REPRODUCTIVE JUSTICE AT WORK: EMPLOYMENT LAW AFTER *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

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Introduction

In June 2022, the Supreme Court of the United States overturned *Roe v. Wade*[1] and *Planned Parenthood v. Casey*,[2] landmark decisions which held that the U.S. Constitution protected a right to abortion prior to the viability of the fetus. The Court's decision, *Dobbs v. Jackson Women's Health Organization*,[3] opened the door for states to ban abortion outright.[4] Overnight, about 64 million American women of childbearing age[5] potentially lost the right to decide what happens in their own bodies.[6] In the two years since the decision, nineteen states

[1] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[2] 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[3] 597 U.S. 215 (2022).

[4] The decision eliminates all federal (national level) constitutional protections for abortion and holds that all abortion laws and regulations are to be assessed under "rational basis," the most lenient level of judicial scrutiny. Under this standard, going forward, "a law regulating abortion . . . will receive a 'strong presumption of validity.'" *Id.* at 301.

[5] Not all persons who can become pregnant identify as women. Transgender men and non-binary or gender nonconforming individuals can become pregnant. *See* Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 Obstetric. Med. 4 (2016). However, because most persons who become pregnant identify as female, and because societal norms and expectations regarding pregnancy are tightly wrapped up with gender, this Article frequently refers to "pregnant women" or "women."

[6] *See* Editorial, *The Ruling Overturning Roe Is an Insult to Women and the Judicial System*, N.Y. Times (June 24, 2022) https://www.nytimes.com/2022/06/24/opinion/dobbs-ruling-roe-v-wade.html [https://perma.cc/NPT2-SGJF].

have made most or all abortions illegal,[7] with the fight over abortion still taking place in state and federal courts.[8] Most of these laws impose criminal penalties on clinicians who provide abortions, and some extend penalties to people who help women who seek to terminate pregnancies or to the women themselves.[9]

Justice Alito sought to limit the reach of the Court's decision, stating in his majority opinion, "we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[10] But *Dobbs* is having ripple effects far beyond the right to terminate a pregnancy. Most immediately, women who want an abortion and are denied one are "more likely to experience serious pregnancy complications, poor longer-term health, chronic pain, and even death."[11] State abortion bans are also unequivocally

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7 *See* Carter Sherman, Andrew Witherspoon, Jessica Glenza & Poppy Noor, *Abortion Rights Across the US: We Track Where Laws Stand In Every State*, THE GUARDIAN (last updated Oct. 10, 2024), https://www.theguardian.com/us-news/ng-interactive/2024/jul/29/abortion-laws-bans-by-state#s-banned [https://perma.cc/6MM5-ZSS5]; *see also Interactive Map: U.S. Abortion Policies and Access After Roe*, GUTTMACHER INSTITUTE, https://states.guttmacher.org/policies/ [https://perma.cc/J5BT-X8N4] (last updated Oct. 16, 2024).

8 *See State and Federal Reproductive Rights and Abortion Litigation Tracker*, KFF (Feb. 17, 2023), https://www.kff.org/womens-health-policy/report/state-and-federal-reproductive-rights-and-abortion-litigation-tracker/ [https://perma.cc/7UJP-MBBJ] (last updated Mar. 7, 2024) [hereinafter *Litigation Tracker*].

9 *See, e.g.*, S.C. CODE ANN. § 44-41-80 (2023) (making it a felony to assist a self-managed abortion, including by providing drugs, and compelling a woman to testify against anyone who helped her to self-manage an abortion).

10 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 290 (2022).

11 Risa Kaufman et al., *Global Impacts of* Dobbs v. Jackson Women's Health Organization *and Abortion Regression in the United States*, 30 SEXUAL & REPROD. HEALTH MATTERS 1, 2 (2022). We already see this happening. For example, in March 2023, five women represented by the Center for Reproductive Rights sued the state of Texas after enduring health and life-threatening medical ordeals as a result of being refused abortions for nonviable pregnancies. *See* Plaintiff's Petition for Declaratory Judgment, State v. Zurawski, 690 S.W.3d 644 (Tex. 2024). For example, one of the plaintiffs, Elizabeth Weller was hospitalized after her water broke at 19 weeks. Plaintiffs' First Amended Verified Petition for Declaratory Judgment & Application for Temporary and Permanent Injunction at ¶ 222, State v. Zurawski, 690 S.W.3d 644 (Tex. 2024). According to the suit, hospital staff "told her to pray." *Id.* ¶ 223. Her OB/GYN concluded that, "at 19 weeks . . . the baby's chances of survival were almost zero" and without an abortion, she risked an infection and could even lose her life. *Id.* ¶ 224. The hospital administration, however, refused to clear the procedure and she was discharged. *Id.* ¶ 227. "For nearly a week, Elizabeth had many symptoms—cramps, bleeding, passing clots of blood, irregular discharge, vomiting—but was repeatedly told that her symptoms were not severe *enough*. Finally, when the discharge from her body became dark and foul smelling, the hospital at last agreed to provide an abortion. Her

harmful to women's and families' economic security.[12] Experts across fields are now exploring the decision's effects on health care privacy rights,[13] the patient-physician relationship,[14] access to assisted reproduction,[15] marriage equality and other LGBTQ rights,[16] constitutional sex equality,[17] disability rights,[18] and medical research.[19]

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daughter was stillborn." Plaintiff's Petition for Declaratory Judgment at ¶ 230, State v. Zurawski, 690 S.W.3d 644 (Tex. 2024). For coverage of similar stories post-*Dobbs*, see Michelle Goldberg, *You Cannot Hear These 13 Women's Stories and Believe the Anti-Abortion Narrative*, N.Y. TIMES (May 22, 2023) https://www.nytimes.com/2023/05/22/opinion/abortion-law-texas-lawsuit.html [https://perma.cc/R5QH-XZXK].

12 *See* Diana Greene Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 AM. J. PUB. HEALTH 407, 409–11 (2018); Sarah Miller, Laura R. Wherry & Diana Greene Foster, *The Economic Consequences of Being Denied an Abortion*, 15 AM. ECON. J.: ECON. POL'Y 394, 429–30 (2023).

13 *See, e.g.*, Wendy A. Bach & Nicolas Terry, *HIPAA v. Dobbs*, 38 BERKELEY TECH. L.J. 609 (2022) (discussing the risk that the medical records of women receiving reproductive care may "end up in the hands of police"); Ellen Wright Clayton, Peter J. Embí & Bradley A. Malin, Dobbs *and the Future of Health Data Privacy for Patients and Healthcare Organizations*, 30 J. AM. MED. INFORMATICS ASS'N 155, 156 (2023) (predicting that, after *Dobbs*, "health care providers . . . will soon experience a conflict between their obligations to produce health information when compelled by law and their longstanding obligations to protect physician-patient confidentiality.").

14 *See, e.g.*, Grace Getchell, Sofia Horan, Katelynn G. Sagaser & Laura Hercher, *Prenatal Genetic Counseling in States Hostile to Abortion in the Final Days of* Roe v. Wade*: A Qualitative Study*, 32 J. GENETIC COUNS. 584 (2022) (finding that legal uncertainty and the absence of institutional guidance in the wake of abortion bans affected the ability of genetic counselors to counsel patients, hindering care).

15 *See, e.g.*, AM. SOC'Y FOR REPROD. MED., STATES' ABORTION LAWS: POTENTIAL IMPLICATIONS FOR REPRODUCTIVE MEDICINE (2022).

16 *See, e.g.*, Robin Maril, *Queer Rights After* Dobbs v. Jackson Women's Health Organization, 60 SAN DIEGO L. REV. 45 (2023) (exploring the implications of the Court's textualist philosophy of jurisprudence for queer rights); Marc Spindelman, *Trans Sex Equality Rights After* Dobbs, 172 U. PA. L. REV. ONLINE 1 (2023).

17 *See, e.g.*, Reva B. Siegel, *Memory Games*: Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1135 n.30 (2023) (discussing Justice Alito's brazen repudiation of a half-century of equal protection jurisprudence in his *Dobbs* opinion, even though there was no equal protection claim in the case).

18 *See, e.g.*, Robyn M. Powell, *Including Disabled People in the Battle to Protect Abortion Rights: A Call-to-Action*, 70 UCLA L. REV. 774 (2023) (exploring disabled people's unique needs for abortion services and how they are disproportionately affected by abortion restrictions).

19 *See, e.g.*, Natalie Ram, Jorge L. Contreras, Laura M. Beskow & Leslie E. Wolf, *Constitutional Confidentiality*, 80 WASH. & LEE L. REV. 1349 (2023) (examining the constitutionality of Federal Certificates of Confidentiality, which protect sensitive information about human research subjects from disclosure and use in judicial, administrative, and legislative proceedings, and their implications for healthcare privacy post-*Dobbs*).

Less attention has been given to the impact of *Dobbs* on employment law and women workers.[20] Besides the obvious work disruptions for women who may need abortions and work in states criminalizing abortion, many other questions relevant to the workplace are raised by the Court's decision to overturn half a century of legal precedents protecting women's rights. My prior work on this subject explored the failure of federal employment law to address the common experience of miscarriage.[21] This Article continues that inquiry by assessing the post-*Dobbs* landscape in which women's reproductive experiences and capacities may serve as a justification for employment discrimination.

Even before *Dobbs*, the law's efficacy in addressing the intersections of women's reproductive capacity and wage work was not what it should or could be. For example, federal employment law failed to adequately prevent and redress workplace pregnancy discrimination,[22] especially in the form of employer policies and practices singling out pregnancy for different treatment than other temporary impairments. Although some states have stepped up,[23] the United States still does not guarantee paid family leave for American workers,[24] a benefit

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20 Fortunately, explorations of this topic are beginning to occur. *See* Symposium, *The Effect of* Dobbs *on Work Law*, 27 Emp. Rts. & Emp. Pol'y J. 56 (2024).

21 *See* Laura T. Kessler, *Miscarriage of Justice: Early Pregnancy Loss and the Limits of U.S. Employment Law*, 108 Cornell L. Rev. 543 (2023).

22 *See, e.g.*, Stephanie Bornstein, *The Politics of Pregnancy Accommodation*, 14 Harv. L. & Pol'y Rev. 293 (2020); Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 Idaho L. Rev. 825 (2016); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. Mich. J.L. Reform 371 (2001); Saru M. Matambanadzo, *The Fourth Trimester*, 48 U. Mich. J.L. Reform 117 (2014); Nicole Buonocore Porter, *Accommodating Pregnancy Five Years After* Young v. UPS*: Where We Are & Where We Should Go*, 14 St. Louis U. J. Health L. & Pol'y 73 (2020); Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 Minn. L. Rev. 749 (2018); Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 Wm. & Mary L. Rev. 969 (2018); Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After* Young v. UPS, 50 U.C. Davis L. Rev. 1423 (2017); Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 Yale L. & Pol'y Rev. 97 (2015). This is just a subset of the vast legal literature on workplace pregnancy discrimination.

23 *Interactive Overview of Paid Family and Medical Leave Laws in the United States*, A Better Balance, https://www.abetterbalance.org/family-leave-laws/ [https://perma.cc/6HYT-RVE4] (last visited June 4, 2024) (reporting that thirteen states and Washington, D.C. have paid family and medical leave laws).

24 *See* Maxine Eichner, The Free-Market Family 23 (2020); Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15

urgently needed by American families and especially for women workers given their continuing central role in reproduction and care work in our society.[25] Caregiver discrimination,[26] while now recognized as a form of sex-discrimination by federal agencies[27] and courts[28] in certain cases where evidence suggests that male and female caregivers are treated differently, is not prohibited outright at the national level[29] and is still a problem for workers with family responsibilities. In the United States, there is an absence of affordable, high-quality childcare[30] and other social supports,[31] which negatively impacts women's labor force participation and attachment,[32] as well as children's health and economic well-being.[33] The *Dobbs* decision will most certainly exacerbate these inequities caused by

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WASH. U. J.L. & POL'Y 17 (2004); Kessler, *supra* note 22, at 371. Indeed, we are the only developed country that provides no paid national parental leave whatsoever.

25 *See* PEW RSCH. CTR., RAISING KIDS AND RUNNING A HOUSEHOLD: HOW WORKING PARENTS SHARE THE LOAD 3 (2015), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2015/11/2015-11-04_working-parents_FINAL.pdf [https://perma.cc/NQ4B-Q5KA] (finding that "even in households where both parents work full time, many say a large share of the day-to-day parenting responsibilities falls to mothers").

26 *See* Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359 (2008); Keith Cunningham-Parmeter, *Men at Work, Fathers at Home: Uncovering the Masculine Face of Caregiver Discrimination*, 24 COLUM. J. GENDER & L. 253 (2013).

27 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EMPLOYER BEST PRACTICES FOR WORKERS WITH CAREGIVING RESPONSIBILITIES (2009), http://www.eeoc.gov/policy/docs/caregiver-best-practices.html [https://perma.cc/2RZ9-TUJ8]; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007).

28 *See, e.g.*, Lust v. Sealy, 383 F.3d 580, 583 (7th Cir. 2004) (holding that the decision not to consider recommending the plaintiff for promotion because she had children is a discrimination); Knussman v. Maryland, 272 F.3d 625, 634–35 (4th Cir. 2001) (holding that a State personnel officer violated equal protection by denying a male employee, solely on basis of his status as father rather than mother of newborn, "primary caregiver" status under a state statute granting additional paid leave to primary caregiver of infant).

29 *See* CTR. FOR WORKLIFE LAW, LAWS PROTECTING FAMILY CAREGIVERS AT WORK (2023). There is some progress at the state level; seven states, D.C., and more than 200 municipalities now prohibit discrimination against parents or discrimination on the basis of familial status per se. *See id.*

30 *See* EICHNER, *supra* note 24, at 94 ("Half of the people in the United States live in childcare 'deserts'—areas in which there are no childcare providers or far too few slots for licensed childcare than there are children who need care.").

31 *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 276 (2004) (noting that most Americans, even the middle class, live in a "state of insecurity . . . only a few paychecks, a catastrophic illness, or a divorce away from economic disintegration and despair").

32 *See* Kessler, *supra* note 22, at 371.

33 *See* EICHNER, *supra* note 24, at 119–41.

American law and already borne most acutely by marginalized American women such as women of color, immigrant women, and low-income women.

Countless commentators have called attention to these inadequacies in our country's employment discrimination laws and social policies.[34] More recently, some commentators have also used a reproductive justice lens to extend the critique of the law's failure to account for women's reproductive and family experiences, highlighting the connections between race, inequality, reproductive rights, and women's health.[35] The reproductive justice framework has created a space for legal experts to consider how a fuller range of reproductive experiences are constructed by and through law. For example, legal scholars have built a legal framework and political movement for menstrual justice.[36] They have worked to define women's reproductive justice-based health care (and tort) rights concerning miscarriage and stillbirth.[37] New works are now discussing the silence about menopause in the law.[38] Experts have also challenged the criminalization of motherhood,[39] particularly Black and brown motherhood, and systemic racism within the child "welfare" system.[40]

Given the expanding reproductive justice movement, the subject of the lack of employment law protections and benefits for the full range of workers' reproductive experiences deserves additional attention. While feminist experts have tackled workplace obstacles faced by pregnant and parenting workers

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34 *See supra* notes 22–33 and accompanying text.

35 "Reproductive rights and justice" is a relatively new field. Broadly, it "encompass[es] the various ways law shapes the decision 'whether to bear or beget a child,' and the conditions under which families are created and sustained." *Introduction*, REPRODUCTIVE RIGHTS AND JUSTICE STORIES 1 (Katherine Shaw, Reva Siegel & Melissa Murray eds., 2019) (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

36 *See, e.g.*, BRIDGET J. CRAWFORD & EMILY GOLD WALDMAN, MENSTRUATION MATTERS: CHALLENGING THE LAW'S SILENCE ON PERIODS (2022); Margaret E. Johnson, *Asking the Menstruation Question to Achieve Menstrual Justice*, 41 COLUM. J. GENDER & L. 158 (2021); Deborah A. Widiss, *Time Off Work for Menstruation: A Good Idea?*, 98 N.Y.U. L. REV. ONLINE 170 (2023).

37 *See, e.g.*, Jill Wieber Lens, *Miscarriage, Stillbirth, & Reproductive Justice*, 98 WASH. U. L. REV. 1059 (2021).

38 *See* Emily Gold Waldman, Naomi R. Cahn & Bridget J. Crawford, *Contextualizing Menopause in the Law*, 45 HARV. J.L. & GENDER 1 (2022).

39 *See* MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 122–28 (2020); GENIECE CRAWFORD MONDÉ, THIS IS OUR FREEDOM: MOTHERHOOD IN THE SHADOW OF THE AMERICAN PRISON SYSTEM (2022).

40 *See* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEMS DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD *passim* (2022).

for decades, the reproductive justice movement has yet to take on the subject of workers' reproductive lives—including abortion, infertility, miscarriage, and stillbirth—in a comprehensive way. Nor has there been enough concerted attention to the occupational risks to reproductive health, which are disproportionately experienced by women of color working in jobs and occupations involving demanding physical labor.[41]

This Article represents a small step intended to fill this gap. It does not seek to address or define the entire field of workplace reproductive justice, which includes myriad legal questions in the wake of *Dobbs* that will need to be addressed. These questions include, for example, whether federal law preempts state laws requiring (or prohibiting) abortion coverage in employer-sponsored health plans;[42] whether federal law preempts state laws that allow a party to sue employers or insurance administrators for money damages for aiding and abetting abortions if they provide workers with health or travel employment benefits for abortions;[43] whether religious employers, particularly schools, may discriminate against employees for their reproductive healthcare choices;[44] whether anti-abortion employees have a right, on religious freedom grounds, to proselytize or harass coworkers, customers, or clients about abortion;[45] or

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41 Kessler, *supra* note 21, at 592–98, which argues for the enforcement of the Occupational Health and Safety Act (OSHA), 29 U.S.C. §§ 651–678, to protect worker reproductive health, is an effort in that direction.

