



# Pregnant Workers Rights During COVID-19: What Attorneys Need to Know

Wednesday, June 24  
3 PM ET

# Welcome

## Today's presenters:

**Elizabeth Gedmark** – Vice President, A Better Balance

**Sarah Brafman** – Senior Policy Counsel & Director of D.C. Office, A Better Balance

**Kameron Dawson** - Staff Attorney, A Better Balance

## Moderated by:

**Jeffrey Neil Young**, Board Member, NELA



# About NELA

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- We aspire to a future in which all workers are treated with dignity and respect; workplaces are equitable, diverse, and inclusive; and the well-being of workers is a priority in business practices.
- NELA's mission is to **empower workers' rights attorneys** through legal training, promoting a fair judiciary, and advocating for laws and policies that level the playing field for workers.
- To join NELA's community of Advocates, request *amicus* assistance, or seek the assistance of NELA's Ethics & Sanctions Committee visit <https://www.nela.org>
- **Join us for our 2020 Annual Convention July 8-10.** This year NELA is bringing our signature event to you! Join workers' rights attorneys from across the country as we share tips and strategies to navigate the rapidly-changing area of workers' rights and strengthen your practice. Early bird registration ends this Friday!  
<https://exchange.nela.org/nelaconvention/home>

# About A Better Balance

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**WHO WE ARE** National legal advocacy organization with offices in New York City, Nashville, Washington D.C., and Denver

**MISSION** Leverage the power of the law to ensure workers can care for themselves and their loved ones, without risking their economic security. When women, caregivers, and families have a fair shot in the workplace, our families, our communities, and our nation are healthier and stronger. Key ABB priorities:

- Pregnancy discrimination & accommodations
- Lactation discrimination & accommodations
- Caregiver discrimination
- Defending local democracy
- Paid family and medical leave
- Paid sick time
- LGBTQ Rights & Family Recognition
- Predictable & flexible scheduling

# Pregnancy + COVID 19: The Healthcare Landscape

**CDC Guidance for Pregnant People:** “Although there are currently no data showing that COVID-19 affects pregnant people differently than others, we do know that pregnant people are at greater risk of getting sick from other respiratory viruses than people who are not pregnant. Sometimes, this causes adverse outcomes for the mother or child.”

**American College of Obstetricians & Gynecologists (ACOG):** “Historically, respiratory infections in pregnant individuals have been thought to increase their risk for severe morbidity and mortality. With regard to COVID-19, the limited data currently available do not indicate that pregnant individuals are at an increased risk of infection or severe morbidity (eg, need for ICU admission or mortality) compared with nonpregnant individuals in the general population.”

**Medical research and guidance is constantly changing and more medical research on the effects of COVID-19 on maternal and infant health is needed. Doctors & healthcare providers may also have individual recommendations based on each pregnant person’s specific health needs and medical history.**

# Pregnancy + COVID 19: The Healthcare Landscape

**Women, disproportionately women of color, are on the front lines of this crisis. According to the Center for Economic and Policy Research, nearly  $\frac{2}{3}$  of frontline workers are women, and people of color are overrepresented in these industries. A snapshot:**

Industry	Female (%)	People of Color (%)
Building cleaning: housekeeping	90.7	69.8
Childcare workers	95.0	44.8
Home health care services	87.5	53.0
Nursing care facilities	84.2	44.6
Cashiers	71.8	44.6

SOURCE:  
<https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries>

# Pregnancy + COVID 19: The Healthcare Landscape

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With this backdrop in mind, the purpose of today's webinar is to highlight the workplace laws that can help support pregnant workers amidst this crisis and beyond.

# What We'll Cover Today

## Laws related to:

- ❖ Workplace accommodations
- ❖ Pregnancy discrimination
- ❖ Paid and unpaid time off
- ❖ Lactation accommodations
- ❖ Caregiver discrimination
- ❖ Unemployment assistance

\*This webinar is for informational use only. Nothing herein constitutes legal advice.



