

## 2021 Issue Brief: The Pandemic & the Pregnant Workers Fairness Act

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With women exiting the workforce in the millions, Congress must act without delay to ensure pregnant workers, especially those in frontline, low-wage and physically demanding jobs, get the accommodations they need to stay healthy and attached to the workforce.

Recent analysis from A Better Balance from our updated *Long Overdue* report<sup>1</sup> shows:

- Current federal law is failing pregnant workers. Gaps in the Pregnancy Discrimination Act and the Americans with Disabilities Act remain even in 2021 and are still leaving women without the accommodations they need to stay healthy and working, with **approximately 2/3 of workers still losing their Pregnancy Discrimination Act accommodations cases under the current legal framework.**
- Due to these gaps in federal law, **pregnant workers continue to be forced off the job when they need simple accommodations to keep working.** We know this firsthand from our legal helpline, hearing from hundreds of pregnant workers throughout the pandemic (and thousands in the years pre-pandemic) who left their jobs due to inhospitable workplaces.
- Pregnancy accommodations are one critical solution **to keep women attached to the workforce and healthy during pregnancy and the post-partum period.** Over the last year, racial justice and maternal health equity organizations have been outspoken in emphasizing how **accommodations are one crucial way to address this country's shameful Black maternal health crisis.**

The Pregnant Workers Fairness Act is an urgent measure to promote women's workforce participation and ensure pregnant workers do not have to choose between their job and healthy pregnancy.

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<sup>1</sup> DINA BAKST, ELIZABETH GEDMARK, SARAH BRAFMAN, & MEGHAN RACKLIN, A BETTER BALANCE, LONG OVERDUE: THE PREGNANT WORKERS FAIRNESS ACT IS A CRITICAL MEASURE TO REMOVE BARRIERS TO WOMEN'S WORKPLACE PARTICIPATION AND PROMOTE HEALTHY PREGNANCIES (2021) [hereinafter LONG OVERDUE UPDATE], <https://www.abetterbalance.org/wp-content/uploads/2021/06/Long-Overdue-June-2021-Update-Final-1.pdf>.



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## **In 2021, Amidst Labor Shortages and a She-cession, Pregnant Workers Are Continuing to Be Forced to Choose Between Their Jobs and a Healthy Pregnancy**

During the course of the pandemic we've heard from countless pregnant workers through A Better Balance's free legal helpline facing termination or forced out for needing pregnancy accommodations, in situations often exacerbated by the pandemic and economic crisis. Many pregnant workers want and need to keep working—they are not opting out—but discrimination is forcing them off the job.

**In late 2020, Jordan worked as a cashier at a major retailer in Mississippi** when she became pregnant. Her doctor advised her to stop lifting heavy objects after she began to experience preterm contractions. Her employer refused to grant her the lifting accommodation and also prevented her from taking more frequent water breaks or sitting breaks. As a result, Jordan was forced to take unpaid leave, months before her due date, using all of her job-protected FMLA leave, and ultimately Jordan was forced off the job altogether. This experience has caused Jordan tremendous hardship and she is still seeing the effects of having her financial means taken away. She recently moved in with her mother because she could not afford to pay for power and utilities.

**Tesia, a retail store employee in Missouri,** called us at the height of the pandemic when she needed to carry a water bottle as an accommodation due to her pregnancy. The hot temperature at her work station, combined with her pregnancy, resulted in severe dehydration and she was only given the option of unpaid leave. Tesia had recently taken a month of unpaid emergency COVID-19 leave beforehand due to her high risk pregnancy, and could not afford to take another leave without pay. As a result, her requests were denied and she was pushed off the job. Tesia said getting pushed out "caused my financial situation to be entirely different. I wasn't able to save money like I had planned, because as we all know, babies, children, are very expensive, with diapers and formula and the many other things that they're going to need."

**Jennifer, a family nurse practitioner in Texas,** told her manager she was pregnant and needed to limit her exposure to COVID units. She was high-risk due to a medical condition. She had originally worked successfully in one location for five years and was able to work with limited exposure to COVID-19 because there were very few cases in that location. Then in July 2020, she was told she needed to transfer to a different location that had a huge outbreak of COVID cases. She requested to see patients through telehealth, which she



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knew a doctor with an autoimmune disease was permitted to do, but they declined her request.

