNANT WORKERS FAIRNESS ACT: MAKING ROOM FOR PREGNANCY ON THE JOB 2 (2013), [http://www.nwlc.org/sites/default/files/pdfs/pregnantworkersfairnessfactsheet\\_w\\_bill\\_number.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnantworkersfairnessfactsheet_w_bill_number.pdf). As previously discussed, some pregnancy-related conditions can be considered disabilities under the ADA but only a few courts have adopted such a position and in limited circumstances. *See supra* notes 90–94 and accompanying text.

125. *See* H.R. REP. NO. 113-1975 (2013); H.R. REP. NO. 112-5647 (2012). For all intents and purposes the text of the 112th and 113th Congresses are the same and are referred to interchangeably.

126. H.R. REP. NO. 113-1975 (2013).

## II. NEW JERSEY PREGNANT WORKER'S FAIRNESS ACT AND SIMILAR STATE ACCOMMODATION LAWS

Despite the failure to pass more robust workplace protections for pregnant workers at the federal level, numerous states and several cities recently have passed statutes requiring accommodations for pregnant workers.<sup>127</sup> This section examines the New Jersey Pregnant Worker's Fairness Act as a model state law. While there are some variations, New Jersey's statute is representative of the recent state accommodation laws. As of December 2014, twelve states and five cities have passed accommodation laws.<sup>128</sup> Remarkably, they were almost all passed within the last two years, perhaps indicative of a concern for pregnant women in the workplace. Those are positive developments, but there is still much uncertainty regarding scope, implementation, and enforcement. New Jersey provides some clear examples of what constitutes a reasonable accommodation (e.g., bathroom breaks, change in schedule, etc.), and other examples can be gleaned from existing ADA case law.<sup>129</sup>

### A. *New Jersey Pregnant Worker's Fairness Act*

In January 2014, Governor Chris Christie signed the New Jersey Pregnant Worker's Fairness Act into law.<sup>130</sup> The Act amends the New Jersey Law Against Discrimination (NJLAD) and imposes an accommodation require-

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127. *Id.*

128. *Id.*

129. NAT'L P'SHIP FOR WOMEN AND FAMILIES, REASONABLE ACCOMMODATIONS FOR PREGNANT WORKERS: STATE AND LOCAL LAWS, FACT SHEET (2014), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf> [hereinafter FACT SHEET, STATE AND LOCAL LAWS]; Haverstick, *supra* note 39; Schulte, *supra* note 35 and accompanying text.

130. FACT SHEET, STATE AND LOCAL LAWS, *supra* note 129. The twelve states are: Alaska, California, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Minnesota, New Jersey, Texas, and West Virginia. ALASKA STAT. § 39.20.520 (2013); CAL. GOV'T CODE §§ 12945, 12926 (West 2012); CONN. GEN. STAT. §§ 46a-60(a)(7), 46a-51 (2011); DEL. CODE ANN. tit. 19, §§ 710, 711, 716 (West 2014); Haw. Code R. § 12-46-107 (1990); 775 ILL. COMP. STAT. 5/2-101, 102 (2014); LA. REV. STAT. §§ 23:342, 23-341 (1997); MD. CODE ANN., STATE GOV'T §§ 20-609, 20-601 (West 2013); MINN. STAT. §§ 181.940, 181.9414, 181.9436 (2014); N.J. STAT. ANN. § 10:5-12(s) (West 2014); TEX. LOC. GOV'T CODE § 180.004 (2001); W. VA. CODE §§ 5-11b-1 *et seq.* (2014). In addition, New York City, Philadelphia, Providence, and the District of Columbia have passed similar laws. New York, N.Y., Int. No. 974-A (Oct. 2, 2013); Philadelphia, Pa., Code § 9-1128 (2014); (to be codified at) Providence, R.I., Code §§ 16-54, -57, -84 (2014); Protecting Pregnant Workers Fairness Act of 2014, D.C. Act. 20-458 (2014).

ment for employers.<sup>131</sup> First, it adds pregnant workers as an explicitly protected class.<sup>132</sup> The Act defines pregnancy broadly in the employment context, as “pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth.”<sup>133</sup> Second, it requires employers to treat employees whom they know or *should know* are pregnant no less favorably than similarly-situated employees.<sup>134</sup> The “should know” requirement goes further than the federal PDA.<sup>135</sup> Third, it requires reasonable accommodation in the workplace, “such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work, for needs related to the pregnancy when the employee, based on the advice of her physician, requests the accommodation . . . .”<sup>136</sup> Like the ADA, there is an undue hardship provision, which exempts the employer from providing accommodation if such accommodations would be an undue hardship on the business operations of the employer.<sup>137</sup>

### B. Defining Accommodation

One of the largest questions that will arise with the passage of pregnancy accommodation law is to what extent accommodation is required. Under the New Jersey statute, the legislature provides guidance for what constitutes an undue hardship and lists factors for consideration including:

[T]he overall size of the employer’s business with respect to the number of employees, number and type of facilities, and size of budget; the type of the employer’s operations, including the composition and structure of the employer’s workforce; the nature and cost of the accommodation needed, taking into consideration the availability of tax credits, tax deductions, and outside funding; and the extent to which the accommodation would involve waiver of an essential requirement of a job as opposed to a tangential or non-business necessity requirement.<sup>138</sup>

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131. N.J. STAT. ANN., § 10:5-12(s) (WEST 2014).

132. Lauren Khouri, *He Signed It! New Jersey Expands Protection for Pregnant Workers*, NAT’L WOMEN’S LAW CTR. (Jan. 22, 2014), <http://nwlc.org/he-signed-it-new-jersey-expands-protection-pregnant-workers/>.

