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Statement of Ellen McLaughlin, Partner, Seyfarth Shaw LLP
Subcommittee On Civil Rights And Human Services
Hearing on "Pregnant Workers Fairness Act"
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BACKGROUND

Chair Bonamici, Ranking Member Comer, and Members of the Subcommittee, thank you for giving me the opportunity to testify on the Pregnant Workers Fairness Act, H.R. 2694.[1]

Under the current legal landscape, protections afforded pregnant workers largely fall under the Pregnancy Discrimination Act, the Americans With Disabilities Act, and the Family and Medical Leave Act. Each of these protections are different but can overlap in any given situation depending on the underlying facts. In addition to these federal laws, there are approximately 25 states that have enacted specific legislation to protect pregnant workers.

The Pregnant Workers Fairness Act (Bill) purports to provide new and distinct protections for pregnant individuals in the workplace in addition to the current system of federal and state legislation. The purpose of this submission is not to take a position on the Bill, but rather to

(i) describe the protections currently afforded workers who are pregnant and/or experience pregnancy-related conditions which impact their ability to work;

(ii) review the provisions of H.R. 2694 against the current legal protections; and

(iii) raise questions that the Subcommittee should consider regarding the proposed legislation, especially with regard to the practical application of its terms.

[1] I would like to acknowledge Seyfarth Shaw LLP attorneys Randel K. Johnson, Gillian B. Lepore, Lawrence Z. Lorber, and Gina R. Merrill for their invaluable assistance in the preparation of this testimony.

DISCUSSION

The Current Statutory Scheme

As previewed, below is an overview of the current federal laws applicable to pregnant workers, as well as examples of the 25 state laws protecting pregnant workers. This overview is designed to provide context for the proposed legislation and does not attempt to cover the nuances of each law with respect to coverage, qualifications, employee thresholds or enforcement.

Pregnancy Discrimination Act. Congress responded to a series of confusing Supreme Court decisions in 1978 by amending Title VII of the 1964 Civil Rights Act with the Pregnancy Discrimination Act (PDA). The PDA covers a broad set of medical conditions relating to pregnancy and/or childbirth:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment- related purposes, including receipt of benefits under fringe benefit programs as other persons not so affected but similar in their ability or inability to work…

42 U.S.C. § 2000e(k). Under the PDA, an employer violates Title VII if it intentionally discriminates against pregnant employees due to their pregnancy or maintains a policy that adversely affects pregnant employees. Intentional discrimination is punishable under Title VII by punitive and compensatory damages, capped depending on the size of the company, with jury trials.

If a worker is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer must treat her in the same way as it treats any other temporarily disabled employee. As the EEOC notes in its guidance on pregnancy discrimination,

"For example, the employer may have to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees if it does for other temporarily disabled employees."[2] On the other hand, if an employer does not accommodate other temporarily disabled employees under its policies, it need not do so for an individual whose pregnancy results in similar disabilities. In other words, the treatment is the same for similar conditions across all employees, whether or not related to pregnancy.

Americans with Disabilities Act. The employment protections of the Americans with Disabilities Act (ADA) were negotiated on a bipartisan basis by Congress from 1989-1990 and carefully balance the rights of disabled workers with the recognition that employers cannot remedy or address every medical condition experienced by workers.

Under the ADA, pregnancy in and of itself is not a disability. Significantly, however, under the ADA Amendments Act of 2008 (ADAAA), limitations experienced by pregnant workers that are not of short term duration are covered under the law, triggering the employer's duty to provide reasonable accommodation unless there is undue hardship. *See, e.g.*, *Oliver v. Scranton Materials, Inc.,* 3:14-CV-00549, 2016 WL 3397679, at *10 (M.D. Pa. June 13, 2016) ("Thus, while pregnancy in and of itself may not constitute a disability under the ADA, courts interpreting the [ADA] in light of the 2008 amendments have found that *complications arising out of pregnancy* can constitute disability sufficient to invoke the ADA.") (emphasis in original) (internal citations omitted); *Mayorga v. Alorica, Inc.*, No. 12-21578-CIV, 2012 WL 3043021, at *5 (S.D. Fla. July 25, 2012) ("[W]here a medical condition arises out of a pregnancy and causes an impairment separate from the symptoms associated with a healthy pregnancy, or significantly intensifies the symptoms

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[2] https://www.eeoc.gov/laws/types/pregnancy.cfm

associated with a healthy pregnancy, such medical condition may fall within the ADA's definition of a disability.")[3] Even where pregnancy-related conditions are of short term duration, they may still be covered if "sufficiently severe.[4] "For example, this means that a woman experiencing debilitating nausea for just a few weeks (or even less) may be found to have an impairment."[5]

The fact that the ADAAA broadened the definition of disability to include impairments of short-term duration has the practical effect of expanding the number of comparators available to pregnant workers when asserting a claim under the PDA. For example, where an employer approves a request for more frequent breaks and a stool for the employee recovering from knee replacement surgery, it must also provide similar assistance to the pregnant employee.