42 The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans; ERISA preempts all related state laws. *See Employee Retirement Income Security Act (ERISA)*, U.S. DEP'T LABOR, https://www.dol.gov/general/topic/retirement/erisa [https://perma.cc/UQ7P-WWZE] (last visited Mar. 7, 2024).

43 Texas passed such a law. *See infra* note 293 and accompanying text.

44 Title VII's ministerial exception can be broad. *See* Demkovich v. St. Andrew the Apostle Parish, Calumet City, 3 F.4th 968 (7th Cir. 2021) (holding that an Illinois church could raise the ministerial exception to block a gay music director's harassment claims). In a recent 6-3 decision, siding with a high school football coach who prayed on the field with students, the Supreme Court overturned a more than 50-year-old precedent limiting the government's entanglement in religion, pointing instead to history and tradition. *See* Kennedy v. Bremerton School Dist., 597 U.S. 507, 544 (2022). *Bremerton* may make it possible for public-sector employers to rely on the First Amendment when employees allege harassment or discrimination based on their reproductive choices.

45 *See* Patrick Dorrian & Peter Hayes, *Ex-Southwest Flight Attendant Wins $5.1 Million in Bias Row*, BLOOMBERG L. (July 15, 2022), https://news.bloomberglaw.com/litigation/ex-southwest-flight-attendant-wins-5-1-million-in-bias-row [https://perma.cc/PAS7-NM59] (discussing case in which Southwest Airlines was ordered by a court to pay an anti-abortion Christian flight attendant $5.1 million for discrimination and retaliation for her anti-abortion rights stance

whether employees who band together to push for employment benefits for abortion are engaging in protected union organizing activity,[46] just to name a few.

Rather, this Article addresses a narrower (although hardly narrow) set of questions concerning the need for enhanced medical privacy and antiretaliation protections in federal employment discrimination law post-*Dobbs*. This seems like a good place to start, given the immediate health, legal, and economic risks faced by pregnant and potentially pregnant workers with the revival of criminal abortion laws in many states. Put simply, we are entering a period where there will be more pregnant workers and more pregnant workers with medical complications caused by a lack of access to reproductive healthcare. This will inevitably lead to more medical leave and accommodation requests. Workers who need medical attention for abortion, infertility, pregnancy, or miscarriage after *Dobbs* may need to travel out of state for their health care, disrupting work and testing workplace family, medical, and sick leave laws. Further, those most impacted by *Dobbs* are low-wage workers, who are disproportionately represented in jobs without workplace flexibility, paid medical and family leave, or health benefits. All of this is occurring in an environment in which criminalization of abortion shrouds women's reproductive decisions and health care needs in a cloak of fear, secrecy, and shame, chilling workers' ability to exercise their statutory employment rights. While these issues represent just a subset of the many legal dilemmas unleashed by *Dobbs,* my hope is that this Article's focus on the privacy and antiretaliation rights of pregnant and potentially pregnant workers can serve as a starting point for a larger conversation about how we might imagine a workplace that accounts for workers' reproductive lives.

Part I provides the sociomedical and legal landscape upon which this Article's arguments rest. Specifically, Part I.A. reviews the current medical, psychological, and sociological understandings of abortion, infertility, and miscarriage, including their definitions, prevalence, and broader health and economic

against Southwest managers and its union). The scope of employers' duty to accommodate employees' religious practices was recently expanded by the Supreme Court. *See* Groff v. DeJoy, 600 U.S. 447, 470 (2023) (holding that Title VII requires an employer that denies a religious accommodation to "show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business").

46 *See* Jeffrey M. Hirsch, *Labor Law's Impact on the Post-*Dobbs *Workplace*, 27 EMP. RTS. & EMP. POL'Y J. 360 (2024) (examining the extent to which labor law might preempt state prohibitions against workplace abortion benefits).

impacts. This subpart also examines the blurred medical and legal boundaries among common reproductive-health experiences. As this Part shows, the experiences of abortion, infertility, and miscarriage are often indistinguishable, as the symptoms and treatments for these conditions significantly overlap. Given this overlap, after *Dobbs*, all of these reproductive-health events are becoming more complicated (and potentially dangerous) medically and uncertain legally.

Part I.B. provides a brief overview of four major federal employment statutes relevant to workers' reproductive freedom and reproductive lives—the Pregnancy Discrimination Act of 1978 (PDA),[47] the Americans with Disabilities Act of 1990 (ADA),[48] the Pregnant Workers Fairness Act of 2022 (PWFA),[49] and Family and Medical Leave Act of 1993 (FMLA).[50] My emphasis is on how (with the exception of the PWFA, which is new) federal courts have significantly undermined federal protections for workers affected by common reproductive-health conditions, despite Congress's broad remedial purposes in passing federal employment statutes and the EEOC's loyal interpretations of them.

Part II goes on to examine more closely some of the judicially imposed gaps that render federal employment statutes particularly ineffective at addressing workers' reproductive lives, given the culture of shame and secrecy surrounding common reproductive experiences. In particular, Part II examines the weak or nonexistent medical privacy and antiretaliation protections provided by federal antidiscrimination and family leave laws, largely due to constraining lower court interpretations. It also examines the mismatch between the culture of secrecy surrounding workers' common reproductive-health experiences such as abortion, infertility, pregnancy, and miscarriage and federal employment statutes and legal doctrines that require workers to share private health information as a precondition to receiving legal protections. As Part II argues,

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47 42 U.S.C. §§ 2000e(k), 2000e-2. The PDA defines sex discrimination in Title VII to include discrimination on the basis of pregnancy, childbirth, or related medical conditions.

48 42 U.S.C. §§ 12101–12213. The ADA mandates both nondiscrimination and reasonable accommodations for employees with disabilities.

49 Consolidated Appropriations Act of 2023, H.R. 2617, 117th Cong., Div. II, §§ 101–109. The Act was passed as part of an omnibus spending bill. The PWFA requires reasonable accommodations to a worker's known limitations related to pregnancy, childbirth, or related medical conditions.

50 29 U.S.C. §§ 2601–54. The FMLA requires covered employers to provide employees with job-protected, unpaid leave for personal or family illness.

criminalization of abortion in the wake of *Dobbs* is likely to exacerbate these legal and cultural conditions that render federal employment law particularly ineffective in this realm.

Part III turns to solutions. Among other reforms, Part III examines the recently-passed Pregnant Workers Fairness Act (PWFA), a new federal law providing a basic right to reasonable workplace accommodations for pregnancy and related medical conditions. The PWFA is a significant victory for pregnant workers and women's rights. It is a hard-won victory after a ten-year fight in the courts and Congress to restore and reinvigorate the PDA and ADA. The purpose of the PWFA is to eradicate, once and for all, pregnancy discrimination in the workplace and ensure pregnant workers are treated fairly. With the passage of the PWFA, pregnant workers may now access reasonable accommodations for pregnancy and pregnancy related impairments.

As Part III argues, Congress passed the PWFA as a separate statute rather than amending the ADA or PDA, because these statutes and judicial interpretations of them do not provide a sufficient avenue for receiving reasonable accommodations for pregnancy and other reproductive-health conditions. Many provisions of the PWFA are significantly broader than the ADA and PDA, including definitions of who is a qualified employee and impairments requiring reasonable accommodation. It should also not be lost on judges that Congress promptly passed the PWFA—the first major new federal antidiscrimination law since 2008[51]—very shortly after the Supreme Court wiped away constitutional protection for abortion. It is therefore incumbent upon federal judges to respect the broad remedial purpose that Congress clearly intended in passing a new major federal employment discrimination statute at this tragic moment for women in U.S. history.

At the same time, Part III argues that the PWFA, in some significant respects, does not go far enough, because it does not sufficiently shore up privacy and antiretaliation protections that workers are going to need to meaningfully access reasonable accommodations in a legal landscape where abortion is a crime and even a miscarriage or failed IVF cycle may be prosecuted as an abortion. Therefore, as Part III argues, enhanced medical privacy and antiretaliation protections in

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51 The last major federal employment discrimination statutes passed by Congress were the ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553 and the Genetic Nondiscrimination Employment Act of 2008. Pub. L. No. 110–233, § 1, 122 Stat. 881.

all of our federal employment statutes are required. Without such protections, the entire legal regime of substantive protections from sex and disability discrimination at work will be severely weakened for women workers post-*Dobbs.* Finally, Part III argues that it is time for a national paid sick leave law in the United States. Such a law is also necessary to address the unique vulnerabilities of women workers in a post-*Dobbs* world.

I
Reproductive Justice at Work: The Sociomedical and Legal Landscape

A. The Health, Social, and Economic Impacts of Abortion, Infertility, and Miscarriage (Post-*Dobbs*)

Pregnancy has been conceptualized in employment law as the nine-month period of gestation of a normal pregnancy, birth, and a brief postpartum recovery period. Yet, as other scholars have highlighted,[52] pregnancy and childbirth defy neat categorization and are in any case just two experiences in a lifetime of potential health experiences related to reproduction and reproductive capacity, including menstruation, conception, abortion, infertility, pregnancy, miscarriage, birth, lactation, and menopause. All of these reproductive experiences impact workers, yet few were given much legal relevance in employment law prior to passage of the PWFA. Moreover, by retaining narrow biological conceptions of reproduction and reproductive health, employment law has failed to grapple with the larger psychological, cultural, social, and economic impacts of reproduction on work and workers. This subpart discusses three common reproductive experiences that have historically received insufficient attention and protection in federal employment law and doctrine: abortion, infertility, and miscarriage.

[52] As Saru Matambanadzo explains:

> [Pregnancy is] not a nine month event, with a clear beginning, middle, and end. It does not begin with conception. It does not end at birth. Instead, pregnancy is a process of being and becoming that defies the rationalization of temporality and demands a different logic beyond conceptions of individualism, productivity, and efficiency.

Matambanadzo, *supra*, note 22, at 119; *see also* Waldman, Cahn & Crawford, *supra* note 38, at 6 (conceptualizing pregnancy, breastfeeding, menstruation, and menopause as reproduction-associated processes that must be understood together, rather than in silos).

1. *Abortion*

Definitions of abortion can vary and there is often controversy surrounding what abortion means. That is, definitions of abortion often reflect not just scientific knowledge, but social and political opinions.[53] However, in the scientific and medical literature, abortion is generally defined as the removal of pregnancy tissue, products of conception, or a fetus and placenta from the uterus.[54] Given the private nature of abortion and the different methods used to track abortion, an exact figure on the number of abortions that take place in the U.S. is hard to come by. However, two reliable sources, the U.S. Centers for Disease Control (CDC) and the Guttmacher Institute,[55] estimate that there were 620,327 and 930,160 abortions nationally in 2020, respectively.[56]

In the 46 states that reported data to the CDC in 2020, the majority of women who had abortions (57%) were in their 20s, while 31% were in their 30s.[57] Teens ages 13 to 19 accounted for 8% of those who had abortions, while women in their 40s accounted for 4%.[58] The vast majority of women who had abortions in 2020 were unmarried (86%), while married women accounted for 14%, according to the CDC.[59] In the District of Columbia and 29 states that reported racial and ethnic data on abortion to the CDC, 39% of all women who had abortions in 2020 were Black, 33% were white, 21% were Hispanic, and 7% were of other races or ethnicities.[60] According to the

53 Kate Zernike, *What Does 'Abortion' Mean? Even the Word Itself Is Up for Debate*, N.Y. TIMES (Oct. 18, 2022), https://www.nytimes.com/2022/10/18/us/abortion-roe-debate.html [https://perma.cc/LW34-DVCM].

54 *Abortion (Termination of Pregnancy)*, HARV. HEALTH PUBL'G HARV. MED. SCH. (Jan. 9, 2019), https://www.health.harvard.edu/medical-tests-and-procedures/abortion-termination-of-pregnancy-a-to-z [https://perma.cc/D5XG-JA8D]. In general, the terms fetus and placenta are used after eight weeks of pregnancy. *Id.*

55 The Guttmacher Institute is a leading research and policy organization committed to advancing sexual and reproductive health and rights worldwide. *See About*, GUTTMACHER INST., https://www.guttmacher.org/about [https://perma.cc/E5FW-GN76] (last visited Jan. 22, 2024).

56 *See* Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (Jan. 11, 2023), https://www.pewresearch.org/fact-tank/2023/01/11/what-the-data-says-about-abortion-in-the-u-s-2/ [https://perma.cc/4XC8-9L23]. The last year for which the CDC and Guttmacher reported a yearly national total for abortions is 2020. *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

Guttmacher Institute, 49% of abortion patients live below the federal poverty level.[61]

Women express complex emotions after abortion. Certainly, not all women feel stigmatized by it. However, many follow the "implicit rule of secrecy": Women are expected to keep quiet about abortion.[62] One large study found that two out of three women having abortions anticipate stigma if others were to learn about it; 58% felt they needed to keep their abortion secret from friends and family.[63] Carol Sanger distinguishes between abortion privacy, a form of nondisclosure based on a woman's desire to control personal information, and abortion secrecy, a woman's defense against the many harms of disclosure.[64] As she explains,

> Women often keep abortion secret because of the prospect of harm if they don't: Harassment, stigmatization, fear of violence or loss of relationships are real concerns. Clinic protesters armed with nothing more than smartphones have posted patients' pictures online, contacted the parents of pregnant minors and sent abortion patients (not to mention providers) hateful, threatening literature in the mail.[65]

Research finds that people who become pregnant and are unable to get a safe, legal abortion and must carry the pregnancy to term experience long-term mental health and economic harms. A landmark study supporting this finding is the "Turnaway Study," a longitudinal study of 956 women seeking abortions at 30 U.S. abortion facilities across 21 states.[66]

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61 *See United States Abortion Demographics*, GUTTMACHER INST., https://www.guttmacher.org/united-states/abortion/demographics [https://perma.cc/SM4D-U8ZV].

62 Marcia A. Ellison, *Authoritative Knowledge and Single Women's Unintentional Pregnancies, Abortions, Adoption, and Single Motherhood: Social Stigma and Structural Violence*, 17 MED. ANTHROPOLOGY Q., 322, 332 (2003) (discussing the sense of "shame and secrecy" among women who have abortions).

63 Kristen M. Shellenberg & Amy O. Tsui, *Correlates of Perceived and Internalized Stigma Among Abortion Patients in the USA: An Exploration by Race and Hispanic Ethnicity*, 118 INT'L J. GYNECOLOGY & OBSTETRICS S152, S154–55 (2012).

64 CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA 46–69, 216, 238 (2017) (seeking to "pry abortion loose from the confines of paralyzing secrecy" so that "it will come to be regarded like other medical decisions—thoughtfully taken and exercised without a gauntlet of picketers on the pavement or hard looks at home").

65 Carol Sanger, *Secrecy Isn't the Same as Privacy: Why Some Women Don't Talk About Their Abortions*, WBUR (Apr. 13, 2017), https://www.wbur.org/cognoscenti/2017/04/13/why-women-dont-talk-about-abortion-secrecy-privacy-carol-sanger [https://perma.cc/25PU-BT7V].

66 *See* Katie Woodruff, M. Antonia Biggs, Heather Gould & Diana Greene Foster, *Attitudes Toward Abortion After Receiving vs. Being Denied an Abortion in the USA*, 15 SEXUALITY RSCH. & SOC. POL'Y 452, 453 (2018).

The Turnaway Study was designed "to describe the mental health, physical health, and socioeconomic consequences of receiving an abortion compared to carrying an unwanted pregnancy to term."[67] Overseen by demographer Diana Greene Foster, the study was conducted by more than forty researchers[68] who are part of a large social science group within the University of California San Francisco's Bixby Center for Global Reproductive Health called Advancing New Standards in Reproductive Health (ANSIRH).[69] Over eight years, the team conducted approximately eight thousand interviews of those 956 women.[70] The researchers interviewed each woman every six months over five years to learn how receiving versus being denied a wanted abortion affects a woman's mental and physical health, her life aspirations, and the well-being of her family.[71] They were asked about their financial status, goals, health (both physical and mental), and children's development.[72] Women were recruited into three different groups: those who received an abortion early in pregnancy (the "First-Trimester" group), those who barely made it in time but received an abortion (the "Near-Limit" group), and those who were a little too late and were turned away (the "Turnaway" Group).[73]

Six months after being denied a wanted abortion and subsequently giving birth, the Turnaway group had almost four-times-higher odds of being below the federal poverty level that the Near-Limit group, and this poverty persisted through four years.[74] Women who were denied an abortion and gave birth were also more likely to be enrolled in programs like

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67 *The Turnaway Study*, ANSIRH, https://www.ansirh.org/research/ongoing/turnaway-study [https://perma.cc/58VU-G5AK] (last visited Sept. 25, 2023).

68 The researchers included "project directors, interviewers, epidemiologists, demographers, sociologists, economists, psychologists, statisticians, nurses, and public health scientists." DIANA GREENE FOSTER, THE TURNAWAY STUDY: THE COST OF DENYING WOMEN ACCESS TO ABORTION 14 (2020) (ebook).

69 *Id.* at 202; *About*, ANSIRH, https://www.ansirh.org/about [https://perma.cc/NNC8-GTB3] (last visited Sept. 25, 2023).

