NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

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In Support of
H. 136—An Act Relating to Accommodations for Pregnant Employees
Before the
Vermont House Committee on General, Housing and Military Affairs

February 23, 2017

Thank you for the opportunity to submit this testimony on behalf of the National Women's Law Center in support of House bill 136, An Act Relating to Accommodations for Pregnant Employees. The National Women's Law Center has been working since 1972 to secure and defend women's legal rights, including their rights to equal opportunity in the workplace. We urge you to support H. 136, which would ensure that pregnant workers in Vermont are no longer asked to choose between their health and their jobs.

I. Too many pregnant workers are denied the simple accommodations they need to continue doing their jobs safely.

Many women can work through their pregnancies without any changes in their jobs. However, some pregnant women do find that particular job activities – such as lifting, bending, or standing for long periods – can pose a challenge at some point during a pregnancy. These women may have a medical need for temporary adjustments of job duties or work rules so that they can continue to work safely and support their families. However, too often when pregnant workers ask for modest accommodations recommended by their doctors, like a stool to sit on or the right to drink water during a shift, they are instead forced onto unpaid leave or even fired.[1] This is a particular problem for women who work in physically demanding jobs that have been traditionally held by men, and for women in low-wage occupations where work rules can be especially inflexible.[2] One recent survey estimated that a quarter of a million pregnant workers are denied their requests for reasonable workplace accommodations nationally every year.[3]

[1] For stories of women pushed out of work because they were denied the temporary accommodations that they sought during pregnancy, *see generally* NATIONAL WOMEN'S LAW CENTER AND A BETTER BALANCE, IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS (2013), *available at* http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf.
[2] *See id*. at 5.
[3] *See* NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, LISTENING TO MOTHERS: THE EXPERIENCE OF EXPECTING AND NEW MOTHERS IN THE WORKPLACE 3 (Jan. 2014), *available at* http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf.

In Vermont, nearly three-quarters of the women who give birth in any given year are working women.[4] Indeed, it is increasingly common for women to continue working while pregnant, and through later stages of pregnancy. For example, two-thirds of women who had their first child between 2006 and 2008 worked during pregnancy, and 88 percent of these first-time mothers worked into their last trimester.[5]

When women who have physical limitations stemming from pregnancy are forced off the job instead of being accommodated, their families can suffer a devastating loss of income at the very moment financial needs are increasing. Mothers' earnings are crucial to most families' financial security and well-being – in 2015, forty-two percent of mothers were either the primary breadwinner or a co-breadwinner for their families nationally.[6] In Vermont, 19 percent of families with children under 18 are headed by single mothers, whose families may have no income at all if they are forced out of work during pregnancy.[7] Women in low-wage occupations are even more likely to be their family's primary breadwinners, more likely to need a pregnancy accommodation, and more likely to be refused such an accommodation; income loss during pregnancy can impose particularly severe consequences on these families.[8] Immigrant women and women of color, who are more likely to work in low-wage jobs, are thus particularly at risk of the income loss that can flow from the denial of pregnancy accommodations.[9]

Other women continue working without the accommodations that they need because they cannot afford to follow their doctor's advice if it means losing their income; these women are often put at risk of serious health consequences, such as miscarriage, pre-term birth, pregnancy-induced hypertension and preeclampsia, congenital anomalies, and low birth weight.[10] Low birth weight babies face increased health risks at birth such as breathing difficulties, bleeding in the brain, heart problems, intestinal issues, and potential vision problems.[11] No woman should have to choose between her job and a healthy pregnancy.

II. Current laws often leave pregnant workers unprotected.

Before Congress passed the federal Pregnancy Discrimination Act of 1978 (PDA), it was common for employers to categorically exclude pregnant women from the workplace. The PDA changed this forever by providing that the right to be free from discrimination on the basis of sex includes: (1) the right not to be treated adversely because of pregnancy, childbirth, or related medical conditions; and (2) the right of workers affected by pregnancy, childbirth, or related

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[4] NWLC calculations from US Census Bureau, American Community Survey, 2015, 1-year estimates, using IPUMS.
[5] LYNDA LAUGHLIN, U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961-2008 4, 6 (Oct. 2011), *available at* https://www.census.gov/prod/2011pubs/p70-128.pdf.
[6] *See* CENTER FOR AMERICAN PROGRESS, BREADWINNING MOTHERS ARE INCREASINGLY THE U.S. NORM (Dec. 2016), *available at* https://www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm/.
[7] NWLC calculations based on US Census Bureau, American Community Survey 2015 1-year estimates, Table B11003: Family type by presence and age of own children under 18 years, available at https://www.census.gov/programs-surveys/acs/.
[8] IT SHOULDN'T BE A HEAVY LIFT, *supra* note 1, at 3, 7.
[9] *Id.* at 7.
[10] *See id.* at 12.
[11] *Id.*

medical conditions to be treated the same as other employees who are not so affected but are "similar in their ability or inability to work" with respect to all aspects of employment, including benefits, insurance, and leave policies.[12] The Vermont Supreme Court has also adopted a similar interpretation of the state's Fair Employment Practices Act, which prohibits sex discrimination in employment.[13]