133. N.J. STAT. ANN., § 10:5-12(s) (West 2014).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

The specifics in the New Jersey law are somewhat similar to the ADA and could be a model for other states. The statute requires the employee to request the accommodation under advice of her physician.<sup>139</sup> This could be a significant limitation and will protect employers from frivolous claims by requiring a valid medical reason for the accommodation. Like the ADA, the statute requires the employee to make the request for such an accommodation.<sup>140</sup>

The reasonable accommodation requirement will positively benefit pregnant employees. For example, take the case of Heather Wiseman. Wiseman was an employee of Wal-Mart for seven months when she became pregnant.<sup>141</sup> At that time, she informed her employer she was pregnant and had a medical condition (urinary tract and bladder infections), requiring her to consume adequate amounts of water.<sup>142</sup> Her doctor advised her to carry a water bottle while at work.<sup>143</sup> Shortly after Wiseman began following the advice of her doctor, Wal-Mart changed its policy to forbid non-cashiers from carrying water bottles and told her to cease doing so.<sup>144</sup> Wiseman worked in a fitting room area and continued to carry a water bottle as her doctor had advised.<sup>145</sup> She was subsequently fired for insubordination.<sup>146</sup> Wiseman brought suit under Title VII, claiming pregnancy discrimination, and a violation under the FMLA.<sup>147</sup> Her claims for both counts were dismissed.<sup>148</sup> The District of Kansas held that she could not establish a prima facie case of discrimination because she could not prove she was “treated less favorably than others who were not pregnant but were similar in their ability or inability to work.”<sup>149</sup> In other words, Wal-Mart would have fired any employee who carried a water bottle in violation of its policy.

Now suppose this same scenario happened in 2015 in the state of New Jersey. Wiseman was a pregnant worker who asked for an accommodation under advice of her doctor. She meets the first requirement of the Pregnancy Fairness Act. Then the analysis would turn to the reasonableness of the accommodation itself—requesting to carry a water bottle. In addition to the apparent reasonableness of having a water bottle in a fitting area, the

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. Memorandum and Ord. at 2, *Wiseman v. Wal-Mart Stores Inc.*, No. 08-1244-EFM, 2009 WL 2168911 (D. Kan. July 21, 2009).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

statute seems to provide for such an accommodation explicitly by stating that the employer must provide accommodations such as “breaks for increased water intake.”<sup>150</sup> Moreover, an employer could not discriminate against or penalize the employee for requesting such an accommodation.<sup>151</sup> Under New Jersey law, Heather Wiseman would probably not have been fired, and, in fact, would have been provided a reasonable accommodation that allowed her to continue working.

The district court in *Wiseman* stated that the plaintiff was conflating the ADA and the PDA by arguing for treatment similar to that a disabled employee would receive.<sup>152</sup> In New Jersey, the Pregnant Workers Fairness Act seems to require just that. It is likely that state courts will look to ADA guidelines and case law in interpreting the reasonable accommodation provision of the Pregnant Workers Fairness Act. Although there is currently no case law concerning the Act, employers would be prudent to structure their employee guidelines and policies for pregnant workers in the same manner as their guidelines and policies for disabled workers.

### 1. “Should Know”

One question and potential problem that will arise under the New Jersey statute is the requirement of non-discrimination for employers that know or “should know” an employee is pregnant. The Act forbids an employer “to treat . . . a woman employee that the employer knows, or should know, is affected by pregnancy in a manner less favorable than the treatment of other persons not affected by pregnancy but similar in their ability or inability to work.”<sup>153</sup> The “should know” provision of the statute is best interpreted as a constructive notice requirement. Given the private nature of a woman’s pregnancy, it may be difficult, and in fact offensive, to require an employer to investigate into a woman’s pregnancy status. That inquiry in itself could create numerous human resource problems and, depending on the circumstance, legal issues as well. Although the PDA does not explicitly prohibit an employer from asking an employee or applicant about her pregnancy status, the EEOC warns against it because such a question could create suspicion of an intent to discriminate.<sup>154</sup>

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150. *Id.*

151. *Id.*

152. N.J. STAT. ANN. § 10:5-12(s) (West 2014).

153. *Id.*

154. *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm#IV](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#IV) (last accessed Mar. 16, 2016).

Accordingly, employers will have to make careful considerations regarding pregnancy policies and accommodations. Perhaps employers should have policies that allow women to report their pregnancies. For example, the EEOC already lists best practices for employers to comply with the ADA and PDA.<sup>155</sup> One of the very first suggestions is “ensure . . . the policy provides multiple avenues of complaint.” Indeed, identifying problems (or potential problems) in the workplace is the first step for employers to come into compliance with pregnancy discrimination and accommodation laws.

## 2. “Undue burden”

Similar to the ADA, the New Jersey Pregnant Worker’s Fairness Act does not require an employer to provide an accommodation if doing so would create an undue hardship.<sup>156</sup> Again, it is likely that state courts will look to the regulations and case law of the ADA to determine what constitutes an undue hardship on the business operations of the employer. While an employer may be fairly confident that allowing a water bottle in a fitting room is a reasonable accommodation, it may be equally unsure whether transferring a pregnant worker to a different position would be reasonable.

The PDA has taken an approach that encourages employers to not ask about the status of an employee’s pregnancy. As previously discussed, the PDA does not forbid an employer from asking about an employee’s pregnancy, but the EEOC has advised against such practice because asking about a worker’s potential pregnancy could create evidence of an intent to discriminate.<sup>157</sup> There is no need for an employer to ask and the pregnancy has no legal bearing on her employment. If the employee is able to do the job, then the employer cannot fire her because of her pregnancy. Thus, her pregnancy is irrelevant unless the woman divulges it to her employer because she is unable to perform her job. However, given the rise in state pregnancy accommodation laws, it is prudent for employers to examine their pregnancy policies.