70 FOSTER, *supra* note 68, at 17, 179.

71 *Id.* at 14.

72 *Id.* at 22. In addition, interviewers surveyed the participant's "attitudes about abortion[] and religiosity." *See* Woodruff, Biggs, Gould & Foster, *supra* note 66, at 453.

73 FOSTER, *supra* note 68, at 14; Woodruff, Biggs, Gould & Foster, *supra* note 66, at 454.

74 *See* Foster et al., *supra* note 12, at 410; *see also* FOSTER, *supra* note 68, at 149–50.

Temporary Assistance for Needy Families (TANF),[75] food assistance (SNAP),[76] and Women, Infants, and Children (WIC),[77] compared to women in the Near-Limit group who received abortions.[78] In contrast, women who were able to receive an abortion were more likely to stay employed and live above the federal poverty level.[79] Children whose mothers were denied abortions were found to be less likely to achieve developmental milestones such as language, gross motor, and fine motor skills.[80]

"Some of the largest differences in the Turnaway Study between women who received and women who were denied abortions are found in . . . a decrease in employment that lasts for years . . . ."[81] Only 30% of women denied abortions were working full-time at six months; some who had been working were fired.[82] In contrast, 40% of women who received abortions were working full-time at the time of the abortion, and their rate of full-time employment slowly increased to 50% five years later.[83] "It took four years for women who were turned away and gave

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75 "TANF is a time-limited program that helps families when parents or other relatives cannot provide for the family's basic needs." *What is TANF?*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/answers/programs-for-families-and-children/what-is-tanf/index.html [https://perma.cc/VB4G-2X2A] (last visited Sept. 25, 2023).

76 "[SNAP] is a federal program that provides nutrition benefits to low-income individuals and families that are used at stores to purchase food. The program is administered by the USDA Food and Nutrition Service . . . ." *Supplemental Nutrition Assistance Program (SNAP): Frequently Asked Questions*, USDA FNS (Sept. 4, 2023), https://www.fns.usda.gov/snap/retailer/faq [https://perma.cc/TC3T-LXT6].

77 WIC is also a federal program, supplementary to SNAP, that "provides federal grants to states for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women . . . ." *About WIC: WIC's Mission*, USDA FNS, (Aug. 2, 2022) https://www.fns.usda.gov/wic/about-wic-wics-mission [https://perma.cc/83XH-5HEB]; 7 C.F.R. § 246.1 (2023) ("[WIC's] purpose . . . is to provide supplemental foods and nutrition education, including breastfeeding promotion and support, through payment of cash grants to State agencies which administer the Program through local agencies at no cost to eligible persons.").

78 Foster et al., *supra* note 12, at 409.

79 FOSTER, *supra* note 68, at 41.

80 *Id.* at 150.

81 *Id.* at 141.

82 *Id.* at 149. As one Turnaway study subject explained: "A week before I was supposed to go on maternity leave, I got let go, so that was kind of traumatic, because I was eight months pregnant, and now I'm jobless. So, that was very hard, and I don't think that I actually went back to work until my baby was about six months." *Id.*

83 *Id.*

birth to catch up to the level of employment experienced by [Near-Limit] women who received their abortion."[84] "Turnaways were [also] significantly less likely to have vocational goals compared to women who obtained an abortion, likely because employment-related goals felt unattainable while parenting a newborn."[85] Both older studies examining the impact of the liberalization of abortion laws after *Roe* on women's employment[86] and newer studies examining the effects of contemporary *Dobbs*-era abortion restrictions[87] have corroborated the Turnaway study's findings about the impact of abortion access on employment. Exacerbating the connection between lack of access to abortion and employment is that the states with more restrictive abortion laws are the least likely to have paid family leave laws.[88]

In sum, abortion is socially stigmatized, surrounded by secrecy and shame, and increasingly illegal, yet accessing abortion is essential to sustaining women's workforce attachment, income, and employment. The long-term economic hardship and insecurity experienced by women denied abortion lasts for years.[89] "Laws that . . . restrict access to abortion will result in worsened economic outcomes for women."[90] Given these devastating long-term economic impacts of lack of access to abortion on women's economic security, protections against workplace pregnancy discrimination post-*Dobbs* are more important than ever.

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84 *Id.*

85 Ushma D. Upadhyay, M. Antonia Biggs & Diana Greene Foster, *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, BMC WOMEN'S HEALTH, Nov. 11, 2015, at 1, 9.

86 *See* David E. Kalist, *Abortion and Female Labor Force Participation: Evidence Prior to* Roe v. Wade, 25 J. LAB. RSCH. 503, 508 (2004) ("The results consistently support the hypothesis that access to legalized abortion allows working women the option to abort an unwanted pregnancy and hence maintain their employment status.").

87 *See* Itay Ravid & Jonathan Zandberg, *The Future of Roe and the Gender Pay Gap: An Empirical Assessment*, 98 IND. L.J. 1089, 1132 (2023) ("We further find that the introduction of TRAP [(Targeted Regulation of Abortion Providers)] laws has pushed women outside of the labor force . . . .").

88 *See* Alina S. Schnake-Mahl et al., *Forced Birth and No Time Off Work: Abortion Access and Paid Family Leave Policies*, 65 AM. J. PREVENTIVE MED. 755, 756 (2023) ("None of the states that ban or are hostile to abortion have PFL [paid family leave] laws. In addition, 16 of 25 states that ban or are hostile to abortion preempt local governments from enacting their own PFL policies.").

89 Foster et al., *supra* note 12, at 412.

90 *Id.* at 413.

2. *Infertility*

Approximately 12% of all women require some level of fertility assistance during their lifetime and the use of fertility treatments has been growing for several years.[91] The risk of infertility increases with age; approximately one-third of women over thirty-five will have difficulty conceiving naturally.[92] Fertility counseling and possible subsequent fertility treatment is recommended for women "not . . . able to achieve pregnancy after 1 year of having regular, unprotected intercourse, or after 6 months if the woman is older than 35 years of age."[93] Fertility treatment is also used by LGBTQ families,[94] individuals at risk of passing on a heritable genetic disease (along with genetic testing),[95] and patients who need medical treatments that may render them infertile.[96]

In vitro fertilization (IVF)[97] treatment, in particular, is complicated and often "involv[es] short notice doctor appointments early in the morning, physically invasive procedures that can require sedation, endless blood draws, regular self-injections of intense hormones, and the emotional roller coaster of waiting

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91 *See* Holly Vo, Diana Cheng, Tina L. Cheng & Kamila B. Mistry, *Health Behaviors Among Women Using Fertility Treatment*, 20 MATERNAL & CHILD HEALTH J. 2328, 2329 (2016).

92 *See* Sarah Kroeger & Giulia La Mattina, *Assisted Reproductive Technology and Women's Choice to Pursue Professional Careers*, 30 J. POPULATION ECON. 723, 725 (2017).

93 *Infertility and Fertility*, EUNICE KENNEDY SHRIVER NAT'L INST. CHILD HEALTH & HUM. DEV. (Jan. 31, 2017), https://www.nichd.nih.gov/health/topics/infertility [https://perma.cc/769G-VCW6].

94 Stu Marvel et al., *Listening to LGBTQ People on Assisted Human Reproduction: Access to Reproductive Material, Services, and Facilities*, *in* REGULATING CREATION: THE LAW, ETHICS, AND POLICY OF ASSISTED HUMAN REPRODUCTION 325, 325 (Trudo Lemmens, Andrew Flavell Martin, Cheryl Milne & Ian B. Lee, eds. 2017) ("LGBTQ people are uniquely dependent on assisted human reproduction . . . services to create biologically related children . . . .").

95 Michelle J. Bayefsky, Arthur L. Caplan & Gwendolyn P. Quinn, *The Real Impact of the Alabama Supreme Court Decision in* LePage v Center for Reproductive Medicine, 331 J. AM. MED. ASS'N 1085 (2024).

96 *Id.*

97 In vitro fertilization ("IVF") "is the process of fertilization by extracting eggs, retrieving a sperm sample, and then manually combining an egg and sperm in a laboratory dish. The embryo(s) is then transferred to the uterus." *IVF – In Vitro Fertilization*, AM. PREGNANCY ASS'N (Apr. 24, 2019), https://americanpregnancy.org/getting-pregnant/infertility/in-vitro-fertilization/ [https://perma.cc/M73M-CF9G]. IVF has become a widely accepted therapy to address fertility problems. *See In Vitro Fertilization (IVF)*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/QY7B-T262] (last visited Sept. 21, 2023).

to find out if a procedure was successful."[98] Multiple IVF cycles are usually required to achieve a successful pregnancy and birth.[99] The majority of women undergoing IVF require time off work;[100] this is especially problematic for low-wage and contingent workers without sick leave[101] who may be fired for missing one day of work.[102] Even professional workers may be subject to probationary periods, during which perfect job attendance is expected.[103] In addition to the physical limitations associated with some fertility treatments, individuals experiencing infertility are at a high risk of "social, marital, and personal distress."[104] Emotional difficulties can continue after the treatment itself is over, with one study finding that over 20% of IVF patients continued to experience anxiety and depression six months after completing an unsuccessful IVF treatment.[105]

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98 Katherine Goldstein, *"My Boss Said, 'I Understand What You're Going Through, but You Have a Job to Do'"*, SLATE (Jan. 30, 2019), https://slate.com/human-interest/2019/01/infertility-workplace-pregnancy-challenges-2019.html [https://perma.cc/Q6MH-H8X3].

99 Kroeger & La Mattina, *supra* note 92, at 726 ("[I]t often takes multiple cycles to achieve a pregnancy . . . .").

100 Clazien A.M. Bouwmans et al., *Absence from Work and Emotional Stress in Women Undergoing IVF or ICSI: An Analysis Of IVF-Related Absence from Work in Women and the Contribution of General and Emotional Factors*, 87 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 1169, 1171 (2008).

101 While overall, 78% of civilian workers had access to paid sick leave in 2020, the numbers are much worse for low wage earners. U.S. DEP'T OF LAB., BUREAU OF LAB. STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2020, at 119 (2020), https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf [https://perma.cc/95GV-U5JR]. For those in the lowest 25% of wage earners, only 52% of employees had paid sick leave. *Id.* Of those being paid the least, the lowest 10% of wage earners, only 33% had access to paid sick leave. *Id.*

102 *See, e.g.*, Garcia v. Colvin, 741 F.3d 758, 762 (7th Cir. 2013) (citing "vocational expert's testimony that missing even one day a month could get a full-time employee fired" in analysis of disability applicant's ability to work).

103 *See, e.g.*, Stephenie Overman, *Are Probationary Periods Passé?*, SHRM (Jan. 23, 2019), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/are-probationary-periods-pass%C3%A9.aspx [https://perma.cc/EU8D-HAUW] (stating that probationary periods may be harmful to companies by giving employees the impression that they are in a quasi-contractual relationship after the period ends).

104 W.D. Winkelman, P.P. Katz, J.F. Smith & T. Rowen, *The Psychosocial Impact of Infertility Among Women Seeking Fertility Treatment*, 104 FERTILITY & STERILITY E359, E360 (2015). Women experience more infertility-related stress than men. B.D. Peterson, C.R. Newton, K.H, Rosen & G.E. Skaggs, *Gender Differences in How Men and Women Who Are Referred for IVF Cope with Infertility Stress*, 21 HUM. REPROD. 2443, 2448 (2006).

105 C.M. Verhaak, J.M.J. Smeenk, A. van Minnen, J.A.M. Kremer & F.W. Kraaimaat, *A Longitudinal, Prospective Study on Emotional Adjustment Before,*

According to experts, at least four features of IVF face scrutiny and possible restriction post *Dobbs*.[106] These include embryo discard,[107] embryo cryopreservation,[108] preimplantation genetic testing ("PGT"),[109] and multifetal selective reduction.[110] While selective reduction is increasingly uncommon,[111]

During and After Consecutive Fertility Treatment Cycles, 20 HUM. REPROD. 2253, 2253 (2005).

106 *See* Judith Daar, *The Impact of Dobbs on Assisted Reproductive Technologies: Does It Matter Where Life Begins?*, HARV. L. PETRIE-FLOM CTR. BILL OF HEALTH (May 9, 2023), https://blog.petrieflom.law.harvard.edu/2023/05/09/the-impact-of-dobbs-on-assisted-reproductive-technologies-does-it-matter-where-life-begins/ [https://perma.cc/ZL6E-RUCH].

107 Embryo discard is one disposal option, among others, to discard unused embryos "[w]hen patients choose to end cryostorage for their embryos." Vinita M. Alexander, Joan K Riley & Emily S. Jungheim, *Recent Trends in Embryo Disposition Choices Made by Patients Following In Vitro Fertilization*, 37 J. ASSISTED REPROD. & GENETICS 2797, 2797–98 (2020). Patients direct health care providers and storage facilities to discard their embryos for a variety of reasons, such as the discovery of genetic anomalies or the achievement of their desired family size through prior successful IVF cycles. *See* Daar, *supra* note 106.

108 Embry cryopreservation is freezing your embryos for later use, even for extended periods of time. Lu Zhang, Li-Yang Yan, Xu Zhi, Jie Yan & Jie Qiao, *Female Fertility: Is It Safe to "Freeze?"*, 128 CHINESE MED. J. 390, 390 (2015) ("[Embryo] [c]ryopreservation . . . refers to freezing cells and tissues to sub-zero temperatures in order to stop all biological activity and preserve them for future use.").

109 PGT is the biopsy of an embryo to test for genetic disorders relevant to embryo health and viability. Firuza Rajesh Parikh et al., *Preimplantation Genetic Testing: Its Evolution, Where Are We Today?*, 11 J. HUM. REPROD. SCIS. 306, 306 (2018) ("[PGT] is an early form of prenatal genetic diagnosis where abnormal embryos are identified, and only genetically normal embryos are used for implantation.").

110 Multifetal pregnancy reduction is "a first-trimester or early second-trimester procedure for reducing the total number of fetuses in a multifetal pregnancy by one or more." AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 719: MULTIFETAL PREGNANCY REDUCTION 1 (2017). Because carrying multiples can be dangerous, "[t]he common tendency is to reduce from triplets or more fetuses to twins." CHIA-LING WU, MAKING MULTIPLE BABIES: ANTICIPATORY REGIMES OF ASSISTED REPRODUCTION 157 (2023).

111 This development can be attributed to both ethical questions concerning the procedure spurred by the "Octomom" controversy in 2009 and medical advances. *See* Deborah L. Forman, *When "Bad" Mothers Make Worse Law: A Critique of Legislative Limits on Embryo Transfer*, 14 U. PA. J.L. & SOC. CHANGE 273, 273–75 (2011) (discussing the Octomom's IVF implantation of 12 embryos that resulted in birthing octuplets and an investigation into her physician's conduct). The Octomom controversy led to "widespread debate among academics and the public about the current use of [ART] in our society." *Id.* The fallout led to relevant change, such as the ASRM offering recommendations on the number of embryos to transfer to avoid multifetal pregnancies. *See Guidance on the Limits to the Number of Embryos to Transfer: A Committee Opinion*, AM. SOC'Y FOR REPROD. MED. (Sept. 2021), https://www.asrm.org/practice-guidance/practice-committee-documents/guidance-on-the-limits-to-the-number-of-embryos-to-transfer-a—committee-opinion-2021/ [https://perma.cc/F6A6-QC9Q].

"the other three are routinely performed in IVF cycles."[112] Post *Dobbs*, all of these procedures have come into question in states that have criminalized abortion.[113]

There are several lawsuits challenging abortion restrictions by individuals seeking to utilize assisted reproductive technologies ("ART") without the risk of criminal prosecution in states that have criminalized abortion post-*Dobbs*.[114] Among other arguments, these suits assert that pre-viability criminal abortion bans are unconstitutionally vague and interfere with individuals' First Amendment religious freedom to procreate.[115] Whether these lawsuits will be successful should one reach

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[112] *See* Daar, *supra* note 106.

[113] *Id.* For example, in February 2024, the Alabama Supreme Court ruled that cryopreserved embryos are the legal equivalent to living "children" under the state's wrongful death statute "without exception based on developmental stage, physical location, or any other ancillary characteristics." *See* LePage v. Ctr. for Reprod. Med., P.C., Nos. SC-2022-0515, SC-2022-0579, 2024 WL 656591, at *4 (Ala. Feb. 16, 2024). Alabama's chief justice, concurring, cited Genesis and Christian thinkers to support the conclusion that the Alabama Constitution adopts a "theologically based view of the sanctity of life." *Id.* at *13 (Parker, C.J., concurring). While lawmakers scrambled to contain the fallout with a law reversing the decision, fertility clinics in Alabama paused treatment. Kim Chandler, *Alabama Lawmakers Advance Legislation to Protect IVF Providers, With Final Approval Still Ahead*, L.A. TIMES (Mar. 5, 2024), https://www.latimes.com/world-nation/story/2024-03-05/alabama-lawmakers-advance-legislation-to-protect-ivf-providers-with-final-approval-still-ahead [https://perma.cc/WP3M-MRQ4].

[114] *See Litigation Tracker*, *supra* note 8 (tracking state court abortion litigation that includes, among other things, lawsuits by parties seeking to utilize ART).

[115] For example, three Jewish women are challenging Kentucky's sweeping abortion ban, which bans abortion beginning at fertilization. Complaint at 2, 5, Sobel v. Cameron, No. 22-CI-005189 (Jefferson Cir. Ct. Oct. 6, 2022) (alleging several claims, including that the statutes are void for vagueness, (i.e., must they carry a nonviable embryo until they miscarry or pay for embryo storage indefinitely?) and unconstitutionally give preference to sectarian Christian beliefs about when life begins).