Unfortunately, many courts, including the Vermont Supreme Court,[14] interpreted the PDA and state law equivalents narrowly and allowed employers to refuse to accommodate workers with medical needs arising out of pregnancy even when they routinely accommodated other physical limitations. In *Young v. UPS*,[15] the Supreme Court held in 2015 that when an employer accommodates workers who are similar to pregnant workers in their ability to work, it cannot refuse to accommodate pregnant workers who need it simply because it "is more expensive or less convenient" to accommodate pregnant women too.[16] The Court also held that an employer that fails to accommodate pregnant workers violates the PDA when its accommodation policies impose a "significant burden" on pregnant workers that outweighs any justification the employer offers for those policies.[17] The *Young* decision is an important victory for pregnant workers, but the multi-step balancing test it sets out will still leave too many employers and employees confused about when exactly the PDA requires pregnancy accommodations.

Pregnant workers experiencing significant pregnancy complications have been able to obtain accommodations under the Americans with Disabilities Act (ADA) or state law equivalents like the Vermont Fair Employment Protections Act.[18] These laws implement the fundamental principle that physical limitations that can be reasonably accommodated without an undue hardship to the employer should not force people out of work. However, courts have been reluctant to treat the physical limitations and medical needs that can arise out of a normally-progressing pregnancy as disabilities.[19]

Finally, some pregnant workers who need to take time away from work because of pregnancy complications may be able to access leave under the Family and Medical Leave Act.[20] While FMLA leave is very important and helpful to those women who need time off, what many pregnant workers want is to be able to continue to do their job – and many could do so and keep earning income for their families with reasonable accommodations to work rules or duties. The FMLA does not provide a solution for these workers.

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[12] *See* 42 U.S.C. § 2000e(k).
[13] *See Lavalley v. E.N. & A.C. Whiting Co.*, 692 A.2d 367, 370-71 (Vt. 1997); *Woolaver v. State*, 833 A.2d 849, 860 (Vt. 2003).
[14] *Lavalley*, 692 A.2d at 371-73.
[15] *Young v. UPS*, 135 S. Ct. 1338 (2015).
[16] *Id.* at 1354.
[17] *Id.*
[18] 42 U.S.C. § 12111 *et seq.*; 21 V.S.A. § 495 *et seq.*
[19] *See* IT SHOULDN'T BE A HEAVY LIFT, *supra* note 1, at 14.
[20] 29 U.S.C. § 2601 *et seq.*

III. H. 136 will ensure that pregnant workers are no longer forced off the job because of physical limitations that can be reasonably accommodated.

H. 136 will strengthen and affirm the Supreme Court's decision in *Young* and ensure that pregnant workers are no longer unnecessarily forced off the job by providing employers and pregnant workers with a clear, predictable rule: employers must provide reasonable accommodations for limitations arising out of pregnancy, childbirth, or related medical conditions, unless this would pose an undue hardship – just like employers already do when workers need accommodations because of temporary disabilities. This bill amends the Fair Employment Practices Act, located in Title 21 of the Vermont Code, to:

- Require employers to make reasonable accommodations for employees who have limitations in their ability to work stemming from pregnancy, childbirth, or related conditions, unless the accommodation would impose an undue hardship on the employer.

- Prohibit employers from forcing a pregnant employee to take paid or unpaid leave when another reasonable accommodation would allow her to continue to work.

- Prohibit employers from firing or otherwise penalizing a pregnant employee because she needs this sort of reasonable accommodation.

- Prohibit employers from requiring a pregnant employee to accept changes to her work when the pregnant employee does not need any modification to do her job.

- Prohibit employers from making accommodations or benefits available to workers with on-the-job injuries, disabilities, or other limitations while excluding pregnant workers from these same accommodations or benefits.

The sorts of accommodations that an employer might have to make under this bill are straightforward, and vitally important to enabling a pregnant worker to maintain both her job and the health of her pregnancy. For example, an employer might have to provide a stool to a pregnant employee experiencing swelling of the legs as a result of standing for an entire shift, or modify a no-food-or-drink policy so that an employee can drink water to prevent painful and potentially dangerous uterine contractions. If a pregnant employee has been advised by her health care provider not to lift more than 20 pounds, the employer might need to reassign occasional heavy lifting duties. If her current position imposes particular medical risks to her pregnancy, then the employer might need to temporarily allow a pregnant worker to fill an alternative position for which she is qualified if the employer has one available at the time.