The most prudent solution for employers is to adopt policies similar to their policies for disabled employees. Employers should have a robust reporting system for pregnant workers to request accommodations, and ensure that employees are aware of the proper procedures. They should clearly

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155. *Id.*

156. N.J. STAT. ANN. § 10:5-12(s) (West 2014).

157. EEOC, *Pregnancy Discrimination – FAQs*, <http://www.eeoc.gov/youth/pregnancy2.html#Q10> (last visited Apr. 27, 2015) (“Federal law does not prohibit employers from asking you whether you are or intend to become pregnant. However, because such questions may indicate a possible intent to discriminate based on pregnancy, we recommend that employers avoid these types of questions.”).

explain the reporting procedures in the handbook and display posters in the workplace. Then, if employees do not take advantage of the reporting system, employers would presumptively lack knowledge. New Jersey and other states should look to the ADA as a model for implementing their state accommodation laws. Although only a federal law could provide uniformity to pregnancy accommodation, the fact that states use language identical to the ADA indicates the probability that the structure of accommodation laws will parallel disability laws.

### III. ARGUMENT FOR PREGNANCY ACCOMMODATION LAWS

Despite some potential criticism, and resistance,<sup>158</sup> pregnancy accommodation laws are ultimately a positive and vital development for women in the workforce. Some pregnant women need accommodations to continue working without risking their health or losing their jobs. First, this section examines the opposition to pregnancy accommodation laws. Then, it addresses the benefits of accommodation laws and focuses on three positive potential effects: (1) an increase in pregnant women's participation in the workplace; (2) economic benefits to both employers and women (particularly blue-collar workers); and (3) the granting of a needed protection for women who must continue working during their pregnancy.

#### A. Reasons for Opposition

Despite the recent explosion of state laws, accommodation requirements are required in only a minority of states. At the federal level, the Pregnant Workers Fairness Act has been opposed every time it has been introduced.<sup>159</sup> In the past two Congresses, the Republican-controlled House opposed the bill,<sup>160</sup> although it is unclear why Republicans were unanimously opposed to the bill. One commentator noted that, "there isn't any articulated opposition from Republican offices. And giving workers a stool rather than making them stand all day—it's very hard to articulate why

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158. *Id.*

159. See *infra* note 162 and accompanying text.

160. Cf. Danielle Paquette, *Why Women Are Afraid to Tell Employers They're Pregnant*, WASH. POST (Apr. 21, 2015, 8:41 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/21/why-women-are-afraid-to-tell-employers-theyre-pregnant/> ("Female workers frequently avoided asking for help or special accommodations, researchers found. High rank didn't quell worries: Entry level employees and managers expressed similar fears. Some hid their pregnancies for as long as possible. Reported one woman, anonymous in the study: 'I have this perception that as I become rounder, I'm going to become 'cuter,' and cuter is not professional. So [I have] a little mixed emotion about other people I work with noticing [that I'm pregnant].'").

you're against that."<sup>161</sup> The one consistent explanation, although not a cohesive policy stance, has been the theory that accommodation laws are an "unfair burden on businesses."<sup>162</sup> That argument has been a perennial concern for the advancement of workplace rights in general.<sup>163</sup> First, the text of the bill does not require an employer to provide an accommodation if doing so would create an undue hardship.<sup>164</sup> Second, many argue that the accom-

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161. NAT'L WOMEN'S LAW CTR., FACT SHEET, THE PREGNANT WORKERS FAIRNESS ACT: MAKING ROOM FOR PREGNANCY ON THE JOB (2013), [http://www.nwlc.org/sites/default/files/pdfs/pregnantworkersfairnessfactsheet\\_w\\_bill\\_number.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnantworkersfairnessfactsheet_w_bill_number.pdf).

162. Schulte, *supra* note 35. See Marsha Mercer, *States Go Beyond Federal Law to Protect Pregnant Workers*, PEW TRUSTS (Jan. 7, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/1/07/states-go-beyond-federal-law-to-protect-pregnant-workers> ("Additional protections for pregnant workers are less popular on Capitol Hill, where a new federal measure proposed by Democrats, the Pregnant Workers Fairness Act, has failed to garner any Republican support. GOP opponents contend the law would place an unfair burden on businesses."); Christina Wilkie, *Workplace Pregnancy Bill Introduced Despite Opposition*, HUFFINGTON POST (Sept. 25, 2013, 4:52 AM), [http://www.huffingtonpost.com/2012/09/25/workplace-pregnancy-bill-opposition\\_n\\_1914062.html](http://www.huffingtonpost.com/2012/09/25/workplace-pregnancy-bill-opposition_n_1914062.html) ("The Republican-controlled House has consistently opposed workplace bills like PWFA, which they argue place an unnecessary burden on businesses, lowering overall profits. The Senate is similarly inclined.").

163. See generally Richard A. Epstein, *The Subtle Vices of the Employment Discrimination Laws*, 29 J. MARSHALL L. REV. 575, 583(1996). Professor Epstein discussed the economic costs of Title VII:

Any sound overall assessment cannot ignore the material effects that such litigation has on the creation of new jobs for other workers. . . . The effects are likely to be large and significant, but they also will be hidden from view. They may involve decisions on where to build the next new plant; or to decide which of two plants the firm will expand and by how much; or to decide which plant the firm will shut down. Civil rights laws also might influence the types of capital equipment that companies purchase, or the kinds of new jobs they create. They surely influence the percentage of individuals who companies will hire as employees covered under the Civil Rights Act, compared to the percentage of work that will be set out on a piecework basis to independent contractors to whom the Civil Rights Act does not apply. It is no accident that the rate of independent contracting, e.g., the number of temporary workers in the United States, is increasing rapidly. A key motivation for this trend is to enable employers to escape the burdens associated with civil rights laws and other so-called protective employment laws.

*Id.*

164. Pregnant Workers Fairness Act of 2013, H.R. 1975, 113th Cong. § 2(1) (2013) ("[It is unlawful to] not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.").

modation laws would not be costly and would in fact provide economic benefits to employers and workers. These arguments are discussed below.