In Florida, the clergy members of five religions (Buddhists, Episcopalians, Jews, Unitarians, and United Church of Christ (UCC)) have challenged Florida's abortion ban, which criminalizes most abortions after 15 weeks, on the basis of freedom of speech, religious liberty, and separation of church and state. *E.g.*, Complaint, Hafner v. Florida, No. 2022-14270-CA-01 (Cir. Ct. 11th Jud. Dist. Aug. 1, 2022).

A similar lawsuit was successfully litigated in Indiana. Individual Members of Med. Licensing Bd. of Ind. v. Anonymous Plaintiff 1, 233 N.E.3d 416, 451 (Ind. Ct. App. 2024) (holding that "abortion when directed by [the Plaintiffs'] sincere religious beliefs is their exercise of religion" and is therefore a protected religious exercise under Indiana's Religious Freedom Restoration Act); *see also* Isabella Vomert, *Lawsuit Challenging Indiana Abortion Ban Survives a State Challenge*, AP NEWS (Apr. 4, 2024), https://apnews.com/article/indiana-appeals-court-religious-freedom-law-abortion-4da0cd6d585e69ede87bea2ee2da2896 [https://perma.cc/MK9B-LTW9].

the Supreme Court is open to debate; the Court has a record of protecting the religious rights of some groups and not others.[116]

As these lawsuits work their way through the courts, state lawmakers across the country are also attempting to legislatively exempt IVF or other ART procedures from criminal abortion bans,[117] with a few successes.[118] Efforts are also afoot to pass a national law exempting ART from state criminal abortion bans.[119] Although the legal status of IVF and other medical treatments for infertility remain highly uncertain, experts predict that "ART[] may be in a position to hold on to its sheltered status . . . ."[120]

As doctors await the outcome of legal challenges and legislative efforts, many fertility doctors have said that they will continue to provide these services, "even if the scope of what they can offer to patients is likely to be curtailed,"[121] but the legal uncertainty hangs like a cloud over the entire field of reproductive medicine.[122]

3. *Miscarriage*

Miscarriage[123] is a very common experience. Although statistics on pregnancy loss vary depending on how pregnancy is

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116 *See* Trump v. Hawaii, 585 U.S. 667 (2018) (upholding a Trump administration order denying entry to travelers from six majority-Muslim countries).

117 From 2010 to June 2022, states introduced "45 bills explicitly exempt[ing] IVF and assisted reproductive technologies." Erin Heidt-Forsythe, Nicole Kalaf-Hughes & Heather Silber Mohamed, *Roe Is Gone. How Will State Abortion Restrictions Affect IVF and More?*, WASH. POST (June 25, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/06/25/dodds-roe-ivf-infertility-embryos-egg-donation/ [https://perma.cc/AW3P-5BAL].

118 *See, e.g.*, LA. STAT. ANN. § 40:1061 (2022) (exempting "contraception" and IVF).

119 *See, e.g.*, Access to Family Building Act, S. 3612, 118th Cong. (2024) (prohibiting states from limiting access to assisted reproductive technology, and all medical care surrounding such technology).

120 *See* Eli Y. Adashi, Daniel P. O'Mahony & I. Glenn Cohen, *Assisted Reproduction Post-*Dobbs*: The Prospect of Legislative Protection*, 4 FERTILITY & STERILITY REPS. 128, 129 (2023).

121 *See* Abigail Tracy, *"This Is the Whole Point of the Movement" Doctors Fear IVF Will Be the Next Target in GOP's Abortion Crusade*, VANITY FAIR (Sept. 28, 2022), https://www.vanityfair.com/news/2022/09/doctors-ivf-abortion-bans [https://perma.cc/5YKW-FTUA].

122 As one Austin-based physician explained, "[i]t's definitely added a lot of anxiety and stress to my patients—to anybody who's trying to get pregnant, not just about what is gonna happen to the IVF process, but just fear if they are going to be able to have the . . . 'normal' complications of pregnancy managed appropriately." *Id.*

123 Medical experts define miscarriage as a pregnancy that ends naturally before twenty weeks' gestation. *Miscarriage*, NEW OXFORD AM. DICTIONARY (3d ed.

diagnosed,[124] researchers estimate that, of confirmed pregnancies, about 15% will end in miscarriage.[125] The prevalence of miscarriage is even greater when measured on a per-person basis; according to one recent very large study, nearly half of parous women have experienced at least one spontaneous first-trimester miscarriage.[126] These are conservative estimates; the actual incidence of miscarriage is almost certainly higher, since most miscarriages are managed at home.[127]

Certain identity and other characteristics increase the risk of pregnancy loss. Older individuals are at higher risk of miscarriage.[128] Black Americans also have a nearly two-fold higher risk of miscarriage compared with whites and a 93% greater hazard for a later miscarriage.[129] Other risks for miscarriage include obesity, prior history of miscarriage, certain health conditions (such as polycystic ovary disease, high blood pressure, and diabetes),[130] smoking and alcohol consumption

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2010). Most miscarriages occur in the first thirteen weeks; pregnancy losses after 20 weeks are considered stillbirths. *Id.*

124 Kessler, *supra* note 21, at 551 n.22.

125 Siobhan Quenby et al., *Miscarriage Matters: The Epidemiological, Physical, Psychological, and Economic Costs of Early Pregnancy Loss*, 397 LANCET 1658, 1658 (2021) ("The pooled risk of miscarriage is 15.3% . . . of all recognised pregnancies."); Lesley Regan & Raj Rai, *Epidemiology and the Medical Causes of Miscarriage*, 14 BAILLIÈRE'S CLINICAL OBSTETRICS & GYNAECOLOGY 839, 840 (2000) ("The incidence of clinically recognizable miscarriage in general population studies has been consistently reported as 12–15% . . . .").

126 Judy Slome Cohain, Rina E. Buxbaum & David Mankuta, *Spontaneous First Trimester Miscarriage Rates per Woman Among Parous Women with 1 or More Pregnancies of 24 Weeks or More*, 17 BMC PREGNANCY & CHILDBIRTH 437, 437 (2017) (finding, in a study of more than 50,000 women, that 43% reported having experienced one or more first-trimester spontaneous miscarriages); *see also* Regan & Rai, *supra* note 125, at 840 ("[O]ne in four of all women who become pregnant will experience pregnancy loss.").

127 *See* Quenby et al., *supra* note 125, at 1659. Underreporting is particularly common among non-white and low-income women who may be wary of "greater surveillance and regulation of their fertility and reproductive autonomy . . . ." Laura Lindberg & Rachel H. Scott, *Effect of ACASI on Reporting of Abortion and Other Pregnancy Outcomes in the U.S. National Survey of Family Growth*, 49 STUD. FAM. PLAN. 259, 269 (2018) (finding that abortion and miscarriage are underreported in the National Survey of Family Growth (NSFG), the premier survey of fertility behaviors in the United States conducted by the National Center for Health Statistics—especially by non-white and low-income women).

128 Lindberg & Scott, *supra* note 127, at 268.

129 Sudeshna Mukherjee, Digna R. Velez Edwards, Donna D. Baird, David A. Savitz & Katherine E. Hartmann, *Risk of Miscarriage Among Black Women and White Women in a US Prospective Cohort Study*, 177 AM. J. EPIDEMIOLOGY 1271, 1273, 1276 (2013).

130 Regan & Rai, *supra* note 125, at 842–45.

during pregnancy,[131] exposure to pollution and pesticides,[132] and certain working conditions, such as working night shifts and repeated heavy lifting.[133]

Despite the common experience of miscarriage, public perception differs substantially, perhaps because miscarriage is so shrouded in secrecy. According to a recent survey of more than one-thousand adults in the United States, 55% incorrectly believed miscarriage was "rare" (occurring in 5% of pregnancies or fewer).[134] Also contrary to popular understandings, miscarriage does not typically occur in a moment or an hour or even a day. Waiting for tissue to pass on its own without medical intervention can take weeks,[135] causing uncertainty and stress.[136] Moreover, this "expectant management" is unsuccessful in 20% of pregnancies, requiring surgery or medication to clear the uterus.[137] Some people who miscarry may develop an infection, bleed heavily, or have preexisting conditions such as anemia or blood-clotting disorders, requiring surgical uterine evacuation, sometimes urgently.[138]

Miscarriage also has potentially longer-term mental health impacts. A miscarriage may represent the loss of a desired future child. It is usually unexpected,[139] and the cause is often

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131 Quenby et al., *supra* note 125, at 1659.

132 *Id.*

133 *See Physical Job Demands – Reproductive Health*, CTRS. FOR DISEASE CONTROL & PREVENTION NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, https://www.cdc.gov/niosh/topics/repro/physicaldemands.html [https://perma.cc/WL65-YPF8] (last updated June 2, 2022) (warning that heavy lifting, standing for long periods of time, or bending a lot during pregnancy "could increase your chances of miscarriage, preterm birth, or injury during pregnancy"); Luise Moelenberg Begtrup et al., *Night Work and Miscarriage: A Danish Nationwide Register-Based Cohort Study*, 76 OCCUPATIONAL & ENV'T MED. 302, 302 (2019) (finding in a study of 22,744 pregnant women, those who had worked two or more night shifts during the previous week had a 32% increased risk of miscarriage compared with women who did not work nights).

134 Jonah Bardos, Daniel Hercz, Jenna Friedenthal, Stacey A. Missmer & Zev Williams, *A National Survey on Public Perceptions of Miscarriage*, 125 OBSTETRICS & GYNECOLOGY 1313, 1313 (2015). Additionally, "[t]his misperception was more common among men; the odds of men reporting that miscarriages are uncommon was 2.5 . . . that of women." *Id.* at 1315.

135 Am. Coll. of Obstetricians and Gynecologists, *Clinical Practice Bulletin No. 200: Early Pregnancy Loss*, 132 OBSTETRICS & GYNECOLOGY e197, e199 (2018) [hereinafter ACOG, *Clinical Management Guidelines for Early Pregnancy Loss*] (stating expulsion can take up to eight weeks).

136 *Id.* at e198 (discussing "patient anxiety").

137 *Id.* at e199.

138 *Id.* at e201.

139 Iris M. Engelhard, *Miscarriage as a Traumatic Event*, 47 CLINICAL OBSTETRICS & GYNECOLOGY 547, 547 (2004).

unclear,[140] as the biological mechanisms explaining miscarriage are not well-understood. Thus, individuals who experience miscarriage are often left without answers to why a pregnancy failed, and this lack of information may threaten a person's "sense of . . . control and trust in [their] procreative ability."[141]

A miscarriage is often a traumatic event. It "may involve considerable [physical] pain, potentially disturbing images of blood and tissue, . . . hospitalization, and surgery."[142] Sometimes, a surgery is required to clear the uterus.[143] After a miscarriage, a period of intense emotional distress follows, typically for six to eight weeks.[144] Symptoms of grief may be impossible to distinguish from depression, and some people who miscarry may continue to experience depressive symptoms for months or years.[145] Individuals without partners, who lack social support, who have a history of mental illness, who have no children, or who have experienced previous miscarriages are at a greater risk of severe psychological distress.[146] Those who conceive through assisted reproduction are also more likely to experience depression and anxiety following a pregnancy loss.[147] Contrary to popular belief, a subsequent pregnancy after a miscarriage is not a protective factor against depression or anxiety,[148] and mood symptoms following a miscarriage do not always resolve with the birth of a subsequent healthy child.[149]

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[140] Julia Frost, Harriet Bradley, Ruth Levitas, Lindsay Smith & Jo Garcia, *The Loss of Possibility: Scientisation of Death and the Special Case of Early Miscarriage*, 29 SOCIO. HEALTH & ILLNESS 1003, 1004 (2007) (discussing the limited medical knowledge about the causes of early pregnancy loss); Regan & Rai, *supra* note 125, at 849.

[141] Engelhard, *supra* note 139, at 547.

[142] *Id.*

[143] *See* ACOG, *Clinical Management Guidelines for Early Pregnancy Loss*, *supra* note 135, at e203.

[144] *See* Johnna Nynas, Puneet Narang, Murali K. Kolikonda & Steven Lippmann, *Depression and Anxiety Following Early Pregnancy Loss: Recommendations for Primary Care Providers*, *in* 17 PRIMARY CARE COMPANION FOR CNS DISORDERS 1, 2 (2015).

[145] *Id.* at 2–3. Studies show that, after suffering a miscarriage, about two-thirds of women report that they are still upset two years after the event and that the experience affected their decisions about subsequent pregnancies. *Id.* at 5.

[146] Olga BA van den Akker, *The Psychological and Social Consequences of Miscarriage*, 6 EXPERT REV. OBSTETRICS & GYNECOLOGY 1, 4 (2011).

[147] CS Cheung, CH Chan & EH Ng, *Stress and Anxiety-Depression Levels Following First-Trimester Miscarriage: A Comparison Between Women Who Conceived Naturally and Women Who Conceived with Assisted Reproduction*, 120 BJOG: INT'L J. OBSTETRICS & GYNAECOLOGY 1090, 1096 (2013).

[148] van den Akker, *supra* note 146, at 6.

[149] *Id.*

Further, research shows that miscarriage can have emotional impacts on individuals well beyond the person who experiences physical pregnancy loss. For example, studies have found that when a pregnancy is desired, non-pregnant partners grieve over a miscarriage more than once thought. According to a study of eighty-three miscarrying women and their male partners, "a significant proportion of men demonstrated psychological distress after miscarriage."[150] Miscarriage also represents a significant loss for intended parents utilizing assisted reproductive technologies, whether or not their role is that of a gestational parent. Those seeking to access procreation through surrogacy, in particular, face an array of logistical, emotional, legal, and financial obstacles.[151] In sum, the emotional experience of pregnancy loss spans many reproductive contexts and is not limited to miscarriage's physical aspects.

4. *The Blurry Lines Between Abortion, Infertility, and Miscarriage*

As legal and medical experts have highlighted, the phenomena we understand as menstruation, conception, pregnancy, childbirth, lactation, miscarriage, infertility, and abortion, are contested and unstable categories in medicine, law, and society. If a fertilized egg fails to implant in a person's uterus and grow, it is counted as a miscarriage if hCG levels are used to detect the "pregnancy loss"; but this event is just a period if visualization through ultrasound is the method of diagnosis.[152] Along the same lines, menstruation is commonly thought to be a discrete phenomenon. Yet, menstruation overlaps significantly with infertility and miscarriage, since menstrual conditions are the primary causes of infertility and early miscarriages can be experienced as late or unusually heavy periods.[153] At the other end of a person's reproductive life, the line between fertility and menopause is not bright either, with

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[150] GWS Kong, TKH Chung, BPY Lai & IH Lok, *Gender Comparison of Psychological Reaction After Miscarriage—A 1-Year Longitudinal Study*, 117 BJOG: INT'L J. OBSTETRICS & GYNAECOLOGY 1211, 1211 (2010).

[151] CHRISTA CRAVEN, REPRODUCTIVE LOSSES: CHALLENGES TO LGBTQ FAMILY-MAKING 74–75 (2019) (discussing emotional losses experienced by intended LGBTQ parents after a failed pregnancy).

[152] *See* Kessler, *supra* note 21, at 551 n.22.

[153] *See* Marcy L. Karin et al, Comment Letter on Proposed Rule to Implement the Pregnant Workers Fairness Act (Oct. 12, 2023), https://www.regulations.gov/comment/EEOC-2023-0004-98178 [https://perma.cc/7KLP-P8NB].

common perimenopausal symptoms such as insomnia, hot flashes, brain fog, and unpredictable spotting or heavy bleeding[154] lasting for four or more years before the arbitrarily defined medical event we call menopause, defined as "a full year since [the] last period."[155] Moreover, all of these experiences are socially constructed. To one person, engorged and leaking breasts after giving birth may be a painful and embarrassing problem to be solved; to another, the welcome commencement of nursing a child. Reproductive experiences defy neat categorization.

The law, both because it changes over time and is differentially applied, also contributes to these blurred boundaries. For example, under fetal harm legislation, pregnant women have been charged with abortion-related crimes in cases when they have experienced pregnancy loss, physical trauma, declined medical advice, or used drugs in pregnancy.[156] A medical and legal environment in which people may be criminalized for pregnancy loss, pregnancy complications, or exercising their rights to make informed decisions about their own medical care and bodies can leave some reluctant to seek needed care and vulnerable to legal harm through the criminal law. As this Article argues, it may also leave them unprotected by employment discrimination laws.[157] The shame, stigma, and silence surrounding women's reproduction has massively distorted how workers' reproductive experiences are regarded in federal employment laws. As the next subpart shows, the major federal employment laws in the United States that would seem to protect employees from sex, pregnancy, and disability discrimination, have historically provided flimsy protections for common reproductive-health conditions and life events.

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154 *See* Waldman, Cahn & Crawford, *supra* note 38, at 9, 23, 45.

155 *Menopause Basics*, U.S. Dep't Of Health & Hum. Servs. Off. On Women's Health (Mar. 18, 2019), https://www.womenshealth.gov/menopause/menopause-basics [https://perma.cc/TG8S-FX7X] (defining "perimenopause").

156 *See* Goodwin, *supra* note 39; Wendy A. Bach, Prosecuting Poverty, Criminalizing Care 85, 98 n.1 (2022); *see also infra* note 271 and accompanying discussion.

157 Perhaps the most useful way of thinking about these blurred lines is that all reproductive experiences, to greater or lesser extent are shrouded in secrecy, shame, and stigma, especially those predominantly experienced by people who identify as women. Indeed, as some have argued, it is this shame that creates the category "woman" itself.