# Key Laws We'll Discuss

## PERMANENT LAWS

**Pregnancy Discrimination Act** (federal)

**Americans with Disabilities Act** (federal)

**Family and Medical Leave Act** (federal)

**Occupational Safety and Health Act** (federal)

**State Temporary Disability Insurance Laws & Paid Medical Leave Laws**

**State/Local Pregnant Workers Fairness Act laws, paid sick time laws, and caregiver discrimination laws**

## EMERGENCY LAWS THAT EXPIRE AT VARIOUS POINTS IN 2020 AND/OR ARE COVID-19 SPECIFIC

**Families First Coronavirus Response Act** (federal)

**CARES Act** (federal)

**State/local emergency paid sick leave laws**

# Workplace Accommodations

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Diana is pregnant and works at a grocery store. She has severe respiratory issues and is nervous about her health during this crisis and staying safe at work.

Are there any changes Diana can ask for in the workplace to stay healthy while working?

# Workplace Accommodations

## Americans with Disabilities Act

If someone works for an employer with **15 or more** employees and have a “**pregnancy-related impairment**” that limits a “**major life activity**” (including major bodily functions) they may have the right to receive reasonable accommodations so long as the accommodation does not impose an “undue hardship,” i.e. is not very difficult or very expensive for the employer to provide. Many states also have similar laws that may have lower thresholds, providing coverage to more workers.

**What is a pregnancy-related impairment?** Examples can include, but aren't limited to, gestational diabetes, preeclampsia, abnormal heart rhythms that may require treatment. **Note:** Pregnancy itself is not a disability.

# Workplace Accommodations

## What are examples of reasonable accommodations?

- Making changes to the workplace to reduce contact with others
- Temporarily changing some job duties
- Modifying work schedules (e.g. staggering commuting times)
- Temporarily transferring positions
- Requesting to telework

These are all examples of accommodations cited in the EEOC's pandemic-specific guidance and FAQs for workers with disabilities.

# Workplace Accommodations

## Americans with Disabilities Act

### How can an employee ask for an accommodation?

The first step in the **“interactive process”** is to let the employer know that there is a need for an accommodation. An employer must be informed that the employee is requesting an adjustment or change at work for a reason related to a medical condition.

The exact phrase “reasonable accommodation” or “ADA” does not need to be used — plain English is just fine.

# Workplace Accommodations

## Americans with Disabilities Act

After an employee has asked for the accommodation, an employer can ask for a note from a health care provider to confirm the existing disability. It is important for employees to provide notes that are as specific as possible and outline exactly what the employee can and cannot do at work.

Employees should make sure their health care provider avoids using vague terms about the condition or vague language about the type of accommodation that is needed. An employer need not provide the exact accommodation that is requested and may not have to provide accommodations at all if it imposes an “undue hardship.”

**For more guidance visit [babygate.abetterbalance.org](https://babygate.abetterbalance.org).**

# Workplace Accommodations

## Americans with Disabilities Act

The Equal Employment Opportunity Commission, the agency that enforces the ADA, said in its pandemic guidance that so long as it does not impose an undue hardship on an employer, *if an employee has an underlying disability that puts them at higher risk of severe illness if they contract COVID-19*, there are reasonable workplace accommodations that can be provided to prevent exposure.

# Workplace Accommodations

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Hailey is a food service worker who is pregnant and worried about her health and safety at work but she is not clear that she has a pregnancy-related disability.

What rights does this Hailey have to accommodations?



# Workplace Accommodations

## Pregnancy Discrimination Act

If an employee works for an employer with 15 or more employees, they may have the right to a reasonable accommodation under the Pregnancy Discrimination Act **even if a worker does not have a disability associated with their pregnancy.**

Under this law, if an employer is providing accommodations to other employees similar to the pregnant employee but refusing to provide the pregnant employee with an accommodation, that could be a violation of the law and they would need to provide the employee with the accommodation.