In addition to the possible detriments to businesses, some commentators have expressed concerns that providing an accommodation to pregnant women would further harm the already stigmatized workers.<sup>165</sup> Some employers already view pregnant workers as less than capable, even when they perform their jobs without needing an accommodation.<sup>166</sup> In such situations, accommodations for pregnant women would further exacerbate these negative stereotypes by reinforcing the idea that pregnant women cannot perform their jobs without special treatment. The “equal treatment” argument addresses this problem by opposing accommodations and preferential treatment for pregnant women in the workplace.<sup>167</sup> A further concern is that women of color, single women, and economically disadvantaged workers are more likely to be viewed as “bad mothers” for continuing to work while pregnant.<sup>168</sup> However, the stereotypes about pregnant women in the workforce exist in spite of favorable laws, not because of them. Title VII did not cause employers to have discriminatory attitudes towards women. On the contrary, it sought to eliminate such animus by expressly prohibiting discrimination.<sup>169</sup> If pregnant women are not permitted reasonable accommodations while working, women will be pushed out of the workforce, just

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165. See Epstein, *supra* note 164. Although Professor Epstein does not address accommodation laws specifically, he argues that that general discrimination laws have negative economic benefits to companies.

166. Researchers found that “[f]emale workers frequently avoided asking for help or special accommodations.” See Paquette, *supra* note 161. See also Alissa Quart, *Why Women Hide Their Pregnancies*, N.Y. TIMES (Oct. 6, 2012), <http://www.nytimes.com/2012/10/07/opinion/sunday/why-women-hide-their-pregnancies.html> (“Although federal law prohibits companies with 15 or more employees from discriminating against pregnant job seekers, it can be quite hard for an ordinary woman to land a job if she lets prospective bosses know she is pregnant.”).

167. See Wendy W. Williams, *Equality’s Riddle: Pregnancy and Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 351-370 (1985).

168. Joan C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of “Careers” in the Workplace*, 13 DUKE J. GENDER L. & POL’Y 31, 35 (2006) (“[T]he findings of social science research documenting overwhelmingly negative stereotypes about the competence and commitment of pregnant women and mothers. . . . Another study showed that pregnant women, as compared to nonpregnant women, are subjected to lower performance ratings based on identical behavior and other available information. Such rating likely reflect the stereotypes that pregnant women will become less available and committed to their jobs and that they pose risks to their employer because they will likely not return to work at the conclusion of their maternity leave.”).

169. Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 306 (1983) (“Congress sought to improve the lot of traditionally victimized minorities both by eliminating blatant injustices stemming from intentional discrimination and

as sex discrimination forced women out of the workplace before Title VII.<sup>170</sup> Similar to the positive benefits of Title VII, pregnancy accommodation laws will benefit pregnant women by allowing them to continue working without fear of discrimination.

*B. Increasing Pregnant Women's Rights in the Workplace*

Ultimately, pregnancy accommodation laws will allow women to continue working when they would have been previously unable to without an accommodation—or would have risked losing their jobs by asking for an accommodation. The passage of the PDA increased the participation of married women and pregnant women in the workforce and helped create a dynamic model for labor force participation.<sup>171</sup> Moreover, the PDA's unpaid leave requirement further increased labor force participation for women with children.<sup>172</sup> Providing protection for pregnant workers is crucial to ensuring their participation.

One might argue that requiring employers to accommodate women will discourage employers from hiring women of childbearing age in the first instance.<sup>173</sup> This assumption is too attenuated to withstand scrutiny and could be applied to a host of similar historical workplace protections. For instance, during the passage of Title VII itself and the subsequent PDA, it could have been said that employers would be less likely to hire women because of the threat of litigation. Again, this could be applied to workers with disabilities and workers of a protected race or national origin. But protective laws have not decreased hiring of those groups; they have actually accomplished the opposite result.<sup>174</sup>

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by creating employment opportunities that would provide the economic power to propel these groups into the mainstream of American society.”).

170. Brake & Grossman, *supra* note 43, at 106 (“Women of color, single women, and economically vulnerable women who must navigate the cultural fault-lines for working mothers are susceptible to charges of being bad mothers, irresponsible for having children at all, or for having too many children. At the same time, they are expected to continue working without ‘special’ accommodation, a sentiment reflected in the harsh judgments reserved for ‘welfare mothers’ who are dependent on state support.”).

171. Sankar Mukhopadhyay, *The Effects of the 1978 Pregnancy Discrimination Act on Female Labor Supply*, INT’L ECON. REV. 1133, 1150 (2012).

172. *Id.*

173. See Williams & Westfall, *supra* note 168, at 35 (“The stereotype that women who become pregnant will lose interest in their jobs, if taken to its logical extreme, may cause employers to be reluctant to hire women whom they fear might become pregnant.”). Although this statement is applied to PDA in general, proving extra protections in the form of accommodations could further exacerbate the fear that employers will not hire pregnant women.

174. *Id.*

State accommodation laws will similarly allow women to continue working while pregnant (if they wish) and thus increase their overall workforce participation and earnings. Despite the gaps in the law, the PDA has been successful in protecting pregnant women from employment discrimination and increasing their participation.<sup>175</sup> There are numerous obstacles for pregnant women and mothers in the workplace that stem from a culture of hostility and not from formal legal equality. In fact, Title VII and subsequent litigation have been imperative in overcoming the “maternal wall,” which limits the ceiling of women’s success.<sup>176</sup> State accommodation laws (and maybe one day an analogous federal law) will further increase women’s progress. Since the PDA was first passed in 1978, pay equality and the gender pay gap have continued to be relevant. State accommodation laws that allow women to continue working during their pregnancy, and thus reduce missed time, will help to achieve parity.<sup>177</sup> Moreover, it is a just imperative to provide reasonable accommodations to pregnant workers like we do for disabled workers.