FMLA. Turning to the Family and Medical Leave Act (FMLA), when an employee experiences conditions arising from pregnancy that meet the definition of a "serious health condition," the employee has the right to take 12 weeks of job-protected leave within a 12-month period. The applicable regulation is quite broad:

> (4) The expectant mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not

[3] *See also Colas v. City of University of New York,* 17-CV-4825, 2019 WL 2028701 (E.D.N.Y. May 7, 2019) (denying defendants motion to dismiss and finding that plaintiff had alleged sufficient facts to state a plausible claim for relief under the ADA for a pregnancy-related medical complication); *Wadley v. Kiddie Academy International, Inc.*, No. 17-05745, 2018 WL 3035785 at*5 (E.D. Pa. June 19, 2018) ("a high-risk pregnancy may, in some instances, constitute a disability if it substantially limits a woman's reproductive functions or other major life activity"); *Nayak v. St. Vincent Hosp. and Health Care Center, Inc.*, 1:12-cv-0817, 2013 WL 121838 (S.D. Ind. Jan. 9, 2013) (upholding a claim for disability discrimination under the ADAAA where plaintiff, a medical resident, experienced pregnancy related issues, including morning sickness and was placed on bed rest).

[4] According to the implementing regulations of the ADAAA, "[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe." 29 C.F.R. § 1630.2(j)(1)(ix) app.

[5] Joan C. William, et al., *A Sip Of Cool Water: Pregnancy Accommodation After The ADA Amendments Act*, 32 Yale L. & Pol'y Rev. 97, 114 (Fall 2013) (emphasizing that post-ADAAA the demise of the duration requirement, a more expansive definition of "major life activities" and a more employee favorable "substantially limits" standard, makes it easier for pregnant employees to establish their status as disabled.

> receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be unable to report to work because of severe morning sickness.

29 CFR 825.120(e).

The FMLA also allows for a pregnant employee to take intermittent leave or reduced schedule leave. 29 C.F.R. § 203. For example, a worker with pregnancy-related nausea that lasts only in the mornings can take FMLA leave for the first four hours of her shift and then come to work for the later part of the day. Another example is a pregnant worker who takes intermittent FMLA leave to attend prenatal doctor's appointments. Intermittent leave may be taken in the smallest increment the employer uses for other types of leave, which for many employers can be 15 minutes or less. 29 C.F.R. § 825.205(a).

State laws. There are approximately 25 states that currently have legislation governing leave or accommodations relating to pregnancy. Within these state laws, there is a vast array of definitions and requirements for accommodations. For example, in Kentucky, an employer must make reasonable accommodations to employees "who are limited due to pregnancy, childbirth, and related medical conditions." KRS Chapter 344.040(1)(c). In West Virginia, it is unlawful for an employer to "not make reasonable accommodations to the known limitations related to the pregnancy...of an employee." W. Va. Code § 5-11B-2. Colorado requires employers to provide reasonable accommodations "for health conditions related to pregnancy," Colo Rev. Stat. § 24-34-402.3, and New York law requires accommodation of a "medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function." N.Y. Exec. Law § 296. In Illinois, employers are required to make reasonable accommodations for "any medical or common condition of a job applicant or employee related to pregnancy or childbirth." 775 Ill. Comp. Stat.

5/2-102(I)-(J). And, in the District of Columbia, employers must provide reasonable accommodations to employees "with known limitations related to pregnancy." D.C. Code § 2-1401.05(b).

The Pregnant Workers Fairness Act

Provisions. The core protection of H.R. 2694 is that it should be an unlawful employment practice for a covered employer 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." PWFA § 2(1) (emphasis added). The Bill also notes that a job applicant or employee may choose not to accept a proffered accommodation from the employer if "such accommodation is unnecessary to enable the applicant or employee to perform her job" and that it is unlawful to require an employee to take leave, whether paid or unpaid, if "another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth or related medical conditions of an employee." *Id.* § 2(2).

The Bill prohibits retaliation and makes clear that employment opportunities cannot be denied on the basis of an employee or a job applicant requesting a reasonable accommodation. *Id.* § 3(f). The Bill further invokes the enforcement mechanisms of Title VII of the 1964 Civil Rights Act, which, as noted above, provide for compensatory and punitive damages capped at certain levels depending on the size the employer, with jury trials. *Id.* § 3(a)(1).

The terms "reasonable accommodation" and "undue hardship" would have the same meanings as defined under the ADA, incorporating the interactive process in which the employer and employee typically discuss what an appropriate reasonable accommodation might be under the

circumstances. *Id.* § 5(5). Lastly, state and local laws would not be preempted by the federal legislation. *Id.* § 7.