B. Federal Employment Discrimination Law and Reproduction: The Legal Landscape

Several different federal laws protect workers from discrimination related to their reproductive capacity or status, including the PDA, ADA, PWFA, and FMLA.[158] This subpart briefly summarizes the protections afforded by each of these federal statutes to pregnant and potentially pregnant workers, highlighting their scope and relevance to common reproductive experiences. I also discuss how federal courts have undermined the protective scope of these statutes through judicial interpretation.

1. *The Pregnancy Discrimination Act*

Until the recent passage of the PWFA, the statute that was most directly relevant to the issues surrounding reproduction and work was the PDA. The PDA prevents discrimination on the basis of "pregnancy, childbirth, or related medical conditions."[159] The PDA forbids discrimination based on current, past, or potential pregnancy when it comes to any aspect of employment, including hiring, firing, forced leave, pay, job assignments, promotions, layoffs, training, fringe benefits (such as leave and health insurance) and any other term or condition of employment.[160] The PDA also addresses harassment based on pregnancy and bans retaliation against workers for making complaints about pregnancy discrimination.[161] Facially neutral policies that fall more harshly on pregnant workers and cannot be justified by business necessity may also be vulnerable to disparate impact challenges under the PDA.[162] Courts have construed the words "related medical conditions" in the PDA to include abortion,[163] infertility,[164] pregnancy-related

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158 *See supra* notes 47–50.

159 Pregnancy Discrimination Act of 1978, Pub. L. No. 95–555, 92 Stat. 2076.

160 U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance on Pregnancy Discrimination & Related Issues, No. 915.003 (June 25, 2015) [hereinafter EEOC Enforcement Guidance on Pregnancy Discrimination].

161 *Id.*

162 Joanna Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims After* Young v. United Parcel Service, Inc., 14 Harv. L. & Pol'y Rev. 319, 342–44 (2020) (discussing the disparate impact theory as an underutilized framework to address failure-to-accommodate pregnancy discrimination).

163 *See, e.g.*, Ducharme v. Crescent City Déjà Vu, L.L.C., 406 F. Supp. 3d 548, 556 (E.D. La. 2019) (holding that "Title VII as amended by the [PDA] extends to abortions," because any "woman terminated from employment because she had an abortion was terminated because she was affected by pregnancy").

164 *See* Hall v. Nalco, Co., 534 F.3d 644, 649 (7th Cir. 2008); Ingarra v. Ross Educ., LLC, No. 13-cv-10882, 2014 WL 688185, at *5 (E.D. Mich. Feb. 21, 2014);

medical complications,[165] delivery,[166] postpartum conditions,[167] and lactation, among other conditions.[168] Employers with fifteen employees or more are covered by the provisions provided in the PDA.[169]

In its operation, the PDA works in two ways. First, the PDA prohibits employers from taking an adverse employment action against employees because of pregnancy, childbirth, or related medical conditions who are capable of performing their job duties without any accommodations.[170] In this sense, the PDA can be understood as a simple nondiscrimination mandate. The PDA's nondiscrimination mandate is derived from the first clause of the PDA, which adds pregnancy to the list of categories protected from discrimination under Title VII of the Civil Rights Act of 1964,[171] declaring that "[t]he 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."[172] The legislative history of the PDA reveals that this right to nondiscrimination was a "central thrust of the PDA,"[173] as the statute was aimed at altering assumptions

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Govori v. Goat Fifty, L.L.C., No. 10 Civ. 8982, 2011 WL 1197942, at *3 (S.D.N.Y. Mar. 30, 2011).

165 *See, e.g.*, Hernandez v. Clearwater Transp., Ltd., 550 F. Supp. 3d 405, 410, 415–18 (W.D. Tex. 2021) (denying summary judgment on plaintiff's PDA claim where the worker was terminated shortly after being diagnosed with hyperemesis gravidarum and requesting accommodations for this pregnancy-induced medical complication).

166 *See, e.g.*, Neessen v. Arona Corp., 708 F. Supp. 2d 841, 851 (N.D. Iowa 2010).

167 *See, e.g.*, Hollstein v. Caleel & Hayden, LLC, No. 11-CV-00605-CMA-BNB, 2012 WL 4050302, at *4 n.4 (D. Colo. Sept. 14, 2012) (noting that the "PDA prohibits employers from discriminating against employees on the basis of conditions related to pregnancy that occur after the actual pregnancy").

168 *See, e.g.*, Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1259 (11th Cir. 2017) (recognizing lactation as a "related medical condition" that is "covered under the PDA").

169 *Id.*; 42 U.S.C. § 2000e(b).

170 U.S. Equal Emp. Opportunity Comm'n, Fact Sheet: Pregnancy Discrimination (Jan. 15, 1997), https://www.eeoc.gov/eeoc/publications/fs-preg.cfm [https://perma.cc/9Q8T-89K6].

171 Title VII is the primary federal statute addressing discrimination in the workplace. It makes it unlawful to discriminate "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

172 42 U.S.C. § 2000e(k).

173 *See* Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 Yale J.L. & Feminism 15, 26 (2009).

about pregnant women's incapacity and giving women workers a right not be pushed out of work merely due to a pregnancy.[174]

Second, the PDA requires employers to treat pregnancy, childbirth, and related medical conditions as they do other temporary disabilities.[175] This provision can be conceptualized as an equal accommodation mandate; employers must treat pregnancy as they do temporary impairments attributable to causes unrelated to pregnancy.[176] The PDA's equal accommodation requirement is derived from the statute's second clause requiring that "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."[177] As construed by the courts, the second clause of the PDA giving pregnant workers a right to equal accommodation has not turned out to be particularly robust. Courts have struggled to decide which workers not affected by pregnancy are similarly situated to the plaintiff, with many courts approaching pregnant workers' accommodation claims with a high degree of skepticism.[178]

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174 *Id.* at 26–27.

175 42 U.S.C. § 2000e(k).

176 *Id.*

177 *Id.*

178 Much scholarship has addressed the reasons for this, but to summarize briefly here: In the 1990s, as more non-pregnant workers received workplace accommodations under the ADA (especially in jobs involving physical labor), lower federal courts started distinguishing implicitly deserving workers with accommodations due to on-the-job injuries and implicitly undeserving pregnant workers seeking accommodations due to their off-the-job life choices. *See* Bornstein, *supra* note 22, at 312–13; Grossman, *supra* note 22, at 852; Shinall, *supra* note 22, at 775–76; Siegel, *supra* note 22, at 983–84; Widiss, *supra* note 22, at 1428; Williams, Devaux, Fuschetti & Salmon, *supra* note 22, at 107. According to the logic of these decisions, a pregnancy-related temporary disability is in a class of its own, in effect, a disfavored disability, even though the text of the PDA and its legislative history suggest that the reason for a pregnant worker's temporary disability is irrelevant to their right to be treated the same as nonpregnant workers similar in their ability or inability to work. *See* Siegel, *supra* note 22, at 981 (discussing the statute's plain language which focuses on a pregnant worker's "functional ability to perform the job" in comparison to other non-pregnant workers); Grossman, *supra* note 24, at 36 (noting that the second clause of the PDA expressly focuses on the extent of a worker's capacity, not the location where the capacity arose).

The Supreme Court attempted to correct lower courts' misreading of the PDA in *Young v. United Parcel Service, Inc.*, 575 U.S. 206 (2015), which held that a plaintiff denied workplace accommodations for pregnancy may prove pretext (i.e., pregnancy discrimination) by "providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden . . . ." *Id.* at 229. However, analysis of decisions post-*Young* reveals that

Further, the PDA does not affirmatively require that an employer reasonably accommodate a pregnant worker; it is merely a comparative right.[179]

Pregnant workers' lack of access to reasonable accommodations due to narrow judicial constructions of the PDA's equal accommodation requirement and the absence of any absolute right to accommodation have had negative health and economic effects on pregnant workers and their families. The most acute effects are felt by women in low-wage, inflexible, and physically-demanding jobs (disproportionately Black and Latina women) who "are routinely fired or forced out on unpaid leave—or are forced to risk their health—instead of being granted a temporary, reasonable accommodation that would allow them to keep working and maintain a healthy pregnancy."[180]

There are many cases where courts have found that employers are not required to accommodate temporary impairments related to reproduction and pregnancy under the PDA. For example, when pregnant workers are prescribed bed rest due to pregnancy complications, courts often find that the plaintiff's inability to do her job constitutes a legitimate reason for termination.[181] Workers who experience discrimination due to the mental-health consequences of pregnancy, such as postpartum depression, often face challenges when they bring their cases to

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the Court's attempt at a course correction still set the bar too high; *Young* ultimately did not restore the PDA to its intended scope. *See* Kessler, *supra* note 21, at 566–68 (reviewing cases showing that *Young* had mixed consequences for temporarily disabled pregnant workers seeking the same workplace accommodations as non-pregnant disabled workers; post*Young*, lower courts continued to rely on the "on-the-job/off-the-job" distinction as a legal justification for employers' refusal to accommodate pregnancy); Grossman & Thomas, *supra* note 162, at 331 (explaining that while *Young* has had a positive impact on the margins, "courts continue to impose burdens on PDA plaintiffs not intended by *Young*"); DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT 5 (Marcella Kocolatos ed. 2019) (finding that in the three years after *Young*, courts ruled in two-thirds of the cases that the employer was not required to provide the requested accommodation).

179 *See* Grossman & Thomas, *supra* note 173, at 18.

180 *Joint Hearing: Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing on H.R. 1065 Before the H. Comm. on Educ. and Lab.'s Subcomm. on Workforce Protections and Subcomm. on C.R. and Hum. Servs.*, 117th Cong. 3 (2021) (statement of Dina Bakst, J.D., Co-Founder and Co-President, A Better Balance), http://docs.house.gov/meetings/ED/ED07/20210318/111340/HHRG-117-ED07-Wstate-BakstJDD-20210318.pdf [https://perma.cc/S426-9P4P].

181 *See, e.g.*, Appel v. Inspire Pharms., Inc., 428 F. App'x 279, 282 (5th Cir. 2011) (affirming summary judgment for the employer who terminated employee when she went on bed rest, as the plaintiff "was incapable of performing her job functions because of medical complications specific to her pregnancy").

court, facing an uphill battle to convince judges that they are suffering from a medical condition related to pregnancy and to identify appropriate comparators.[182] Even modest accommodations such as additional bathroom breaks, permission to carry a water bottle at work, being allowed to sit rather than stand, and lighter physical lifting limits that could permit pregnant workers to stay on the job during pregnancy have been denied to pregnant workers under the PDA.[183] The PDA has also, by and large, been similarly unhelpful to workers experiencing infertility. For example, excluding fertility treatment from an employer-sponsored health insurance plan is not sex discrimination under the PDA in some federal circuits; these courts reason that infertility is a gender-neutral condition that applies to both men and women.[184] The PDA has also generally been unprotective of employees who need time off work or other accommodations when undergoing medical treatment for infertility. Courts have generally found that employers have no duty under the PDA to accommodate employees who need time off from work for IVF treatment.[185]

2. *The Americans with Disabilities Act*

The ADA is also relevant to workers who may be temporarily impaired due to pregnancy or other reproductive-health experiences, although it too has some significant limitations in this context. The ADA mandates both nondiscrimination and reasonable accommodations for employees with disabilities.[186] Under the ADA, uncomplicated pregnancy is excluded

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182 *See, e.g.*, Hollstein v. Caleel & Hayden, LLC, No. 11-CV-00605, 2012 WL 4050302, at *1, *4 (D. Colo. Sept. 14, 2012) (finding that the plaintiff did not prove she was suffering from postpartum depression, because she did not specifically refer to postpartum depression when she told her employer that she was "not mentally ready" to resume work-related travel).

183 *See* Bakst, Gedmark & Brafman, *supra* note 178, at 8, 14–16 (discussing and cataloging cases).

184 *See, e.g.*, Saks v. Franklin Covey Co., 316 F.3d 337, 345–46 (2d Cir. 2003) ("[R]eproductive capacity is common to both men and women," but "for a condition to fall within the PDA's inclusion of 'pregnancy . . . and related medical conditions' as sex-based characteristics, that condition must be unique to women.").

185 *See generally* Jeanne Hayes, Note, *Female Infertility in the Workplace: Understanding the Scope of the Pregnancy Discrimination Act*, 42 Conn. L. Rev. 1299, 1299 (2010). Hayes's article was written prior to the *Young* decision, discussed *supra* note 178. Post*Young*, depending on the facts, employers might have been required by the PDA to provide time-off for IVF treatment if they allowed flexibility in scheduling or time off work for other conditions.

186 42 U.S.C. §§ 12101–12213. Congress passed the ADA in 1990 "[t]o establish a clear and comprehensive prohibition of discrimination on the basis of disability." Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

from coverage.[187] However, a pregnancy-related impairment that substantially limits a major life activity is a disability for which an employer may be required to provide reasonable accommodations.[188] As with the PDA, narrow judicial interpretations of this standard have left workers with temporary or less serious pregnancy-related impairments, and who need accommodations, without legal recourse.

After a series of Supreme Court cases narrowing the ADA's definition of disability, Congress passed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") with the purpose of "restor[ing] the intent and protections of the Americans with Disabilities Act of 1990."[189] The ADAAA clarified that "the definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[190] Of particular relevance to pregnancy and potential pregnancy, an impairment is not categorically excluded from being a disability simply because it is temporary under the ADAAA.[191]

The EEOC sought to faithfully implement the ADAAA's expansive view of disability. For example, the EEOC's guidance on the statute states that "[i]mpairments that last only for a short period of time [i.e., less than six months] . . . may be covered if sufficiently severe."[192] Moreover, while acknowledging

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[187] 29 C.F.R. pt. 1630, App'x § 1630.2(h) ("[C]onditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition.").

[188] *Id.*

[189] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified throughout 42 U.S.C. Ch. 126).

[190] *Id.* § 3. The ADAAA also expanded the intended scope of disability stating,

> C) [a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability[;] (D) [a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active[; and] (E)(i) [t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . . .

Id.

[191] Summers v. Altarum Inst., Corp., 740 F.3d 325, 333 (4th Cir. 2014). Also, of relevance to pregnancy was the ADAAA's inclusion of lifting and reproduction as a major life activity. *See* Porter, *supra* note 22, at 79 n.46. As Porter explains, "[p]rior to the ADAAA, the statute itself did not define major life activities; instead, the EEOC had provided a fairly narrow definition." *Id.*

[192] 29 C.F.R. § 1630, App. (interpreting 29 C.F.R. § 1630.2(j)(1)(ix)).

that pregnancy per se is not a disability under the ADAAA,[193] the agency, in a post-ADAAA enforcement guidance on pregnancy discrimination, made clear that "some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended."[194] Yet, federal judges have refused to apply the ADAAA's broad definition of disability to common pregnancy-related impairments,[195] reasoning that pregnancy is not the result of a physiological disorder[196] or that its complications have only a temporary effect.[197]

For example, in *Love v. First Transit*,[198] the plaintiff's case did not survive summary judgment because she was unable to show she suffered pregnancy complications that imposed a substantial limit on her major life activities.[199] The plaintiff, a customer service representative at a call center,[200] had been dismissed from her job after missing just part of one day of work due to a miscarriage.[201] The court reasoned that her impairment, even though it required hospitalization, was too fleeting to qualify as a disability.[202] Similarly, in *Adirieje v. ResCare, Inc.*,[203] the court found that a month of intermittent cramping and a subsequent miscarriage did not qualify as a disability under the ADA.[204] Courts have also held that pregnant workers

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193 29 C.F.R. § 1630, App. (interpreting § 1630.2(h)) (Pregnancy is "not the result of a physiological disorder," and is therefore "not [an] impairment[].").

194 *See* EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION, *supra* note 160.

195 *See, e.g.*, Wanamaker v. Westport Bd. of Educ., 899 F. Supp. 2d 193, 211 (D. Conn. 2012) (citing to EEOC guidance that short term impairments must be "sufficiently severe" for the proposition that pregnancy-related conditions are only ADAAA-qualifying in rare cases).

196 Widiss, *supra* note 22, at 1434; Williams, Devaux, Fuschetti & Salmon, *supra* note 22, at 141. *But see* Porter, *supra* note 22, at 84–92 (presenting a more optimistic view of the ADAAA's impact on ADA pregnancy accommodation cases, at least where plaintiffs could secure good lawyers familiar with the ADA).

197 Mary Ziegler, *Choice at Work:* Young v. United Parcel Service*, Pregnancy Discrimination, and Reproductive Liberty*, 93 DENV. L. REV. 219, 269 (2015) (citing Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 554 (7th Cir. 2011)).

198 No. 16-cv-2208, 2017 WL 1022191 (N.D. Ill. Mar. 16, 2017).

199 *Id.* at *6.

200 *Id.* at *1.

201 *Id.*

202 *Id.* Specifically, the judge reasoned that an impairment lasting less than a day cannot qualify as a "substantial limit" on major life activities, and that pregnancy "on its own" is never a disability under the EEOC's post-ADAAA enforcement guidance. *Id.* at *4–6.