Many scholars have argued for the expansion of the PDA to model the ADA, or for the inclusion of pregnancy as a disability under the ADA.<sup>178</sup> This argument very much represents what states are doing at the local level to protect their workers. There are good reasons to treat the two conditions similarly and protect them equally. First, as previously discussed, ADA regulations direct courts to construe the statute broadly, classifying a wide range

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175. Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 *GEO. L.J.* 567, 569 (2009) (“Without a doubt, the PDA successfully opened workplace doors for pregnant women. It brought an abrupt end to common employer policies that categorically excluded pregnant women or restricted the terms on which they could work.”).

176. Joan C. Williams & Nancy Segal, *Beyond The Maternal Wall: Relief For Family Caregivers Who Are Discriminated Against on the Job*, 26 *HARV. WOMEN’S L.J.* 77, 78–79 (2003). Professors Williams and Segal challenge the accepted wisdom that Title VII is an ineffective solution for advancing mothers in the workplace:

We have identified over twenty cases—some with substantial monetary awards—in which the courts have ruled in favor of plaintiffs who have attempted to move beyond the maternal wall. These cases, based on federal and state statutes, state public policies, and constitutional rights, have given rise to roughly ten viable legal theories. Both male and female family caregivers have successfully challenged such treatment. In addition, case law contains clear lessons about what to do and what not to do when litigating these claims—advice that will be of interest to both plaintiffs’ and management-side lawyers.

*Id.*

177. Grossman, *supra* note 175, at 569.

178. Williams & Segal, *supra* note 177.

of impairments as disabilities.<sup>179</sup> Thus, the law is intended to be a workplace protection for workers with physical limitations. Many physical disabilities, such as hypertension, back pain, or diabetes, often impose the same physical limitations on an employee's ability to work that pregnant women might experience.<sup>180</sup> Pregnant women might need the same accommodations that their disabled coworkers require, such as increased breaks or help lifting heavy objects. There is no way to distinguish these impairments other than their cause—some are a result of pregnancy and some are a result of any other medical condition that is recognized by the ADA. One might argue that the difference is that pregnancy is a more common occurrence. But the ADA does not forbid a finding of disability simply because the impairment is common. In fact, hypertension, back pain, and diabetes—all potential disabilities—are quite common.<sup>181</sup> Thus, it is quite contrary to the purpose and plain interpretation of the ADA to exclude pregnancy because the physical limitations that result from pregnancy are indistinguishable from other covered conditions. Such exclusion has had negative consequences for pregnant women, and state accommodations laws will fill this gap in the law.

Despite the benefits of state accommodation laws, one potential problem is the enforcement of such laws. In New York City, where an accommodation law has been passed, women still experience discrimination.<sup>182</sup> Pregnancy accommodation laws are new and many women are not aware of their legal rights.<sup>183</sup> Even if they are aware, some women, especially those of lesser socioeconomic status, may not file complaints for fear of losing their jobs. However, the difficulty of enforcing accommodation laws (and workplace protections more generally) should not deter the proliferation of such laws. That problem will slowly erode as more and more protections are provided and employees become aware of their entitlement to accommoda-

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179. See, e.g., Ann Friedman, *Women Can't End the Wage Gap on Their Own*, NEW YORK MAG. (Apr. 12, 2015, 8:25 PM), <http://nymag.com/thecut/2015/04/women-cant-end-the-wage-gap-on-their-own.html>; Claire Cain Miller, *Pay Gap is Because of Gender, Not Jobs*, N.Y. TIMES (Apr. 23, 2014), [http://www.nytimes.com/2014/04/24/upshot/the-pay-gap-is-because-of-gender-not-jobs.html?\\_r=0&abt=0002&abg=1;](http://www.nytimes.com/2014/04/24/upshot/the-pay-gap-is-because-of-gender-not-jobs.html?_r=0&abt=0002&abg=1;) Claire Cain Miller, *Pay Gap Is Smaller Than Ever, and Still Stubbornly Large*, N.Y. TIMES (Sept. 17, 2014), <http://www.nytimes.com/2014/09/18/upshot/pay-gap-is-smaller-than-ever-and-still-stubbornly-large.html?abt=0002&abg=1>; Brigid Schulte, *The Wage Gap: A Primer*, WASH. POST (Oct. 2, 2014), <http://www.washingtonpost.com/news/local/wp/2014/10/02/the-wage-gap-a-primer/>.

180. Michelle A. Travis, *Disabling the Gender Pay Gap: Lessons from the Social Model of Disability*, 91 DENV. U.L. REV. 893 (2013) (examining how a pregnancy model based off the disability model might close the pay gap).

181. See, e.g., Cox, *supra* note 37; Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (1995).

182. See *supra* note 86 and accompanying text.

183. See Alemzadeh, *supra* note 77, at 14.

tions, though this will take time. Even so, the issue of enforcing the law is still separate from the merits of accommodation laws themselves. The law changes employers' policies, practices, and guidelines. Once protections are in place and litigation begins, employers adjust accordingly and begin to act affirmatively to avoid litigation and be in compliance with the law.

### *C. Economic Benefits*

Although it may seem costly to businesses to provide accommodation to pregnant women, there has been no proof of negative economic effects to employers,<sup>184</sup> and there are benefits to women and employers alike.

#### 1. To Pregnant Women

The economic benefits of accommodations to pregnant workers are obvious—they can continue working and earning income during their pregnancy and they do not have to fear losing their jobs. Moreover, the pregnant women who need reasonable accommodations at work are most likely of lower socio-economic status to begin with. Women in white-collar jobs are not likely to need an accommodation because they are not performing physical labor. A pregnant attorney can have water at her desk while she works, or rest her feet on her office chair. An insurance agent does not have to worry about requesting light-duty to avoid lifting 70-pound boxes. But a waitress who is on her feet all day carrying heavy trays may need more frequent breaks and assistance carrying food; a bathroom attendant at a department store may need a temporary transfer to avoid sniffing dangerous chemicals. Such reasonable accommodations would often be taken for granted in white-collar jobs. Thus, pregnancy accommodations are most critical to low-salary, blue-collar workers who financially need to continue working.