Analysis. The phrase "known limitations" is clearly different than the definition of a covered disability under the ADA, and appears to be an express rejection of that term. While the definitions of the ADA may be imperfect, they have been interpreted and analyzed by courts over a period of years, and employers are familiar with and have been applying the ADA standards for some time. The decision to not cross-reference the ADA indicates that a different scope of coverage is intended by the drafters of the Bill. It is entirely unclear, however, what scope of coverage is intended, and precisely how that coverage differs from a covered disability under the ADA. Given the language of the Bill, it appears that any limitation of any type is covered, as long as the employer is aware of it.

Some might argue that the Bill's incorporation of the concepts of "reasonable accommodation" and "undue hardship" under the ADA incorporate, by inference, the definition of a covered disability under the ADA. To the contrary, the overt reference to certain ADA concepts while excluding any reference to covered disabilities suggests the opposite – that the Bill rejects the standard of a covered disability under the ADA in favor of "known limitations." If in fact the drafters intend to incorporate the ADA definition of a covered disability, that could be accomplished by clearly cross-referencing the ADA, but that is not the case in the legislation as currently proposed.

Setting aside the differences between a known limitation and covered disability, the Bill also dispenses of another key provision of the ADA: that while an employer must provide a reasonable accommodation to a disabled employee, that employee must still be able to do the "essential functions" of the job with that accommodation. The types of accommodation that an employer

must provide under the ADA are numerous and defined, but they do not extend to accommodating an employee who remains unable to perform the essential functions of the job even with those accommodations. By eliminating the essential function criteria, the Bill appears to require employers to take steps to keep the employee on the job regardless of her ability to continue to perform the core functions of the job. The consequences for employers – and employees – are unclear. Does this require an employer to keep an employee in a position despite being unable to perform the core tasks associated with that position – effectively allowing the employee to report for work but not do the job? If an employee cannot work mandatory overtime due to pregnancy and mandatory overtime is clearly an essential job function, is the pregnant employee – unlike the employee with a disability under the ADA – excused from working the mandatory overtime? Or does it require an employer to reassign the employee to a totally different position and, if so, can the employer make appropriate wage adjustments to reflect the compensation in that new job?

The Bill also includes a provision that allows an employee to *not* accept an accommodation offered by the employer. *Id.* § 2(2). Does this provision really contemplate that the employee can veto an accommodation proposed by the employer? Are there any limits to that veto right? For example, what if the employer believes in good faith that the employee cannot safely perform the job, for herself or others, without that specific accommodation? For example, an employer may want to impose a restriction on the amount of weight that can be lifted by an employee in the second or third trimester of pregnancy based on medical documentation. Can the employer only do so with the employee's approval?

Similarly, the Bill contemplates that a pregnant employee cannot be required to go on leave if another accommodation would address the "known limitation" of that employee. PWFA § 2(4). What if the pregnant worker is still physically capable of performing the job, but it would expose

the fetus to unsafe conditions, such as lead or radiation? Under circumstances such as those, employers should be able to require that the pregnant worker not report to the job site, but the Bill appears to prohibit such a requirement.

It is also unclear what happens if the accommodation sought by the employee creates an undue hardship on the employer. Using the ADA scheme, the employer would be able to place the worker on leave, but Section 2(4) of the Bill suggests that the employer cannot place the worker on leave if an accommodation exists that would address the "known limitation," even if that accommodation results in an undue hardship.

Finally, the Bill does not address key issues and questions that are explicitly addressed by the ADA as part of that legislation (and which were heavily negotiated after many months and countless meetings). By way of example:

- The Bill does not address medical examinations, even though the need to attend prenatal doctor's appointments is perhaps the most common issue that pregnant workers will experience;
- The Bill does not address an employer's ability to require medical documentation verifying the employee's medical status and proposed accommodations;
- The Bill does not exclude from coverage applicants who are engaging in the illegal use of drugs;
- The Bill does not include any requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace.

There are likely many more examples of specific issues that are not addressed by the Bill, although it is impossible to identify all of those issues without knowing what is included in "known limitations," which is undefined in the Bill.

CONCLUSION

While the current statutory framework protecting pregnant workers may not be perfect, any legislation purporting to close gaps in coverage should be carefully crafted. It is not clear from the proposed legislation precisely what the drafters of the Bill perceive the gaps to be, or how this proposed legislation purports to close them. Moreover, the legislation does not address key questions and issues that will certainly face employers as they seek to implement the requirements of the Bill, nor does it provide a definition for the Bill's most fundamental term. Employers are already faced with differing regulatory schemes under the ADA, FMLA and state laws when analyzing a pregnant employee's request for accommodation. Does the employee have a disability (ADA), serious health condition (FMLA), or medical or common condition related to pregnancy (N.Y. Exec. Law § 296)? The Committee and Congress should carefully consider the purpose and practical effect of the proposed legislation before imposing another layer on the already complex matrix of federal and state laws that employers must contend with.