203 No. 1:18-cv-01429-TWP-DLP, 2019 WL 4750037 (S.D. Ind. Sept. 30, 2019).

204 *Id.* at *7–9 (determining that even if the plaintiff's cramps and miscarriage were "a pregnancy related complication," there was "no evidence that her cramps

prescribed short-term bed rest due to pregnancy complications are not disabled under the ADAAA.[205] Nor have claims arising from pregnancy-related depression fared very well, such as depression after a miscarriage and postpartum depression (which are common),[206] unless the depression is severe and long-lasting.[207] All too often, courts deciding whether the ADA covers pregnancy-related impairments after the ADAAA amendments just ignore the amendments.[208]

3. *Pregnant Workers Fairness Act*

To address the limitations of the PDA and ADA, in 2022, Congress passed the Pregnant Workers Fairness Act (PWFA).[209] The PWFA was the result of more than a decade of advocacy by women's and workers' rights organizations.[210] Effective

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limited her ability to work or other major life activities," her miscarriage resulted in only about six hours of hospitalization, and "[s]he was released to return to work without any restrictions three days after the hospital visit").

205 *See, e.g.*, Alger v. Prime Rest. Mgmt., LLC, No. 1:15-cv-567-WSD, 2016 WL 3741984, at *1–2, *8 (N.D. Ga. July 13, 2016) (holding that a pregnant bartender with "severe" pregnancy complications and who experienced bleeding at work, which necessitated two weeks of bed rest, and who was subsequently transferred and then fired, was not a person with a disability under the ADA).

206 *See, e.g.*, Seibert v. Lutron Elecs., 408 F. App'x 605, 608 (3d Cir. 2010) (continuing to cite pre-ADAAA precedents excluding temporary or situational depression from the Act's protections in reaching the conclusion that plaintiff's depression, induced by delivering premature twins two months early, was not a disability within the meaning of the ADA).

207 *See, e.g.*, Hostettler v. Coll. of Wooster, 895 F.3d 844, 850, 854 (6th Cir. 2018) (determining that the plaintiff was disabled under the ADA despite some of her symptoms of her "severe postpartum depression" being episodic because "when [plaintiff] was experiencing her depression and anxiety she was substantially limited in her ability to care for herself, sleep, walk, or speak, among others" and because the plaintiff was experiencing postpartum panic attacks, "during which she would have difficulty breathing, thinking, and even walking.").

208 *See, e.g.*, Mayer v. Pro. Ambulance, LLC, 211 F. Supp. 3d 408, 420 (D.R.I. 2016) (summarizing pre- and post-ADAAA case law without distinguishing any difference between the two, explaining that "courts have generally held that normal pregnancy and post-pregnancy do not qualify as a disability."). Although, more recently, more courts seem to have finally received the memo. *See, e.g.*, Donnelly v. Cap. Vision Servs., LP, No. 20-4189, 2021 WL 3367271, at *4 (E.D. Pa. Aug. 2, 2021) (stating that the ADAAA "has shifted the doctrinal environment" on temporary impairments related to pregnancy). For a discussion of the lag time between statutory overrides and judicial recognition of such overrides, *see* Brian J. Broughman & Deborah A. Widiss, *After the Override: An Empirical Analysis of Shadow Precedent*, 46 J. LEGAL STUD. 51 (2017).

209 Consolidated Appropriations Act of 2023, H.R. 2617, 117th Cong., Div. II, §§ 101–109. The Act was passed as part of an omnibus spending bill.

210 *See* Kessler, *supra* note 21, at 605; *see also* Deborah A. Widiss, *Pregnant Workers Fairness Acts: Advancing a Progressive Policy in Both Red and Blue America*,

June 27, 2023, and modeled on the Americans with Disabilities Act (ADA),[211] the PWFA requires employers covered by Title VII to provide "reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee . . . unless . . . the accommodation would impose an undue hardship on the operation" of the employer.[212] A qualified employee under the PWFA is "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position."[213] The PWFA's definition of a "qualified employee" deviates from the ADA's in that the temporary inability to perform essential functions due to pregnancy, childbirth, or related medical conditions does not render a worker "unqualified."[214] Moreover, an employer cannot require a

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22 NEV. L.J. 1131, 1143–56 (2022) (reflecting on the ten-plus-year leadup to the passage of the federal PWFA, including the momentum created by state PWFAs).

[211] H.R. REP. NO. 117-27, at 11 (2021) ("Although workers in need of pregnancy-related accommodations may be able to seek recourse under the [PDA and ADA], varying interpretations have created an unworkable legal framework.").

[212] Pregnant Workers Fairness Act, Pub. L. No. 117-328 § 103(1), 136 Stat. 6085 (2022).

[213] *Id.* § 102(6). Specifically, the PWFA makes it an unlawful employment practice to, among other things: (1) fail to "make reasonable accommodations to the known limitations" of such employees unless the accommodation "would impose an undue hardship" on an entity's business operation; (2) "require a qualified employee affected by [such condition] to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;" (3) deny employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee; (4) require such employees to take paid or unpaid leave "if another reasonable accommodation can be provided;" or (5) "take adverse action in terms, conditions, or privileges of employment against a qualified employee . . . requesting or using" such reasonable accommodations. *Id.* § 103.

[214] 42 U.S.C. § 2000gg(6). Specifically, the definitions section of the PWFA states that "an employee or applicant shall be considered qualified if – (A) any inability to perform an essential function is for a temporary period; (B) the essential function could be performed in the near future; and (C) the inability to perform the essential function can be reasonably accommodated." *Id.* Relief from an essential job function is only required, however, if it is temporary. *Id.*

The terms "temporary," "in the near future," and "can be reasonably accommodated" are not defined in the PWFA, but the EEOC's rule implementing the PWFA defines the term "temporary" as "lasting for a limited time, not permanent, and may extend beyond 'in the near future'." *See* 29 C.F.R. § 1636.3(f)(2)(i). For a current pregnancy, "in the near future" generally means forty weeks. *Id.* at § 1636.3(f)(2)(ii). Finally, whether a condition "can be reasonably accommodated" may vary; the employer may need to consider more than one alternative to identify a reasonable accommodation that does not pose an undue hardship, such as modifying or suspending essential functions that an employee temporarily cannot perform, temporarily transferring or assigning the employee to a different job or to a light or modified duty program, and part-time or modified work schedules, just to name a few examples. *Id.* at §§ 1636.3(h)–(i); *see also* 29 C.F.R. part 1636, app. § 1636.4(d) ¶ 33.

qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation besides leave can be provided that would allow them to keep working.[215] Importantly, the PDA's definition of "known limitations" is broader than the ADA's definition of disability; a condition can qualify "whether or not such condition meets the definition of disability specified in [the ADA]."[216]

The PWFA incorporates the ADA's definitions for "reasonable accommodation,"[217] which may be as minor as having permission to carry a bottle of water, take extra bathroom breaks, or sit on a stool, running all the way to "job restructuring, part-time or modified work schedules, reassignment to a vacant position, [and] . . . appropriate . . . modification[] of . . . policies."[218] The EEOC rule implementing the PWFA provides an extensive, non-exclusive list of potential accommodations and also makes it clear that leave can be a required accommodation if it is the best or only reasonable accommodation in light of the pregnancy-related limitation and the job.[219]

The passage of the PWFA is a really big deal for pregnant and potentially pregnant workers. Assuming that courts do not find ways to undermine the new law,[220] the PWFA should resolve the lack of any affirmative right to pregnancy accommodations in the PDA and ADA, which was further exacerbated by narrow judicial interpretations of these statutes.[221] The PWFA makes it crystal clear that employers are obligated to provide reasonable accommodations for pregnancy, childbirth, and related conditions.

4. *The Family and Medical Leave Act*

Congress passed the FMLA in 1993 in order to guarantee employees job-protected leave for certain family and medical leave reasons, including pregnancy, childbirth, personal or

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215 42 U.S.C. § 2000gg-1(4).

216 42 U.S.C. § 2000gg(4).

217 42 U.S.C. § 2000gg(7).

218 42 U.S.C. § 12111(9).

219 29 C.F.R. § 1636.3(i). For an article explaining the PWFA's statutory mandate in detail, including how it differs in important ways from other discrimination statutes, see Deborah A. Widiss, *The Federal Pregnant Workers Fairness Act: Statutory Requirements, Regulations, and Need (Especially in Post-*Dobbs *America)*, 27 Emp. Rts. & Emp. Pol'y J. 84 (2024).

220 *See infra* subpart III.A.

221 *See supra* sections I.B.1–2.

family illness, adoption, and others.[222] Employers with more than fifty employees are bound by the Act.[223] The Act provides a baseline of twelve weeks of unpaid leave for qualified reasons per twelve-month period.[224] The FMLA does not provide bereavement leave.[225]

In order to obtain FMLA leave for illness, an employee must have a "serious health condition."[226] A serious health condition is defined by the statute and relevant Department of Labor (DOL) regulations as an illness, injury, or impairment that requires inpatient care or continuing treatment by a healthcare provider.[227] "Any period of incapacity due to pregnancy, or for prenatal care" also constitutes a serious health condition.[228] Another DOL regulation on leave for pregnancy or birth clarifies that "[a]n expectant mother may take FMLA leave before the birth of the child . . . if her condition makes her unable to work."[229]

The legislative history of the FMLA shows that Congress intended leave to be available to workers who experience reproductive-health conditions.[230] Yet, workers who experience common reproductive-health conditions such as a miscarriage, high-risk pregnancies requiring bed rest, infertility,[231] or pregnancy related depression,[232] are not consistently protected by

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222 29 U.S.C. § 2612(a)(1) ("[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter[;] . . . [b]ecause of the placement of a son or daughter with the employee for adoption or foster care[;] [i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition[;] . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee[;] . . . [b]ecause of any qualifying exigency . . . arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty . . . in the Armed Forces.").

223 § 2611(4)(A)(i).

224 § 2612(a)(1).

225 Legislation has been introduced to change this. *See* Sarah Grace-Farley-Kluger Act, S. 2935, 117th Cong. (2021).

226 § 2612(a)(1)(D).

227 § 2611(11); 29 C.F.R. § 825.113(a).

228 § 825.115(b).

229 § 825.120(a)(4).

230 *See* Kessler, *supra* note 21, at 577 (discussing legislative history).

231 *See, e.g.*, Victoriana v. Internal Med. Clinic of Tangipahoa, No. 15-2915, 2016 WL 5404653, at *3 (E.D. La. Sept. 28, 2016) (finding plaintiff not entitled to FMLA leave because course of IVF treatments did not cause incapacity for more than three consecutive days).

232 Kessler, *supra* note 21, at 583 n.228 (discussing cases).

the statute, as courts are reticent to find that these conditions qualify as serious health conditions under the Act.[233]

Workers have difficulty accessing FMLA leave to take care of their reproductive health for practical reasons as well. To receive the statute's benefits and protections,[234] an employee must give notice to their employer about their health condition, but most people who experience health conditions or events related to abortion, miscarriage, infertility, or depression do not share these experiences, as they feel they are too personal.[235] Reproduction is culturally embedded with shame in our society,[236] which may deter employees from seeking FMLA leave despite incapacity. Without giving proper notice to their employers about their health condition, employees cannot access FMLA leave.

Finally, cases suggest that after FMLA leave has been granted, workers who use leave for reproductive-health reasons often face retaliation for using leave; plaintiffs generally lose these claims because the legal standard is impossibly high and requires strong evidence of retaliation.[237] Workers also suffer adverse employment consequences such as job loss when medical complications during high-risk pregnancies eat into their FMLA family leave, rendering them unprotected after delivery. In one recent case, for example, a police officer with gestational diabetes was fired for not returning to work a week earlier than she was medically able to; she had exhausted all of her protected leave due to her need to go on bed rest for a high-risk pregnancy and heavy bleeding after the birth.[238]

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233 Although cases suggest that FMLA claims by male workers caring for partners are viewed more favorably by the courts. *Id.* at 581 n.218.

234 Under FMLA regulations, an employee must provide the employer with advance notice before FMLA leave is to begin or "as soon as practicable" in certain cases, such as changed circumstances or a medical emergency. 29 C.F.R. § 825.302(a)–(b).

235 *See infra* subpart II.

236 *Id.*

237 For example, in *Daneshpajouh v. Sage Dental Group of Florida, PLLC*, the court ruled that the plaintiff, who claimed that she was terminated for inquiring about FMLA rights while on bed rest from an emergency surgery to save her pregnancy, did not prove retaliation; the close timing between her requesting FMLA leave and termination, alone, was not enough to prove causation. No. 19-CIV-62700-RAR, 2021 WL 3674655, at *18 (S.D. Fla. Aug. 18, 2021). For further discussion of FMLA retaliation claims, see *infra* subpart II.A.

238 Lopez v. City of Gaithersburg, No. RBD-15-1073, 2016 WL 4124215, at *1–5, *8, *11–15 (D. Md. Aug. 3, 2016).

II
THE PRIVACY CONUNDRUM, RETALIATION, AND OTHER LEGAL OBSTACLES RELATED TO REPRODUCTION AND EMPLOYMENT

Most people believe that their health or disability status are private matters, and they worry about how this information might be used by government, businesses, and employers in ways that negatively impact them.[239] Yet, the United States is unique among developed countries in linking its citizens' health to employment.[240] For example, our country's health care benefits system by its normal operations requires massive, systematic transfers of workers' private medical information to employer-sponsored group health insurance plans. Moreover, workplaces in the United States are typically designed around the bodies and life patterns of healthy, young, white, male, able-bodied, non-pregnant workers.[241] Our exclusionary-by-design workplaces are then subject to accommodation and antidiscrimination laws that require workers to disclose private health information to access and maintain employment.[242] The imperative to share private health information with employers in order to access insurance, workplace accommodations, sick leave, or other benefits—often at the risk of stigmatization and discrimination—creates a privacy conundrum for American workers. Experts in disability law and disabilities studies have addressed this conundrum for workers with disabilities.[243]

Reproductive-health conditions and experiences such as abortion, infertility, pregnancy, and miscarriage present the same privacy dilemmas for workers as other hidden

239 Mary Madden, *Public Perceptions of Privacy and Security in the Post-Snowden Era*, PEW RSCH. CTR. (Nov. 12, 2014), https://www.pewresearch.org/internet/2014/11/12/public-privacy-perceptions/ [https://perma.cc/BV3W-TABD].

240 DAVID BLUMENTHAL & JAMES A. MORONE, THE HEART OF POWER: HEALTH AND POLITICS IN THE OVAL OFFICE 89, 109–10 (2010) (recounting the history of employer-based health insurance in the United States, an idea spearheaded by Republican President Eisenhower).

241 EDWARD STEINFELD & JORDANA MAISEL, UNIVERSAL DESIGN: CREATING INCLUSIVE ENVIRONMENTS 189 (2012) (addressing the difference between universal design, which meets the physical, psychological, and social needs of all citizens, with mere accessible design, which is intended to benefit only those with disabilities).

242 *See infra* subpart II.B.

243 *See* Stacy A. Hickox & Keenan Case, *Risking Stigmatization to Gain Accommodation*, 22 U. PA. J. BUS. L. 533, 537 (2020) ("Because people with hidden disabilities risk stigmatization if they reveal their disability to obtain accommodation, the current process of obtaining accommodations presents a significant bottleneck to the inclusion and success of people with disabilities in the workforce.").

disabilities. However, these conditions are doubly stigmatized because workers who experience them are also stigmatized because of sex.[244] Black women experience additional negative stereotypes related to Black motherhood, sexuality, and fertility.[245] Perhaps it should be no surprise, then, that workers often strive to keep their reproductive-health conditions a secret. This secrecy is driven by a host of factors, including cultural norms on privacy and sex, fear of discrimination and retaliation, wanting to save limited sick, family, or disability leave for recovery and parenting after delivery (in the case of desired pregnancies), and avoidance of invasive advice and questions.

Abortion stigma, which is particularly acute among the many stigmas surrounding sex, sexuality, and reproduction in American politics and culture, is "a negative attribute ascribed to women who seek to terminate a pregnancy that marks them, internally or externally, as inferior to ideals of womanhood."[246] This stigma is a product of religion,[247] anti-abortion efforts to personify the fetus, and the fact that "abortion violates two fundamental ideals of womanhood: [n]urturing motherhood and sexual purity."[248] Experts studying race, culture, and reproductive health find that abortion stigma is a "compound stigma" that "builds on other forms of discrimination and structural injustices."[249] Given this stigma, abortion is often "shrouded in silence and secrecy."[250]

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244 An extensive literature in law and social science finds that women workers are viewed as inauthentic workers precisely because of their reproductive capacity and roles as mothers. *See* Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1892–919 (2000) (discussing the ideology of women as inauthentic workers embedded in economic theory, law, and certain strands of feminist legal thought).

245 Renee Mehra et al., *Black Pregnant Women "Get the Most Judgment": A Qualitative Study of the Experiences of Black Women at the Intersection of Race, Gender, and Pregnancy*, 30 WOMEN'S HEALTH ISSUES 484, 485 (2020).

246 Anuradha Kumar, Leila Hessini & Ellen M.H. Mitchell, *Conceptualising Abortion Stigma*, 11 CULTURE, HEALTH & SEXUALITY 625, 628 (2009).

247 Lori Frohwirth, Michele Coleman & Ann M. Moore, *Managing Religion and Morality Within the Abortion Experience: Qualitative Interviews with Women Obtaining Abortions in the U.S.*, 10 WORLD MED. HEALTH POL'Y 381, 381 (2018) ("Most major religions express doctrinal disapproval of abortion[.]").

248 Alison Norris et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 WOMEN'S HEALTH ISSUES S49, S51 (2011).

249 Kumar, Hessini & Mitchell,, *supra* note 246, at 634.

250 Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1668 (2022); *see also supra* discussion notes 62–65.