This is not to suggest that the disproportionate need of blue-collar women does not have advantages for all pregnant workers. There may be situations when a woman needs an accommodation to continue working but does not necessarily *need* to work. One may argue that her savings or partner's income is sufficient. Financial necessity is not the touchstone of whether a pregnant woman should be granted an accommodation. On the

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184. Epstein, *supra* note 164, at 583.

Tracing down these consequences will be hard. Firms are not likely to announce that their decisions are made to minimize the adverse effects of the civil rights laws. They are not likely to broadcast their strategy. The effects are likely to be large and significant, but they also will be hidden from view.

*Id.*

contrary, the reasonableness of the accommodation is the proper inquiry. Although workers with lower socioeconomic status need accommodations the most, it is not a means-tested right. Regardless of one's relative wealth, a pregnant worker's ability to continue working and to not lose her job is a definite economic benefit of accommodation laws.

## 2. To Employers

Despite the possibility of some costs, providing accommodations in the workplace could actually help businesses' economic success.<sup>185</sup> First, any potential cost of reasonable accommodations is nominal, such as water breaks and schedule adjustments.<sup>186</sup> Second, there are other benefits to providing pregnancy accommodations: improved recruitment and retention of employees; increased employee commitment; increased productivity; reduced absenteeism; and increased diversity.<sup>187</sup> The bottom-line for employers will not be affected at all, or will be positively affected, by providing accommodations to their pregnant workers.<sup>188</sup>

Delaware recognized the potential for state accommodation laws to benefit employers when it passed its own bipartisan law. State Senator Bethany Hall-Long recognized that her state's accommodation law would be good for business, and a unanimous state legislature agreed; the bill was co-sponsored by conservative republicans.<sup>189</sup> Senator Hall-Long explained:

This makes common sense not just for maternal and child health, but as good, sound economics. Women are more and

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185. See generally *Fact Sheet, The Business Case for Accommodating Pregnant Workers*, NAT'L WOMEN'S LAW CTR. (Dec. 2013), [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_workers\\_business\\_case\\_12.04.12.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers_business_case_12.04.12.pdf).

186. *Id.* at 3 ("Research also demonstrates that costs associated with providing these accommodations can typically be expected to be minimal and temporary. The bottom line benefit to businesses is just one of the many reasons to ensure that reasonable accommodations are available to pregnant workers.").

187. *Id.*

188. See Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 30, 2012, [http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html?\\_r=0](http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html?_r=0) ("Finally, employers might consider that providing accommodations to pregnant workers would even be good for the bottom line, in the form of reduced turnover, increased loyalty and productivity and healthier workers. With minor job modifications, a woman might be able to work up until the delivery of her child and return to work fairly soon after giving birth. If she were forced out instead, her employer would waste time and money finding a replacement. In the worst-case scenario, employers could be responsible for much higher medical costs if their workers were afraid to ask for accommodations and instead continued doing work that endangered their pregnancies.").

189. Schulte, *supra* note 35.

more the lead breadwinners of their families. If you make them use up all their leave before they give birth, or terminate their employment because they need an accommodation, you have created an economic situation for that family that then may need to rely on Medicaid, and other public social supports.<sup>190</sup>

Delaware State Senator Colin Bonini agreed that as a fiscal conservative he did not want women losing their jobs and becoming dependent on public assistance.<sup>191</sup> In addition to the economic benefits for businesses, Senator Long-Hall focused on the company morale and employee retention, noting that “businesses with a strategic vision embraced this. A simple accommodation is so much easier than laying someone off, terminating them, then having to bring someone else on and retrain them.”<sup>192</sup> Indeed, it makes common sense for employers to foster a collegial work environment, increase productivity through support in the form of accommodations, and retain employees by making small adjustments.

In sum, pregnancy accommodation laws will have a positive impact for pregnant women in the workforce at minimal to no cost to employers. While negative stereotypes about the competency of pregnant workers is a legitimate concern, it is not enough to outweigh the concerns of pregnant workers who need accommodations to continue working—quite often to survive financially. The women who need to continue working will do so, and without accommodations, which may have negative consequences for their own health and the health of their unborn children.<sup>193</sup> There is strong support for pregnancy accommodations in the workplace, evidenced by the

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190. *Id.*

191. Mercer, *supra* note 163.

192. Schulte, *supra* note 35.

193. It is beyond the scope of this Article to discuss the health effects of women working while pregnant, but it can be assumed that there could be negative health consequences if a doctor recommends a medically necessary accommodation and the mother does not receive or seek one. If there were no medical risks then presumably the medical doctor would not have recommended it in the first instance, even if the recommendation were just a precaution. For a more in-depth look at the health risks to pregnant women who do not receive accommodation see, for example, Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (1995). See also Bakst, *supra* note 188 (“This kind of law is a public health necessity. Without its protections, pregnant women are reluctant to ask for the accommodations they need for their own health and for the health of their unborn children. For many women, a choice between working under unhealthy conditions and not working is no choice at all. In addition, women who can work longer into their pregnancies often qualify for longer periods of leave following childbirth, which facilitates breastfeeding, bonding with and caring for a new child and a smoother and healthier recovery from childbirth.”).

recent passage of state laws and the general desire for friendlier family workplace policies.<sup>194</sup>

#### IV. IMPLICATIONS OF PREGNANCY ACCOMMODATION LAWS

The rapidly developing state accommodation laws for pregnant workers will change the landscape of employment law. In addition to the protection itself, the state laws will positively expand protection for pregnant workers even in states without accommodation laws, despite the fact there is no equivalent federal protection. This will be accomplished in two major ways. First, the state laws might force national employers to change their policies as a whole rather than just state-by-state. Second, the state accommodation laws could provide an impetus for enacting federal legislation or amending the PDA. For both of these scenarios, a critical mass of state accommodation laws is crucial.