# The EEOC Pandemic Guidance

- The EEOC periodically updates its publication, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, to help employers and employees navigate the impact of Covid-19 in the workplace.
- The guidance reiterates that at the federal level, pregnancy accommodations may be available under the ADA or the PDA.
- It would violate Title VII to specifically exclude a worker from the workforce involuntarily due to pregnancy or have an offer of employment withdrawn due to pregnancy during the pandemic even if the motivation is “benevolent concern.”

# Workplace Accommodations

## STATE PREGNANT WORKERS FAIRNESS LAWS

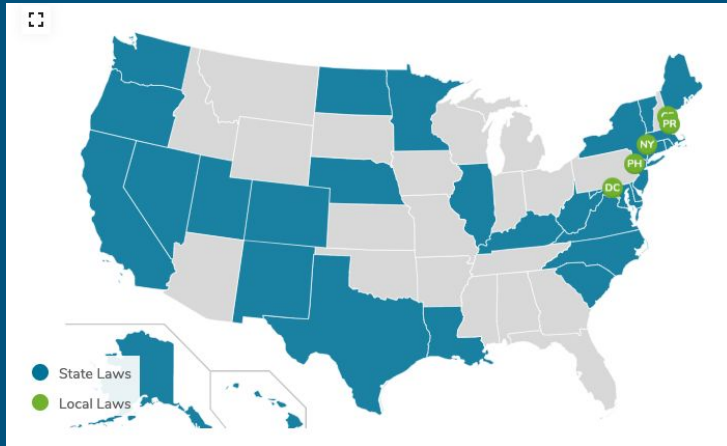
**30 states & 5 cities** have adopted **pregnant workers fairness laws**.

Generally, these laws require employers to provide reasonable accommodations for known limitations related to pregnancy, childbirth, or related medical conditions unless it would cause an undue hardship on the employer.

This means that unlike federal law, a worker does not need to have a disability OR compare themselves to someone else to receive an accommodation.

# Workplace Accommodations

## STATE PREGNANT WORKERS FAIRNESS LAWS



- |             |               |                |                  |
|-------------|---------------|----------------|------------------|
| Alaska      | Louisiana     | New York       | Utah             |
| California  | Maine         | North Carolina | Vermont          |
| Colorado    | Maryland      | North Dakota   | Virginia*        |
| Connecticut | Massachusetts | Oregon         | Washington       |
| Delaware    | Minnesota     | Rhode Island   | Washington, D.C. |
| Hawaii      | Nebraska      | South Carolina | West Virginia    |
| Illinois    | New Jersey    | Tennessee*     |                  |
| Kentucky    | New Mexico    | Texas          |                  |

\* Law not yet in effect.

These laws help workers get the accommodations they need, quickly, and without conflict. We have seen this firsthand through the many workers we've assisted through our legal helpline.

# Workplace Accommodations

## STATE PREGNANT WORKERS FAIRNESS LAWS

The process for getting an accommodation under this type of law usually consists of:

**Asking one's employer for an accommodation** based on a known limitation, medical need, or condition one has related to pregnancy (doesn't need to be a disability).

- Typical accommodations can include light duty, bathroom breaks, temporary transfer, the ability to carry a water bottle on the job.
- COVID-related accommodations may include those outlined in the ADA context - e.g social distancing, modified work schedule, teleworking, and personal protective equipment.

**The employer works with the employee on an individual basis** to come up with an accommodation unless it cause an “undue hardship,” i.e. it is very difficult or expensive for them to provide.

# Workplace Accommodations

## OCCUPATIONAL SAFETY AND HEALTH ACT

Under the federal Occupational Safety and Health Act an employer is required to provide employees with a workplace that is “free from recognized hazards likely to cause death or serious physical harm.”

The Occupational Safety and Health Administration (OSHA) has released guidance that provides recommendations on how workplaces can best prepare and protect their workers from COVID-19. **Unfortunately, this guidance is not law and does not create any new obligations or requirements for employers and current enforcement of OSHA, generally, is limited.**

# Pregnancy Discrimination

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Amanda's boss just terminated her saying that she will not work as hard as her colleagues because she is pregnant and should be at home resting anyway.

Is this illegal?