**One of Jennifer’s bosses told her “she was no good to them pregnant,” and they needed someone who could work without restrictions.** This is despite the fact that at her clinic nurse practitioners and doctors complete the same duties and despite the fact that she could perform her job satisfactorily providing care to her patients through telehealth. Because of their refusal she had no choice but to continue working, exposing herself to COVID-19, and risking her health. Jennifer ultimately ended up leaving and taking a new job, but with a significant pay cut.

**“I know I speak for moms out there, when I say we are exhausted, Jennifer said. A pregnant woman is valuable. We’re valuable to the country, we’re valuable to the workforce, and it’s time that we start getting treated that way.”**

Jennifer, Jordan, and Tesia aren’t casualties of bad employers—they represent the thousands of workers who are facing impossible choices because the law is fundamentally failing them.

## How is current law failing pregnant workers?

Pregnant workers are still being denied the accommodations they need to stay healthy and working due to gaps in two federal laws: The Pregnancy Discrimination Act and the Americans with Disabilities Act.

The Pregnancy Discrimination Act (PDA) is failing to provide pregnant workers with the accommodations they need. **In 2021, approximately 2/3 of pregnant workers are continuing to lose their pregnancy accommodations cases under the Pregnancy Discrimination Act (PDA) because of an unjust legal standard.**<sup>2</sup> This is largely because pregnant workers must contend with the significant barrier posed by the PDA’s “comparator” standard—that is, they must prove that someone else “similar in their ability or inability to work” was accommodated in order to be entitled to an accommodation, a hurdle not imposed on workers with disabilities who need accommodations.

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<sup>2</sup> DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT 13-16 (2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>; LONG OVERDUE UPDATE, *supra* note 1, at 9-12 (analysis on file with authors).

**Julia Barton**, a corrections officer, was denied pregnancy accommodations to avoid toxic fumes, high temperatures, prolonged standing, and pushing over 100 lbs. She lost her 2020 case because she could not meet the onerous PDA comparator standard.

**Pregnant workers with medical needs, but not disabilities, are also unprotected by the Americans with Disabilities Act (ADA)** because courts repeatedly hold that pregnancy, on its own, is not a disability. This means that pregnant workers who need accommodations to *prevent* complications are unprotected. Furthermore, even pregnant workers who have serious complications are losing their Americans with Disabilities Act cases. For instance, in 2020, one court held that a plaintiff with pregnancy complications, including preeclampsia, did not have an ADA-qualifying disability—despite the fact that preeclampsia is one of the three leading causes of maternal mortality.<sup>3</sup>

## **Why is the Pregnant Workers Fairness Act critical to keeping women in the workforce?**

The choice between a healthy pregnancy and economic security has become, and remains, increasingly impossible during an ongoing global pandemic, especially for those on the frontlines as essential workers.

More than [5 million women](#) lost jobs in 2020, a large percentage of whom have been unable to return to work due to caregiving responsibilities and a lack of available social supports. And in September, a year and a half into the pandemic, [863,000 women left the workforce](#)—the largest drop in women’s labor force participation since the pandemic began. Despite the narrative emerging around the “Great Resignation,” many of these workers are not opting out of the workforce, they are being pushed out by discriminatory and inflexible workplace policies, including pregnancy discrimination.

When women cannot get the simple accommodations they need, they are forced out of work and into lasting economic disadvantage. In addition to losing their livelihood, many of workers lose their health benefits at a time when they need them most, forcing them to switch providers, delay medical care, or face staggering health care costs associated with pregnancy and childbirth. Many workers must use up saved paid or unpaid leave they had hoped to reserve to recover from childbirth.

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<sup>3</sup> *Id.* at 9-10.