For example, take a multi-national corporation such as Wal-Mart. As of 2015, Wal-Mart must provide accommodations for pregnant workers in twelve states and several cities.<sup>195</sup> Despite the fact that Wal-Mart is not legally obligated to provide such accommodations in the remaining jurisdictions, it recently announced a change to its employee policy.<sup>196</sup> It may be that it is beneficial to do so for public relations reasons and ease of administration. It would be quite difficult for Wal-Mart to argue that providing water breaks to a pregnant worker in Missouri is an undue burden while doing precisely that for a pregnant worker in New Jersey. It seems as though it would be costly and confusing for Wal-Mart to have different procedures for pregnant employees across different states. But if Wal-Mart were more generous and comported with New Jersey's accommodation law, then women across the country who work for Wal-Mart would be entitled to pregnancy accommodations.

This also limits the potential liability of national corporations by proactively providing an employment protection that might not be required in every jurisdiction. For example, take the case of Heather Wiseman. There is little doubt she would succeed on her discrimination claim under the New Jersey statute. But what if her case took place, instead of New Jersey, in

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194. See Brigid Schulte, *'Mad Men' Era of U.S. Family Policy Coming to an End?*, WASH. POST: SHE THE PEOPLE (Feb. 12, 2014), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/02/12/mad-men-era-of-us-family-policy-coming-to-an-end/> (reporting that the majority of Americans support "family friendly" policies such as paid leave and increased sick days).

195. NAT'L P'SHIP FOR WOMEN AND FAMILIES, *supra* note 130.

196. Bryce Covert, *Pregnant Workers at Walmart Fear the Company's New Policy Won't Go Far Enough to Protect Them*, THINKPROGRESS (Apr. 8, 2014, 1:17 PM) <http://thinkprogress.org/economy/2014/04/08/3424336/walmart-pregnant-disability-policy/>.

Eastern Pennsylvania? Pennsylvania does not have a pregnancy accommodation law. However, Philadelphia does, and Pennsylvania's neighbor, New Jersey, does. Members of the jury in Eastern Pennsylvania may have friends, families, or acquaintances who benefit from accommodation laws in Philadelphia and New Jersey. It is only human nature that their judgments will be influenced by this knowledge—even if only subtly. Suppose that there is a close call of whether Wal-Mart fired her because of the water bottle issue or on account of pregnancy discrimination. If the stated reason, the insubordination, is not believable or seems like pretext, it might manifest in the jury's decision. Of course, that is a narrow hypothetical. However, it costs an employer like Wal-Mart very little to provide reasonable accommodations like carrying a water bottle, and doing so avoids negative perceptions about the company and could potentially help it avoid costly lawsuits. The case of Heather Wiseman has been used as a rallying call for accommodation laws by proponents of the laws.<sup>197</sup> Perhaps the negative attention from her case is the reason that Wal-Mart changed its policy,<sup>198</sup> or perhaps the change was because of the critical mass of states providing such accommodations. Wal-Mart itself recognized the rise in accommodation laws. In its updated policy, Wal-Mart includes a list of the states that currently require accommodation laws in a prominent box.<sup>199</sup> A more optimistic observer might accept Wal-Mart's purported reason for the policy change—to “ensure women Wal-Mart associates will not be discriminated against when

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197. Schulte, *supra* note 35.

198. Many media sources used the case of Heather Wiseman to illustrate the problems and injustices associated with a lack of pregnancy work accommodations. See e.g., Robin Abcarian, *Lawsuit: Forced on Maternity Leave, Forced to Return Before Baby Is Due*, L.A. TIMES (Apr. 16, 2014), <http://articles.latimes.com/2014/apr/16/local/lame-ra-pregnant-worker-sues-pier-1-20140416>; Nikki Gloudeman, *When It Comes to Pregnancy Discrimination, Equal Is Not the Same As Fair*, HUFFINGTON POST (Dec. 4, 2014, 4:45 PM), [http://www.huffingtonpost.com/nikki-gloudeman/when-it-comes-to-pregnancy-discrimination\\_b\\_6271606.html](http://www.huffingtonpost.com/nikki-gloudeman/when-it-comes-to-pregnancy-discrimination_b_6271606.html); Mark Gruenberg, *Unions Back Law to Protect Pregnant Workers*, PEOPLE'S WORLD (May 9, 2012), <http://peoples-world.org/unions-back-law-to-protect-pregnant-workers/>; Avital Norman Nathman, *Mommie Dearest: Pregnant Women Shouldn't Lose Their Jobs*, THE FRISKY (Mar. 7, 2013), <http://www.thefrisky.com/2013-03-07/mommie-dearest-pregnant-women-shouldnt-lose-their-jobs/>; Annamarya Scaccia, *The Face of Pregnancy Discrimination*, RH REALITY CHECK (May 1, 2013, 5:24 PM), <http://rhrealitycheck.org/article/2013/05/01/the-face-of-pregnancy-discrimination/>.

199. Letter from Adam F. Turk, Att'y-Adviser, U.S. Sec. and Exch. Comm'n, to Erron W. Smith, Senior Assoc. Gen. Counsel, Wal-Mart Stores, Inc. at 14 (Mar. 19, 2014) (available at <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2014/cynthiamurray031914-14a8.pdf>). Wal-Mart later withdrew the shareholder proposal from its proxy materials after it adopted a pregnancy accommodation policy prior to its annual shareholders meeting in 2014. *Id.*

they are pregnant.”<sup>200</sup> So far, women Wal-Mart associates still appear to be struggling for accommodations.<sup>201</sup> The company was recently sued after a pregnant worker fainted from exposure to toxic cleaning chemicals she used while on the job; she asked for a transfer from the hazardous position, but was ignored.<sup>202</sup> Wal-Mart issued a statement saying, “[w]e take our policy seriously. We’re proud of our new policy. It is best in class and goes well beyond federal and most state laws.”<sup>203</sup> This is a positive development. It is public acknowledgement of an accommodation policy, which may put pressure on other companies to adopt the same.<sup>204</sup> That also comports with the rapidly changing state accommodation laws.