Similarly, many people experience infertility as a stigma.[251] Researchers find that although infertility affects both sexes equally, infertility is a gendered experience. "[I]t is women who are most frequently blamed" and "stigmatized for being infertile and being childless."[252] Studies find that individuals hide infertility to avoid this judgment.[253] Another study focused on the experiences of African American women found that silence regarding infertility was present among "virtually all the women in [the] sample," irrespective of involvement with fertility treatment.[254]

Studies show that pregnant women and their partners are also not comfortable talking about miscarriage and have difficulty sharing the news with others.[255] Most people do not share news of their pregnancies until after the first trimester, "so keeping a miscarriage a secret seems a natural extension of the pregnancy secret."[256] Couples perceive a "societal-level rule" that miscarriage should be "ke[pt] [] behind closed doors."[257] Another study described the decision to keep a miscarriage secret as "so automatic as to be involuntary."[258] This difficulty is amplified when news of the pregnancy has not been shared publicly.[259] And when news of the loss is shared, those with intended pregnancies who miscarry report feeling a lack of support or understanding by extended family and community, reinforcing the "social norms that undermine the expression of grief surrounding perinatal loss."[260]

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251 Mahboubeh Taebi, Nourossadat Kariman, Ali Montazeri & Hamid Alavi Majd, *Infertility Stigma: A Qualitative Study on Feelings and Experiences of Infertile Women*, 15 INT'L J. FERTILITY & STERILITY 189, 189 (2021) ("Infertility stigma is associated with the feeling of shame and secrecy.").

252 *Id.*

253 *Id.* at 193. This strategy of silence and hiding infertility is "used [as a] defensive mechanism[] against the tensions caused by infertility stigma." *Id.* at 194.

254 Rosario Ceballo, Erin T. Graham & Jamie Hart, *Silent and Infertile: An Intersectional Analysis of the Experiences of Socioeconomically Diverse African American Women with Infertility*, 39 PSYCH. WOMEN Q. 497, 509 (2015).

255 Jennifer J. Bute & Maria Brann, *Co-ownership of Private Information in the Miscarriage Context*, 43 J. APPLIED COMMC'N RSCH. 23, 24 (2015).

256 Emily T. Porschitz & Elizabeth A. Siler, *Miscarriage in the Workplace: An Authoethnography*, 24 GENDER, WORK & ORG. 565, 571 (2017).

257 Jennifer J. Bute, Maria Brann & Rachael Hernandez, *Exploring Societal-Level Privacy Rules for Talking About Miscarriage*, 36 J. SOC. & PERS. RELATIONSHIPS 379, 386 (2017).

258 Porschitz & Siler, *supra* note 256, at 575.

259 Bute, Brann & Hernandez, *supra* note 257, at 390–91.

260 Ariella Lang et al., *Perinatal Loss and Parental Grief: The Challenge of Ambiguity and Disenfranchised Grief*, 63 OMEGA—J. DEATH & DYING 183, 192 (2011);

Even so-called "normal" pregnancy can be a stigmatized condition, especially in contexts such as schools and workplaces where stereotypes about mothers' competency still flourish.[261] Employees are often scared to tell their employers that they are pregnant and wait as long as possible to share the news.[262] A 2011 study revealed that many pregnant employees hide their pregnancies out of fear of negative attitudes, discrimination, and invasive advice and questions.[263] A 2018 study commissioned by Bright Horizons, the largest U.S. provider of employer-sponsored childcare in the United States, found that 21% of working mothers "would be worried to tell their boss they are expecting a child . . . ."[264] These fears are rational considering the prevalence of workplace pregnancy and sex discrimination.[265] Empirical research demonstrates that pregnant women are less likely to be hired[266] or promoted,[267] are viewed negatively by supervisors and co-workers,[268] and

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cf. Crawford & Waldman, *supra* note 36, at 18–23 (discussing the stigmatization and shame surrounding menstruation).

[261] *See, e.g.*, Chabeli Carrazana, *The 'Open Secret' in Most Workplaces: Discrimination Against Moms is Still Rampant*, The 19th (Apr. 27, 2023), https://19thnews.org/2023/04/workplace-discrimination-mothers-open-secret/ [https://perma.cc/5LQH-EW98].

[262] Caroline Gatrell, *Policy and the Pregnant Body at Work: Strategies of Secrecy, Silence and Supra-performance*, 18 Gender, Work & Org. 158, 166 (2011).

[263] *Id.* (describing pregnant employees' strategy of "secrecy and silence, in which pregnancy was kept secret for as long as possible and not discussed at work, and its physical manifestations—nausea, an expanding waistline and the threat of breaking waters and leaking breasts—were concealed").

[264] Bright Horizons, Modern Family Index 2018, at 9 https://www.brighthorizons.com/-/media/BH-New/Newsroom/Media-Kit/MFI_2018_Report_FINAL.ashx [https://perma.cc/7GA7-CAAQ] (showing an increase in this fear from 12% in 2014 to 21% in 2018).

[265] Katie Sear & Dori Goldstein, *ANALYSIS: Pregnancy Bias Suits Keep Rising Amid Pandemic*, Bloomberg L. (Jan. 29, 2021), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-pregnancy-bias-suits-keep-rising-amid-pandemic [https://perma.cc/SKZ8-RGQV] (reporting that federal pregnancy discrimination suits rose 67% from 2016 to 2020, with a 16% jump from 2019 to 2020).

[266] *E.g.*, Whitney Botsford Morgan, Sarah Singletary Walker, Michelle (Mikki) R. Hebl & Eden B. King, *A Field Experiment: Reducing Interpersonal Discrimination Toward Pregnant Job Applicants*, 98 J. Applied Psych. 799, 799 (2013); Barbara Masser, Kirsten Grass & Michelle Nesic, *'We Like You, But We Don't Want You'—The Impact of Pregnancy in the Workplace*, 57 Sex Roles 703, 709 (2007).

[267] *E.g.*, Madeline E. Heilman & Tyler G. Okimoto, *Motherhood: A Potential Source of Bias in Employment Decisions*, 93 J. Applied Psych. 189, 196 (2008) (finding demonstrated bias against mothers in job promotion decisions, both in anticipated competence assessments and in screening recommendations).

[268] *E.g.*, Laura M. Little, Virginia Smith Major, Amanda S. Hinojosa & Debra L. Nelson, *Professional Image Maintenance: How Women Navigate Pregnancy in*

receive lower salaries than non-pregnant applicants and employees.[269]

Today, there is also an additional risk of disclosing a miscarriage, failed IVF cycle, or abortion: the risk of prosecution. Since the late 1960s, a faction of the anti-abortion movement in the United States has been working to define embryos and fetuses as persons.[270] According to the ideology of fetal personhood, pregnant people can be policed and punished for actions they take or do not take. Experts and women's rights organizations have documented thousands of such prosecutions of pregnant women.[271] Historically, those targeted in these cases have been women of color and low-income women.[272]

Now that the Supreme Court has reversed *Roe v. Wade*,[273] the risk of criminal prosecution is palpable for all pregnant people. As Greer Donley and Jill Wieber Lens, two experts in the law of abortion and stillbirth, highlight, "[t]he line between

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the Workplace, 58 ACAD. MGMT. J. 8, 33 (2015) (discussing the strategies employed by pregnant workers to avoid stigmatization at work, including concealing their pregnancies, working harder, shortening their leaves, and not requesting accommodations); Morgan, Walker, Hebl & King, *supra* note 266, at 800, 803 (finding that managers display more interpersonal hostility toward pregnant (vs. non-pregnant) job applicants).

269 *E.g.*, Masser, Grass & Nesic, *supra* note 266, at 709 (finding that pregnancy triggers salary penalties).

270 MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 89, 164–65 (2015); Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, NEW YORKER (June 5, 2019), https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars [https://perma.cc/R4L9-UJMP]. For an example of a recent achievement of the fetal personhood movement, see LePage v. Ctr. for Reprod. Med., P.C., Nos. SC-2022-0515, SC-2022-0579, 2024 WL 656591 (Ala. Feb. 16, 2024), discussed *supra* note 113.

271 *See* BACH, *supra* note 156, at 85, 98 n.1 (documenting 121 prosecutions for "fetal assault" in Tennessee from 2014 to 2016); Lynn M. Paltrow, *Constitutional Rights for the "Unborn" Would Force Women to Forfeit Theirs*, MS. (Apr. 15, 2021), https://msmagazine.com/2021/04/15/abortion-constitutional-rights-unborn-fetus-14th-amendment-womens-rights-pregnant/ [https://perma.cc/T4WU-87LX] (reporting more than 1,000 prosecutions nationwide from 2006–2020 for pregnancy-related offenses documented by the nonprofit organization National Advocates for Pregnant Women); Grace Elizabeth Howard, The Criminalization of Pregnancy: Rights, Discretion, and the Law 64–65, 68–70 (2017) (Ph.D. dissertation, Rutgers University), https://rucore.libraries.rutgers.edu/rutgers-lib/55493/PDF/1/play/ [https://perma.cc/YJ5Y-335N] (documenting 182 cases in South Carolina, 501 cases in Alabama, and 99 cases in Tennessee of "arrests involving maternally mediated fetal harm" from 1973 to 2015).

272 *See* GOODWIN, *supra* note 39, at 4–5, 7–8, 11, 147; DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 3–4 (1997); BACH, *supra* note 156, at 85–101, 191–92; Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1198–214 (2017).

273 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

abortion and pregnancy loss has always been blurry."[274] The symptoms of an incomplete self-managed abortion—bleeding, cramping—and an incomplete miscarriage are "the exact same."[275] The medications and procedures to manage miscarriage and abortion are also largely indistinguishable.[276]

In a post-*Roe* world, both individuals who choose to self-manage their abortions[277] and those who experience miscarriage are at risk of getting caught in the net of abortion law enforcement. Only a few state codes explicitly exclude people who experience a miscarriage or self-manage an abortion from criminal prosecution.[278] And while they are limited in scope, some state statutes may be interpreted to explicitly criminalize self-managed abortions.[279]

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274 Greer Donley & Jill Wieber Lens, Opinion, *Why Do We Talk About Miscarriage Differently From Abortion?*, N.Y. TIMES (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/opinion/abortion-miscarriage-roe-dobbs.html [https://perma.cc/HM6B-3TVV].

275 Donley & Lens, *supra* note 250, at 1707.

276 *Compare* ACOG, *Clinical Management Guidelines for Early Pregnancy Loss*, *supra* note 135, at e200–02 (discussing misoprostol-based medical management and surgical uterine evacuation by curettage or suction aspiration to treat miscarriage), *with* Am. Coll. of Obstetricians and Gynecologists, *Clinical Practice Bulletin No. 225: Medication Abortion Up to 70 Days of Gestation*, 136 OBSTETRICS & GYNECOLOGY e31, e31–e32 (2020) (discussing misoprostol-only and misoprostol-mifepristone-based medication abortion and uterine aspiration abortion). *See also* Donley & Lens, *supra* note 250, at 1666 ("[W]hen missed or incomplete miscarriages occur, patients are offered the same procedures and medications that are used for abortion.").

277 "Self-managed abortion involves any action that is taken to end a pregnancy outside of the formal healthcare system, and could include self-sourcing medications (e.g., misoprostol, mifepristone, or other medications); using herbs, plants, vitamins, or supplements; consuming drugs, alcohol, or toxic substances; and using physical methods." Nisha Verma & Daniel Grossman, *Self-Managed Abortion in the United States*, 12 CURRENT OBSTETRICS & GYNECOLOGY REPS. 70, 70 (2023).

278 *E.g.*, COLO REV. STAT. § 18-3.5-102(2) (2023) ("Nothing in this article shall permit the prosecution of a woman for any act or any failure to act with regard to her own pregnancy."); ARK. CODE § 5-61-304(c)(1) (2022) ("This section does not[] [a]uthorize the charging or conviction of a woman with any criminal offense in the death of her own unborn child . . . .").

279 *See, e.g.*, OKLA. STAT. tit. 63, § 1-733 (2017) (criminalizing self-managed abortion, albeit with no penalties attached); NEV. REV. STAT. § 200.220 (2023) (criminalizing self-managed abortions after twenty-four weeks of pregnancy). State laws that criminalize those who self-manage abortions, but not those who obtain abortions with the assistance of a medical provider, arguably violate constitutional equal protection guarantees. Denying the ability to self-mange one's own medical care also potentially violates other constitutional provisions, such as the right to bodily integrity, freedom from compelled speech, and the right to be free of self-incrimination. *See* Yvonne Lindgren, *When Patients Are Their Own Doctors:* Roe v. Wade *in An Era of Self-Managed Care,* 107 CORNELL L. REV. 151, 217 (2021); Madalyn K. Wasilczuk, *Fifth Amendment Rights as Abortion Rights*, HARV.

To be sure, the routine criminalization of miscarriage or abortion is logistically challenging since most miscarriages[280] and medication abortions are managed at home. However, ample news reports and studies demonstrate that prosecutors have targeted pregnant people suspected of self-managing abortions. For example, prosecutors in Nebraska charged a teenager with "removing or concealing human skeletal remains" in connection with a self-managed medication abortion.[281] After accepting a plea deal, the teenager received a sentence of ninety days in jail.[282] The teen's mother, prosecuted for assisting a self-managed abortion, received a two-year sentence.[283] In February 2023, a South Carolina woman was arrested and charged for a self-managed medication abortion that allegedly took place in 2021.[284] Because it is difficult to determine the cause of miscarriages and stillbirths, people whom the state seeks to blame or punish for experiencing an adverse pregnancy outcome have also been targets of these prosecutions.[285]

A recent study identified 61 cases of people who were criminally investigated or arrested for allegedly self-managing an

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L. Rev. Blog (Apr. 11, 2023), https://harvardlawreview.org/blog/2023/04/fifth-amendment-rights-as-abortion-rights/ [https://perma.cc/JDK7-SZ93].

280 *See* Quenby et al., *supra* note 125, at 1659.

281 *See* Michael Levenson, *Nebraska Teen Who Used Pills to End Pregnancy Gets 90 Days in Jail*, N.Y. Times (July 20, 2023), https://www.nytimes.com/2023/07/20/us/celeste-burgess-abortion-pill-nebraska.html [https://perma.cc/D2Q3-K6KD]. Prosecutors also pursued, but ultimately dropped, charges of concealing a death and false reporting in connection with the self-managed abortion. *Id.*

282 *Id.*

283 Carter Sherman, *US Mother Sentenced to Two Years in Prison for Giving Daughter Abortion Pills*, The Guardian (Sept. 22, 2023), https://www.theguardian.com/us-news/2023/sep/22/burgess-abortion-pill-nebraska-mother-daughter [https://perma.cc/44K2-74WD] ("[A] Nebraska mother accused of helping her teenage daughter use pills to end her pregnancy, was sentenced . . . to two years in prison.").

284 Poppy Noor, *South Carolina Woman Arrested for Allegedly Using Pills to End Pregnancy*, The Guardian (Mar. 3, 2023), https://www.theguardian.com/us-news/2023/mar/03/south-carolina-woman-arrested-abortion-pills [https://perma.cc/N6D6-9AT9]. The woman was reported by hospital staff after allegedly inducing the abortion with pills and subsequently delivering a stillborn fetus at 25 weeks. *Id.*

285 According to a report to the United Nations on U.S. human rights violations in the wake of *Dobbs*, at least 38 states authorize homicide charges for causing pregnancy loss. Human Rights & Gender Justice Clinic, CUNY School of Law et al., Criminalization and Punishment for Abortion, Stillbirth, Miscarriage, and Adverse Pregnancy Outcomes: Shadow Report to the UN Human Rights Committee for the Fifth Periodic Review of the United States 5 (Sept. 12, 2023), https://www.law.cuny.edu/wp-content/uploads/media-assets/2023_Clinic_HRJG_REPORT-U.S.-Criminalization-of-Abortion-and-Pregnancy-Outcomes.pdf [https://perma.cc/V2MQ-DDN8].

abortion or helping someone else self-manage an abortion between 2000 and 2020.[286] The investigations and arrests were not usually conducted pursuant to criminal abortion bans. Instead, prosecutors used other criminal laws, such as those intended to address "mishandling of human remains, concealment of a birth, practicing medicine without a license, child abuse and assault, and murder and homicide[.]"[287] The targets of these investigations were disproportionately poor women and women of color,[288] and reverberations were felt beyond the immediate criminal cases.[289] For example, "[i]n several cases, people lost custody of their existing children" or were "turned over to immigration authorities for deportation."[290] These cases occurred before *Dobbs* eliminated constitutional protection for abortion; self-managed abortion will no doubt become even more prevalent in the United States as access to abortion is constrained.[291] In the current dystopian legal environment in which every person with a uterus is potentially a criminal, the traditional secrecy and shame surrounding abortion, miscarriage, infertility, and other reproductive-health matters are only bound to intensify.

The specter of prosecution of employers who "aid and abet"[292] abortions by providing employees time off or other forms of assistance after a miscarriage or abortion is also now not beyond the pale. For example, after Texas passed a vigilante justice law that lets an individual sue anyone who "aids or abets" an abortion and receive a $10,000 reward,[293] a group of

[286] *See* LAURA HUSS, FARAH DIAZ-TELLO & GOLEEN SAMARI, SELF-CARE, CRIMINALIZED: AUGUST 2022 PRELIMINARY FINDINGS 2 (2022), https://www.ifwhenhow.org/wp-content/uploads/2023/06/22_08_SMA-Criminalization-Research-Preliminary-Release-Findings-Brief_FINAL.pdf [https://perma.cc/9YDQ-BCBM].

[287] *Id.* at 3.

[288] *Id.* at 2 (reporting that 41% were "minoritized racial and ethnic groups" and that 56% of the adult cases that proceeded through court "involved people living in poverty").