# Pregnancy Discrimination

This is likely illegal pregnancy discrimination under the **federal Pregnancy Discrimination Act** and/or **state civil rights laws**.

Under these laws, an employer cannot treat employees differently from other employees based on their pregnancy so if they are taking action against a pregnant worker but not others because that worker is pregnant (i.e. firing, cutting hours, or forcing an employee out), that could be pregnancy discrimination.

## **Coverage under the Pregnancy Discrimination Act?**

The PDA covers employers with 15 or more employees. State laws may have even lower thresholds, providing coverage if someone works for a smaller employer.



# Pregnancy/Race Discrimination

If pregnant workers of color think their boss is also treating them differently not just because they are pregnant but because they are a person of color, e.g. a boss is providing accommodations to white employees who are pregnant but not Black employees who are pregnant, this could be evidence of race discrimination.

The same federal law that protects someone from pregnancy discrimination also protects them from discrimination based on race.

# Pregnancy/LGBTQ+ Discrimination

If pregnant workers who identify as LGBTQ+ think their boss is also treating them differently not just because they are pregnant but because of their sexual orientation or gender identity, e.g. a boss is providing accommodations to pregnant employees in heterosexual relationships but not pregnant employees in same-sex relationships, this could be evidence of sex discrimination.

The Supreme Court recently ruled in *Bostock v. Clayton County* (and consolidated cases) that sex discrimination under Title VII includes discrimination based on sexual orientation and gender identity.

# Unpaid/Paid Time Off

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Anna is pregnant and works for a small restaurant chain that has recently re-opened, coordinating take out, but her health care provider advised her to self-quarantine because they fear she may have been exposed to someone with COVID-19 and she is exhibiting symptoms. She now needs to take leave but she wants to return to her job eventually. What can she do to receive income while she is not working?

# Paid Time Off

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## FAMILIES FIRST CORONAVIRUS RESPONSE ACT

First time in history the U.S. has passed any sort of national paid leave and paid sick time law.

- Only applies to COVID-19 related needs
- Sunsets on December 31, 2020

# Paid Time Off

## FAMILIES FIRST CORONAVIRUS RESPONSE ACT

### Who does the law cover?

Workers can probably take paid leave if:

- They work as an employee in any public agency regardless of size (with some limits for federal employees)
- They work as an employee for a private entity with fewer than 500 employees total

Other coverage exclusions:

- health care provider or emergency responder
- Workers may be excluded from emergency sick time for childcare/summer camp closures or family leave if they work for a business with fewer than 50 employees

# Paid Time Off

## FAMILIES FIRST CORONAVIRUS RESPONSE ACT

This law provides up to **80 hours** of emergency paid sick leave for those who are unable to work or telework because they:

1. Have been advised by a health care provider to self-quarantine due to COVID-19 related concerns
2. Have COVID-19 symptoms and are seeking a medical diagnosis
3. Are subject to a quarantine or isolation order.
  - a. This includes stay-at-home or shelter-in-place orders
4. Need to care for someone who is subject to a quarantine or isolation order or who has been advised to self-quarantine due to COVID-19
5. Child's summer school or daycare is closed due to COVID-19

# Paid Time Off

## FAMILIES FIRST CORONAVIRUS RESPONSE ACT

In addition to emergency paid sick time, this law also provides up to **12 weeks** of emergency paid family leave for those that are unable to work or telework if their child's summer camp or daycare closure due to covid 19.

- One's child must be under 18, with certain exceptions
- The law provides an expansive definition of children who are covered which includes *in loco parentis*, biological, adopted, and step children.
- During the summer, one's child must've been previously enrolled in summer camp for this emergency family leave to be available

# Paid Time Off

## FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Employees taking emergency sick leave for their own health needs must be paid at 100% of their wages.

- However, an employer is not required to pay more than \$511 per day for personal care, meaning caring for yourself not others, under emergency sick leave or more than \$5,110 total.

Employees receiving emergency sick leave for providing care for others or their own child, or emergency family leave must be paid at  $\frac{2}{3}$  of their wages.