Of course, multi-national corporations expanding their policies nationwide would still exclude women who do not work for those companies and women who live in states without accommodation laws. The gap between a corporation’s protections for its employees and workplace protections for all pregnant workers is a legitimate gap that still remains for pregnant workers and will remain until a federal law is passed to provide pregnancy accommodation. However, there may soon be a seismic shift partly because of the Supreme Court’s recently decided case, *Young v. UPS*.

The political climate is ripe for providing pregnant workers with accommodations. In addition to the rise in state protections, *Young* could increase awareness to the issue and influence employers to change their policies. Some media sources have begun advising employers to err on the side of caution and consider providing accommodations to pregnant workers post-*Young*.<sup>205</sup> While *Young* does not go as far as to require an accommo-

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200. *Id.*

201. Brigid Schulte, *Wal-Mart faces New Pregnancy Discrimination Charges*, WASH. POST (Dec. 17, 2014), <http://www.washingtonpost.com/blogs/local/wp/2014/12/17/wal-mart-faces-new-pregnancy-discrimination-charges/>.

202. *Id.*

203. Schulte, *supra* note 202.

204. Lydia DePillis, *Under Pressure, Wal-Mart Upgrades its Policy for Helping Pregnant Workers*, WASH. POST (Apr. 5, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/05/under-pressure-walmart-upgrades-its-policy-for-helping-pregnant-workers/> (“And anytime the world’s biggest retailer [Wal-Mart] changes how it treats its workforce—especially women, with whom the company has a fraught history—the rest of the industry tends to take notice.”).

205. Suhail Morales, *Supreme Court Ruling Unclear Whether Employers Must Provide Light Duty to Pregnant Employees*, DAILY BUSINESS REVIEW (April 14, 2015) <http://www.dailybusinessreview.com/id=1202723436393/Supreme-Court-Ruling-Unclear-Whether-Employers-Must-Provide-Light-Duty-to-Pregnant-Employees?slreturn=20150322201840> (“In order to avoid significant risks for PDA violations, it would be wise for employers to consider what potential accommodations might be made for pregnant employees.”); Liz Morris, Cynthia Thomas Calvert & Joan C. Williams, *What Young vs. UPS Means for Pregnant Workers and Their Bosses*, HARV. BUS. REV. (Mar. 26, 2015), <https://hbr.org/2015/03/what-young-vs-ups->

dation, it does create uncertainty about the standard of comparators and brings further attention to the plight of pregnant workers.

Putting aside any state or local accommodation law, employers would be prudent to provide accommodations for pregnant workers. Under the new *Young* standard, an employer would have to justify not providing an accommodation for a pregnant worker when it provides accommodations to other workers.<sup>206</sup> And if the employer cannot justify the lack of accommodation with sufficient evidence, it creates a presumption of discrimination against the employee.<sup>207</sup> Granted, there would have to be an accommodation provided to other workers for such a presumption. But it would seem to be exceedingly rare for an employer to never have accommodated any of its workers, whether it be for a sprained ankle or recovery from a minor procedure. Moreover, even if the employer can withstand the burden of justifying its denial of an accommodation, it would probably not want to litigate the matter in order to do so. The confusion surrounding *Young* likely will create a rapid increase in litigation. Presumably, lower courts interpreting *Young* will have some disagreements among each other and apply the law slightly differently. If so, there would be tremendous uncertainty for employers regarding their duty to accommodate pregnant workers. This should lead employers to the logical step of providing reasonable accommodations for pregnant workers. Accommodations are often low to no cost, create a positive work environment, avoid potential litigation, protect the health of workers, and reduce attrition rates. Employers are already obligated to provide accommodations to their disabled workers under the ADA, so implementing standards would be minimally difficult.

## V. CONCLUSION

The rise of state pregnancy accommodation laws will have positive benefits for women in the workplace. Pregnant workers currently face obstacles that have not been addressed through legislation. The PDA is insufficient to protect them from being fired, the ADA excludes them from receiving a disability, and the FMLA provides only limited unpaid leave.

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means-for-pregnant-workers-and-their-bosses (“Most businesses already provide accommodations to pregnant women because they understand that it is in their best interest, and the best interest of their employees, to do so. The time has come for those who have not already complied to get on board. Liability under Title VII comes with not only compensatory and punitive damages, but often also hefty legal fees, which may far exceed actual monetary damages awarded. On the other hand, accommodations required by pregnant women are temporary and typically inexpensive. The smartest and safest course of action is to provide them.”).

206. *See supra* Part I.

207. *Young*, 135 S. Ct. 1338, 1354–55.

Simple and reasonable accommodations, such as water breaks and adjusted work schedules, will allow women to continue working without risking their health or that of their unborn children. Accommodation laws are particularly vital for women of lesser socio-economic status, who are often living paycheck-to-paycheck and do not have the means or ability to take pregnancy leave. While the accommodations may seem like a small step, to some women their provision solves the tension between losing their jobs and income and being able to continue working.

As more states begin to pass pregnancy accommodation laws, employers will begin to take notice. Companies will begin to expand accommodation policies and provide greater flexibility, even in jurisdictions that do not currently have an accommodation law—just as Wal-Mart did recently. Because courts will likely begin interpreting the accommodation laws like the ADA, companies should begin modeling their policies and procedures accordingly. Perhaps a federal bill will be passed in response to the rapid growth of increasing state protections. But even if it is not, more states will continue to pass similar laws. State accommodation laws will provide increased protection to women in the workforce, and increased participation in the workforce—just as the PDA did over thirty-five years ago. ❄