The definitions of "reasonable accommodation" and "undue hardship" used in this bill are quite similar to the ones already used in the Vermont Fair Employment Practices Act and the federal Americans with Disabilities Act. These definitions will therefore be familiar to employers, and will be easy for employers and courts alike to implement.

Making reasonable accommodations for those pregnant workers who do need them will not lead to significant burdens for Vermont's employers. Only about 1.1 percent of employed people in Vermont give birth each year, and only a fraction of those workers would require

accommodations.[21] Employer experience with both disability accommodations and workplace flexibility policies show that the costs of accommodating pregnant workers are likely to be small – and that providing accommodations can be expected to have benefits like reducing workforce turnover and increasing employee satisfaction and productivity.[22]

IV. Minor modifications to H. 136 would further strengthen its protections.

H. 136 could be strengthened by making a few minor modifications. First, amending the bill, where appropriate, so that not just employees, but also applicants for employment are protected would ensure that pregnant women in need of accommodations are not foreclosed from job opportunities. Second, amending the bill to make explicitly clear that lactation is a condition related to pregnancy and childbirth would ensure that nursing mothers are able to get the temporary workplace accommodations they need, such as being permitted to have a bottle of water at a workstation since hydration is very important while lactating. Some courts have erroneously held that lactation is not a pregnancy-related condition covered by pregnancy non-discrimination laws.[23] As a result, explicitly naming "lactation" as a condition related to pregnancy for which an employee can be entitled to a reasonable accommodation eliminates any possible confusion that employers and employees might have about their obligations and rights. Finally, to promote compliance with the requirements provided for in this bill, we encourage the bill be amended to include a requirement that employers provide written notice to employees of these rights.

V. Vermont Should Join the Growing Chorus of States Requiring Reasonable Accommodations for Pregnant Workers.

The National Women's Law Center strongly supports H. 136. This bill will ensure that workers who have physical limitations stemming from pregnancy or childbirth will receive reasonable accommodations, unless providing the accommodation will impose an undue hardship on an employer. Eighteen states and the District of Columbia have passed laws to explicitly grant pregnant employees the right to accommodations at work. Twelve states have passed these laws since 2013, all with bipartisan support, and in the majority of cases, with unanimous or near-unanimous support, including Colorado, Delaware, the District of Columbia,

[21] NWLC Calculations from U.S. Census Bureau, American Community Survey, 2015, 1-year estimates using IPUMS.

[22] *See* NAT'L WOMEN'S LAW CTR., THE BUSINESS CASE FOR ACCOMMODATING PREGNANT WORKERS (May 2015), *available at* http://www.nwlc.org/wp-content/uploads/2015/05/NEW-Business-Case-for-Accommodating-Pregnant-Workers-May-2015.pdf.

[23] *See, e.g.*, *Martinez v. N.B.C.*, 49 F. Supp. 2d 305, 309-10 (S.D.N.Y. 1999) ; *Wallace v. Pyro Mining*, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990), aff'd, 951 F.2d 351 (6th Cir. 1991) (per curiam); *Fejes v. Gilpin Ventures, Inc*., 960 F. Supp. 1487, 1492 (D. Colo. 1997) ("[B]reast-feeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within the meaning of the PDA."); *Barrash v. Bowen*, 846 F. 2d 927, 931-32 (4th Cir. 1988) (opining without citation that the PDA only covered medical conditions that were "incapacitating" and therefore did not cover an employee's request for extended leave in order to breastfeed). In 2013, the EEOC Guidance and the Fifth Circuit correctly found that lactation should be considered covered. *See EEOC v. Houston Funding II, Ltd*., 717 F.3d 425, 430 (5th Cir. 2013) (discrimination on the basis of lactation is covered under Title VII generally and as a "related medical condition" under the PDA).

Illinois, Maryland, Minnesota, Nebraska, New Jersey, New York, North Dakota, Rhode Island, Utah and West Virginia.[24]

Pregnant workers in Vermont should not be forced to choose between ignoring their doctor's advice and losing their jobs at a time when both their health and the economic security of their families are absolutely crucial. H. 136 provides a commonsense solution for this important issue.

[24] *See* NAT'L WOMEN'S LAW CTR., PREGNANCY ACCOMMODATIONS IN THE STATES (May 2016), *available at* https://nwlc.org/resources/pregnancy-accommodations-states/.