- An employer is not required to pay more than \$200 per day, or more than \$2,000 total, for emergency sick leave, and no more than \$200 per day, or more than \$10,000 total, for emergency family leave.



# Paid Time Off

## FAMILIES FIRST CORONAVIRUS RESPONSE ACT

### What protections are there for workers?

Employees taking emergency leave are protected against retaliation from their employer, including being fired, punished, and discriminated against for using emergency sick time or family leave.

Also, employees will continue to receive health care coverage on the same terms as if they continued to work if they take any kind of emergency leave.

If an employee uses emergency paid family leave, then they have the right to their same or similar job position with equivalent benefits, terms, and conditions of employment, unless they work for an employer who has less than 25 employees.

# Paid Time Off

## State/Local Paid Sick Time Laws

State, county, or city laws may also help. Twelve states, Washington D.C., and dozens of localities guarantee workers a permanent right to paid sick time.

Some laws have specific “closure provisions” that may also enable covered workers to stay home to protect their health during times of public health emergencies. These laws can also be used if a covered worker needs to attend prenatal appointments or have other pregnancy-related medical needs.

**If a worker qualifies for emergency paid sick leave under the federal Families First Coronavirus Response Act, they may still, in addition, take paid sick leave to which they are entitled.**

# Paid Time Off

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## Temporary Disability Insurance or Paid Medical Leave

Several states and localities have short-term disability laws (NY, NJ, RI, HI, or CA) or paid medical leave laws (WA), which entitle workers to partial wage replacement if they are unable to work due to a serious health need, which could include COVID-19 or symptoms of COVID-19.

# Unpaid Time Off

## Family and Medical Leave Act

If a worker needs time to attend prenatal appointments or has an incapacity related to pregnancy, then they may be able to take up to 12 weeks of job-protected unpaid time off, either all at once or on an intermittent basis. Note: if someone is taking paid leave under Families First for school closure, that time will count against their 12 weeks, though an employer can always be more generous.

### To be eligible for the FMLA a workers needs to have:

- Worked 1,250 hours in the year prior to needing leave
- Worked at the employer at least a year
- Work for an employer with 50+ employees within a 75-mile radius

# Unpaid Paid Time Off

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Devon teaches at a child care facility that is open during COVID-19. Her health care provider thinks she should take leave to avoid risk of exposure.

What are Devon's rights to leave in this circumstance?

# Unpaid Time Off

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## LEAVE AS AN ACCOMMODATION REQUEST

If a worker does not yet have COVID-19, but is worried about contracting the virus, they may be able to ask for leave as a reasonable accommodation under the Americans with Disabilities Act, Pregnancy Discrimination Act, or a state pregnant workers fairness law.

Leave as accommodation does not necessarily have to be paid but does mean a job will be protected.

# Paid Time Off

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## TEMPORARY DISABILITY INSURANCE OR PAID MEDICAL LEAVE

If a state or locality has a short-term disability law (NY, NJ, RI, HI, or CA) or paid medical leave law (WA), depending on that state's law, if a worker has been advised to reduce exposure to COVID-19, they may be eligible for disability benefits, but it may vary by state.

In New York, for example, a worker would likely be eligible for disability benefits in this scenario.

# Unpaid/Paid Time Off

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Charlotte is worried that if she takes leave under the Families First Coronavirus Response Act she won't have time left to take leave once she gives birth.

What are her rights in this situation?



# Unpaid/Paid Time Off

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If a worker is eligible for the federal **Family and Medical Leave Act (FMLA)** but they use up their full 12 weeks before they give birth (including emergency paid family leave taken under the Families First Coronavirus Response Act), they may not have the right to take off as much time as they'd originally anticipated once they give birth. However, if they have not used the full 12 weeks, they may still have time available.

## To be eligible for the FMLA, a worker needs to have:

- Worked 1,250 hours in the year prior to needing leave
- Worked at the employer at least a year
- Work for an employer with 50+ employees within a 75-mile radius

# Unpaid/Paid Time Off

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## Family and Medical Leave Act & State Paid Family Leave Laws

If a worker lives in a state with a paid family and medical leave law that is already in effect and is eligible to receive benefits, a worker may still have time available to take maternity leave to bond with their new child under the state law even if they took FMLA leave to care for themselves, a loved one, or for school closure-related reasons.