### **Twelve Major Business Associations Support the PWFA:**

- U.S. Chamber of Commerce
- Society for Human Resource Management
- Associated Builders and Contractors
- BASF Corporation
- College and University Professional Association for Human Resources
- Dow
- HR Policy Association
- International Franchise Association
- National Restaurant Association
- National Retail Federation
- pH-D Feminine Health
- Retail Industry Leader Association

As employers struggle to retain valuable employees in today's economic climate, the Pregnant Workers Fairness Act presents the opportunity for employers to retain talent. That is why the U.S. Chamber of Commerce, Society for Human Resource Management, and other major business groups support the bill.

### **How will the Pregnant Workers Fairness Act improve maternal health, especially now?**

The federal Pregnant Workers Fairness Act has a key role to play when it comes to improving maternal health, especially for women of color. While many pregnant workers are able to safely work through their pregnancies without need for accommodations many, especially those in physically demanding jobs—disproportionately women of color—may need modest accommodations in order to stay healthy during pregnancy.

For some, physically-demanding jobs can increase the risk of miscarriage or preterm birth, put pregnant workers at risk of falls and injuries, and lead to other maternal and infant health problems, including low-birth weight, preeclampsia, birth defects, and more. Pregnancy **accommodations are often low or no-cost but high impact, helping to significantly reduce these risks.**



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For that reason, the PWFA is one critical way to address this country’s maternal health crisis, which disproportionately impacts women of color. Numerous organizations dedicated to eliminating racial disparities in maternal health outcomes have become vocal supporters of the federal Pregnant Workers Fairness Act because “putting a national pregnancy accommodation standard in place . . . has the potential to improve some of the most serious health consequences Black pregnant people experience.”<sup>4</sup>

As the Black Mamas Matter Alliance and other organizations dedicated to promoting Black maternal health wrote in a September 2020 letter to Congress in support of the Pregnant Workers Fairness Act:

“Black pregnant people are often forced to keep working which can compromise their health and the health of their pregnancy. . . . **Black women have the highest incidence of preterm birth and yet we know that workplace accommodations such as reducing heavy lifting, bending, or excessive standing can help prevent preterm birth, the leading cause of infant mortality in this country.**”<sup>5</sup>

A 2021 letter to the House of Representatives signed by 43 leading maternal health equity groups expounded:

“Black pregnant workers along with Latinx and immigrant women are disproportionately likely to work in physically demanding jobs that may lead to workers needing modest accommodations to ensure a healthy pregnancy. **Too often, however, those requests are refused or ignored, forcing pregnant workers of color to disproportionately contend with unsafe working conditions. . . . The Pregnant Workers Fairness Act is a measured approach to a serious problem.**”<sup>6</sup>

## Why pass the Pregnant Workers Fairness Act now?

**The Pregnant Workers Fairness Act already passed the House, has cleared the Senate committee, and is ready for a vote in the Senate.** In May, the House passed the Pregnant Workers Fairness Act, which would ensure pregnant workers can fully and safely

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<sup>4</sup> Letter from Black Mamas Matter Alliance, et al., to U.S. Representatives 2 (Sept. 11, 2020), [https://www.abetterbalance.org/wp-content/uploads/2020/09/PWFA\\_SignOnLetterForFloorVote\\_BlackMaternalHealthLetter.pdf](https://www.abetterbalance.org/wp-content/uploads/2020/09/PWFA_SignOnLetterForFloorVote_BlackMaternalHealthLetter.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> Letter from Maternal Health Equity Organizations in Support of the Pregnant Workers Fairness Act (May 11, 2021), [https://www.abetterbalance.org/wp-content/uploads/2021/05/PWFA-Maternal-Health-Letter\\_05.11.2021-3.pdf](https://www.abetterbalance.org/wp-content/uploads/2021/05/PWFA-Maternal-Health-Letter_05.11.2021-3.pdf).



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participate in the workforce, with overwhelming bipartisan support, 315-101, and the support of both Democratic and Republican leadership.

In August, the Senate's Health, Education, Labor, and Pensions (HELP) Committee passed the legislation with overwhelming bipartisan support as well.

**The Pregnant Workers Fairness Act is one of a small number of bills in Congress that is actually ready for a Senate vote and could garner 60 votes. Pregnant workers are suffering now and should not have to wait any longer for the Senate to act.**