# Lactation Accommodations

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Nora is employed at a fulfillment center and just gave birth. She is breastfeeding and wants to keep pumping but her employer is giving her a hard time about taking break time to pump because they are so overwhelmed with delivery orders. What are their rights?

# Lactation Accommodations

## Federal Break Time For Nursing Mothers Law

**WHAT:** The Affordable Care Act requires employers to provide “reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.”

**WHO:** The law applies to employers and employees covered under the Fair Labor Standards Act (FLSA). FLSA-exempt employees (e.g., administrative and professional workers) are not covered by this law.

**WHEN:** Assuming an employer is covered, they must provide reasonable unpaid break time for an employee to express breast milk. Breaks do not need to be paid unless they are concurrent with paid breaks.

**WHERE:** An employer must provide a clean, private space, other than a bathroom, where workers can pump milk without interruption.

# Lactation Accommodations

## State Pregnant Workers Fairness Laws & State Break Time/Space Laws

If a worker is not covered under federal law, many states have their own break time and space laws that may provide additional protections.

Additionally, many states with pregnant workers fairness laws also specify that employers must provide reasonable accommodations for lactation-related needs.

# Caregiver Discrimination

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Felicia, who is a new mother, just finished maternity leave and is now teleworking. But her boss is not putting her on certain projects because he said he knows that she will need time to take care of her baby during the day. The three other colleagues on Felicia's team are also parents but are all men, yet their boss hasn't made similar comments to them or taken them off projects.

**What are Felicia's rights?**

# Caregiver Discrimination

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Under federal anti-discrimination law (the same law that outlaws pregnancy discrimination), an employer cannot discriminate based on sex, which includes sex stereotyping. This scenario could be evidence of sex discrimination since the worker's boss is making assumptions about the worker's capabilities based on their being a mother.

In addition, several states and dozens of cities also specifically outlaw discrimination based on one's status as a caregiver, familial status or family responsibilities.

# Unemployment Assistance

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**Gloria was let go from her job along with co-workers.**

**What rights does Gloria have to unemployment insurance?**



# Unemployment Assistance

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Depending on the circumstances, a worker may be entitled to regular unemployment compensation (with some boosts based on a new federal law) or pandemic unemployment assistance.

The **CARES Act** created three new temporary programs to supplement current unemployment compensation laws by providing additional time and funding for beneficiaries of regular UI and creating a pandemic unemployment assistance program for workers not eligible for regular UI.

For more information visit: <https://www.abetterbalance.org/covid19/>

# More Progress is Needed to Support Pregnant Workers.

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**STATES** that have stronger protections for pregnant workers who need workplace accommodations regardless of whether or not they have a disability..

**BUT WE STILL NEED A FEDERAL LAW. WE NEED THE  
PREGNANT WORKERS FAIRNESS ACT.**

# Legal Assistance for Workers

ABB's Pregnancy + COVID-19 FAQs:

[www.abetterbalance.org/covid19/](http://www.abetterbalance.org/covid19/)

ABB's free, confidential legal helpline (we accept referrals):

1-833-NEED-ABB

If you are interested in potential referrals from ABB, please contact Christine Dinan, [cdinan@abetterbalance.org](mailto:cdinan@abetterbalance.org).

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# Join ABB's Pro Bono Partnership Program!

**A Better Balance's Pro Bono Partnership Program** is a passionate, dedicated network of legal professionals committed to defending the rights of women and all working families. We partner with law firms on a variety of initiatives that support our litigation, policy research, and public advocacy efforts, such as:

- Co-counsel opportunities
- Cy pres
- Resource & in-kind support
- Community Know Your Rights trainings
- Policy advocacy

Join Us! Register for ABB's Pro Bono Partnership Program.

<https://www.abetterbalance.org/about/pro-bono-partnership-program/>

# Thank You!



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QUESTIONS?