[289] *Id.* at 3.

[290] *Id.*

[291] *See* Verma & Grossman, *supra* note 277, at 73.

[292] *See* Laura T. Kessler, UTAH ABORTION LAW POST-DOBBS, WHITE PAPER FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS 4 (2022), https://www.nacdl.org/getattachment/437de371-7b2b-4bc5-b690-f50a32ba38d2/utah-statutory-framework-070722.pdf [https://perma.cc/H226-BGTF] (discussing Utah's "aiding and abetting" law).

[293] *See* TEX. HEALTH & SAFETY CODE § 171.208(a) ("Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who: . . . knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or

conservative Texas lawmakers issued a warning that employers offering travel assistance or health-care benefits for abortion procedures or medications could be sued and face criminal charges.[294] Alarm bells were sounded across the field of human resources, with the Society of Human Resources Management issuing a warning to its more than 325,000 members[295] to be aware of legal risks of providing post-*Roe* abortion benefits.[296]

Given the toxic mix of cultural secrecy surrounding abortion, infertility, miscarriage, and other pregnancy-related health conditions, workers fear employment discrimination or retaliation for disclosing these health conditions, and individuals avoid disclosing them to employers.[297] This secrecy, which

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reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter[.]"). The Texas vigilante law has been subjected to numerous lawsuits in state and federal court, but thus far has withstood these challenges and remains in effect. *See* Sakshi Udavant, *2 Years after Texas' SB 8, Advocates Reflect on its Impact Across the US*, PRISM (Sept. 12, 2023), https://prismreports.org/2023/09/12/2-years-texas-sb-8/ [https://perma.cc/X3KL-JMWG]. In March and May 2022, respectively, Idaho and Oklahoma adopted copycat vigilante abortion laws modeled on Texas's law; the Oklahoma law was subsequently struck down by its state high court. *See* Kate Zernike, *Idaho Is First State to Pass Abortion Ban Based on Texas' Law*, N.Y. TIMES (Mar. 14, 2022), https://www.nytimes.com/2022/03/14/us/idaho-abortion-bill-texas.html [https://perma.cc/Q4E3-YDJE]; *Oklahoma Supreme Court Strikes Down Vigilante Abortion Bans*, PLANNED PARENTHOOD (May 31, 2023), https://www.plannedparenthood.org/about-us/newsroom/press-releases/oklahoma-supreme-court-strikes-down-vigilante-abortion-bans [https://perma.cc/TK8L-4QHF].

294 *See* Justin Wise, *Sidley Targeted as Republicans Warn Firms on Abortion Pledges*, BLOOMBERG L. (July 8, 2022), https://news.bloomberglaw.com/business-and-practice/sidley-targeted-as-republicans-warn-firms-on-abortion-pledges [https://perma.cc/75AD-4YGX] ("The Texas Freedom Caucus said it will introduce legislation in the next session that imposes 'additional civil and criminal sanctions on law firms that pay for abortions or abortion travel[.]'").

295 *See About SHRM*, SHRM, https://shrm.org/about-shrm/Pages/default.aspx [https://perma.cc/5NKR-KLSU] (last visited Oct. 13, 2023).

296 *See* Stephen Miller, *Be Aware of Legal Risks with Post-Roe Abortion Benefits*, SHRM (May 16, 2022), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/be-aware-of-legal-risks-with-post-roe-abortion-benefits.aspx [https://perma.cc/44MX-SML5].

297 *See supra* notes 244–69 and accompanying discussion; *see also* Fortesa Latifi, *The Morning After my Abortion, I Went Right Back to Work at my Stressful PR Job. It Taught me a Lot About Privacy and Grief in the Workplace*, Bus. INSIDER (June 16, 2022), https://www.businessinsider.com/i-worked-right-after-my-abortion-didnt-have-time-grieve-2022-6 [https://perma.cc/FS42-5K86] ("Sometimes you don't want to tell your boss what's going on and why you need time off, or maybe you even feel unsafe doing so."). *Cf.* Kate Grindlay et al., *Abortion Knowledge and Experiences Among U.S. Servicewomen: A Qualitative Study*, 49 PERSPS. SEXUAL & REP. HEALTH 245, 250 (2017) (finding that servicewomen cited frequent and interconnected concerns about confidentiality, stigma, and possible

is a product of socio-legal dynamics, creates additional barriers to obtaining workplace protections from discrimination, necessary work accommodations, and medical leave. This section describes a number of specific legal requirements and doctrines within employment law that further frustrate legal relief for workers who experience abortion, infertility, and miscarriage given the common practice of hiding reproductive-health conditions.

A. Retaliation

Title VII, the FMLA, and the ADA all prohibit retaliation for making a claim or exercising protected rights under these statutes.[298] Courts generally apply the same legal standards to retaliation claims under Title VII and the ADA.[299] A standard formulation of the prima facie case for retaliation requires the plaintiff to show "1) 'participation in a protected activity'; 2) the defendant's knowledge of the protected activity; 3) 'an adverse employment action'; and 4) 'a causal connection between the protected activity and the adverse employment action.'"[300]

If plaintiff is able to establish her prima facie case, the burden of production shifts to the employer to introduce into the evidence a nonretaliatory reason for its action. At that point, the plaintiff may still prevail by proving that purported reason is a pretext for retaliation.[301] Although the FMLA is not a discrimination statute, courts also generally use this framework to analyze retaliation claims under the FMLA.[302] Under both

negative effects on their career of disclosing their abortions to their commanders and that about half, therefore, sought abortion care outside military channels).

[298] 42 U.S.C. § 2000e-3(a) (2018) (Title VII retaliation provision); 29 U.S.C. § 2615(a)(2) (FMLA retaliation provision); 42 U.S.C. § 12203(a) (ADA retaliation provision). The PWFA also has retaliation and coercion provisions, discussed *infra* Part III.

[299] *See* Smith v. District of Columbia, 430 F.3d 450, 455 (2005) (collecting cases from eleven other federal judicial circuits).

[300] Kwan v. Andalex Grp., LLC, 737 F.3d 834, 844 (2d Cir. 2013).

[301] Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 179–80 (2d Cir. 2005).

[302] Specifically, a plaintiff making an FMLA retaliation claim must demonstrate a right to leave and that the employer had a discriminatory reason for denying reinstatement after the leave or taking other adverse action. *See* TIMOTHY P. GLYNN, CHARLES A. SULLIVAN & RACHEL S. ARNOW-RICHMAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 785–86 (4th ed. 2019). The courts generally apply Title VII proof structures to determine whether the requisite intent exists. *Id.* Thus, retaliation claims brought based on circumstantial evidence are assessed under the *McDonnell Douglas* burden-shifting framework for Title VII claims. *See* Caldwell v. Clayton Cnty. Sch. Dist., 604 F. App'x 855, 860 (11th Cir. 2015) ("Where, as

the FMLA and ADA, engaging in "protected activities" includes not just opposing discrimination or participating in a formal legal action claiming discrimination, but also asking for or receiving FMLA leave or ADA accommodations.[303]

Proving causation is a significant hurdle[304] that has been made even more difficult for plaintiffs since the Supreme Court's 2013 decision in *University of Texas Southwestern Medical Center v. Nassar*.[305] In *Nassar*, the Supreme Court held that retaliation claims under Title VII must be proven by but-for causation;[306] that is, plaintiffs must show not only that their protected activity was a motiving factor leading to an adverse employment action,[307] but that the unlawful retaliation would not have occurred but-for the protected activity.[308] Prior to *Nassar*, circumstantial evidence in the form of temporal proximity between the protected activity (i.e., asking for a lifting restriction due to pregnancy under the PDA) and alleged retaliation could establish the causation element of the plaintiff's retaliation case. But since *Nassar*, several courts have taken the position that temporal proximity, alone,

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here, the plaintiff presents no direct evidence of retaliatory intent, we analyze the circumstantial evidence presented under the burden-shifting framework of *McDonnell Douglas*"). That is, to establish a prima facie case of FMLA retaliation, the employee must prove they engaged in protected activity under the FMLA, suffered an adverse employment action or decision, and show a causal connection between the protected activity and the adverse employment action. *Id.* Thereafter, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment action at issue. *Id.* If the employer carries this burden of production, the burden shifts back to the employee to demonstrate that the proffered reason is mere pretext for discrimination. *Id.*

303 *See*, *e.g.*, Salemi v. Colorado Pub. Emps.' Ret. Ass'n, 747 F. App'x 675, 700 (10th Cir. 2018) ("The taking of FMLA leave is a protected activity . . . .").

304 Alex B. Long, *Retaliation Backlash*, 93 WASH. L. REV. 715, 727 (2018); Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 54 (2018) (collecting ADA retaliation cases).

305 570 U.S. 338 (2013).

306 *Id.* at 362.

307 The "motivating factor" causation standard was first announced in Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989), and codified for Title VII by Congress in the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2018).

308 *Nassar*, 570 U.S. at 362. The majority offered three justifications for its decision. First, the ordinary meaning of the words "because of" of in Title VII's antiretaliation provision is but-for causation. *Id.* at 350 (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009)). Second, when Congress amended the causation standard for Title VII via the Civil Rights Act of 1991 to be the lesser "motivating factor" standard for Title VII claims, it left in place the words "because of" in the antiretaliation provision of Title VII. *Id.* at 360. Therefore, the lesser motivating factor causation standard is not applicable to claims under the antiretaliation provision. *Id.* Finally, the lesser "motivating factor" causation standard could incentivize plaintiffs to file frivolous retaliation claims. *Id.* at 358.

has little probative value, even at the prime facie stage of the analysis.[309]

Further, since *Nassar* was decided, courts have imported its holding into FMLA retaliation cases,[310] even though the FMLA is a minimum labor standard statute, not an antidiscrimination statute,[311] and even though the Department of Labor issued regulations reaffirming the lesser "motivating factor" test for FMLA retaliation claims.[312] For example, in *Kubik v. Central Michigan University Board of Trustees*,[313] the Sixth Circuit affirmed a grant of summary judgment for the plaintiff's employer.[314] Kubik was an assistant tenure-track journalism professor for a public university.[315] The court concluded that although the plaintiff had experienced adverse actions after she took a family leave, she had not created a genuine issue of material fact on her retaliation claim, because her employer had expressed concerns about her scholarship prior to her leave.[316] This case demonstrates how the "but-for" causation standard prevents plaintiffs from prevailing on retaliation claims if they have had any prior issues in their employment. FMLA retaliation claims could become even more difficult to prove if more circuits decide to apply *Nassar's* requirement of but-for causation in Title VII retaliation cases to FMLA cases.

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309 *See* GLYNN, SULLIVAN & ARNOW-RICHMAN, *supra* note 302, at 675; Long, *supra* note 304, at 735–36; Porter, *supra* note 304, at 56.

310 Specifically, in four federal circuits, to get past a motion for summary judgment, the plaintiff must prove that asking for or taking FMLA leave was a "determinative factor" or the "but-for" cause of the alleged retaliation. *See, e.g.*, Nathan v. Great Lakes Water Auth., 992 F.3d 557, 571 (6th Cir. 2021); Massey-Diez v. Univ. of Iowa Cmty. Med. Servs., Inc., 826 F.3d 1149, 1160 (8th Cir. 2016); Matamoros v. Broward Sheriff's Off., 2 F.4th 1329, 1337 (11th Cir. 2021); Williams v. Verizon Washington, D.C. Inc., 304 F. Supp. 3d 183, 190 (D.D.C. 2018).

311 *See* Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL'Y J. 329, 334–35, 349–50 (2003) (arguing that the FMLA is a minimum labor standard statute and that its antiretaliation provision is modeled on the National Labor Relations Act's antiretaliation provision, with rights that are much broader than a prohibition on discrimination).

312 *See* Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights, 29 C.F.R. § 825.220 (2022). Note that under the FMLA, the "motivating factor" causation test is called the "negative factor" test. *Id.*

313 717 F. App'x 577 (6th Cir. 2017).

314 *Id.* at 579.

315 *Id.*

316 *Id.* at 585.

Nassar has been subjected to criticism by employment law experts,[317] but its impact is particularly problematic for pregnant or potentially pregnant workers, given that retaliation for requesting or using reasonable accommodations or FMLA leave is so common. "Fear of retaliation is the leading reason why people stay silent . . . ."[318] And EEOC data suggest that retaliation is rampant. In fiscal year 2022, 37,898 retaliation charges were filed with the EEOC.[319] Retaliation remained the most frequently cited claim in charges filed with the agency—accounting for 51.6% of all charges filed—followed by charges of disability, race, and sex discrimination.[320]

If an employee feels deterred from requesting workplace accommodations or leave under the PDA (Title VII),[321] ADA, PWFA, or FMLA because they are worried about retaliation for exercising their rights, the goals of these statutes will not be realized. This is already a problem for all employees these statutes are intended to protect. But for employees who need time off for abortion care, miscarriage, infertility, and other reproductive-health conditions, the lack of protection for retaliation has an especially harsh bite, given the existing cultural barriers to even disclosing these conditions at all.

B. Notice without Privacy

The desire for privacy presents special problems for hidden reproductive-health challenges, as oftentimes, an employer does not even know that an employee (or an employee's family member) is experiencing a significant health event. This runs directly up against a basic requirement of all federal antidiscrimination statutes: notice, or at least knowledge, of an employee's protected status. Under Title VII and other major federal employment statutes, an employer typically must know

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317 *See* Long, *supra* note 304, at 764–66; Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*, 10 Stan. J. C.R. & C.L. 223, 223–25 (2014); Michael J. Zimmer, *Hiding the Statute in Plain View:* University of Texas Southwestern Medical Center v. Nassar, 14 Nev. L. J. 705 *passim* (2014).

318 Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005).

319 *See Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2022*, EEOC, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022 [https://perma.cc/85EL-8GX6] (last visited Nov. 10, 2023).

320 *Id.* The EEOC does not report retaliation claims by basis of discrimination, so the data is limited to showing charges filed under all statutes.

321 The Pregnancy Discrimination Act amended the definition of "sex" in Title VII. As such, protections under the PDA are Title VII protections. *See supra* subpart I.B.1

the facts underlying an employee's claim for any statutory duties to exist. This requirement can place the employee in a vulnerable position, as they risk negative employment and/or social consequences from the potential exposure of private health or family information.

An employee must share private medical information with their employer about their (or their family members') abortion, miscarriage, infertility treatments, or pregnancy to receive the protection of the law, especially if the employee needs an accommodation or a leave. Yet, a review of the PDA, FMLA, and ADA demonstrates that privacy protections provided by these statutes are weak or uncertain at best.

This section reviews how courts have analyzed issues of notice and confidentiality of health information under the PDA, FMLA, and ADA, demonstrating how the combination of mandatory notice without sufficient privacy protections often renders the substantive protections intended by these statutes illusory when it comes to pregnancy and other reproductive-health conditions.[322]

1. *Notice Requirements*

a. *Notice and the PDA*

Title VII, as amended by the PDA, does not require that a plaintiff give her employer formal notice of her protected status to be covered by the statute because, in most discrimination cases, "the plaintiff's membership is either patent (race or gender), or is documented on the employee's personnel record."[323] However, on this question, courts often distinguish pregnancy discrimination claims from other types of discrimination claims since pregnancy and related medical conditions are not always readily observable to others. Thus, courts have held that in order to prove causation under the PDA, "the employee bears the burden of demonstrating that the employer had actual knowledge of her pregnancy at the time that the adverse employment action was taken."[324] This is because courts "cannot presume

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322 The PWFA's privacy protections, which are smartly designed to avoid having to provide medical documentation at all for common and obvious pregnancy-related conditions and accommodations, are discussed *infra* Part III.

323 Geraci v. Moody-Tottrup, Int'l, Inc., 82 F.3d 578, 581 (3d Cir. 1996).

324 Prebilich-Holland v. Gaylord Ent. Co., 297 F.3d 438, 444 (6th Cir. 2002) (("[T]he employee bears the burden of demonstrating that the employer had actual knowledge of her pregnancy at the time that the adverse employment action was taken."); *Geraci*, 82 F.3d at 581.

that an employer most likely practiced unlawful discrimination when it did not know that the plaintiff even belonged to the protected class."[325]

Accordingly, courts have granted summary judgment to employers in pregnancy discrimination cases where there is documentation that the decision to take an adverse action against the employee predated the employer's knowledge of her pregnancy;[326] the employee hasn't presented evidence that the employer knew of her pregnancy;[327] or that those with knowledge of the employee's pregnancy were not the decision-makers.[328] This notice barrier exists with equal force, and perhaps more acutely, for workers who have abortions but may not feel comfortable sharing the information with decisionmakers in their workplace.[329]

b. *Notice and the FMLA*

Under FMLA regulations, "[a]n employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable" and "[i]f 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable."[330] The regulations define "as soon as practicable" as "the same day or the next business

325 *Geraci*, 82 F.3d at 581.

326 *Prebilich-Holland*, 297 F.3d at 444 (noting that manager made termination decision four days before learning that employee was pregnant).

327 Lambert v. McCann Erickson, 543 F. Supp. 2d 265, 277 (S.D.N.Y. 2008) ("Plaintiff must also be able to point to some admissible evidence from which a rational jury could infer that the employer knew that the plaintiff was pregnant.").

328 *Lambert*, 543 F. Supp. at 277–78 (internal citations omitted) (stating that plaintiff cannot rely on co-workers' knowledge of her pregnancy but "was obliged to offer evidence indicating that persons who actually participated in her termination decision" knew she was pregnant); *Prebilich-Holland*, 297 F.3d at 444 (determining that plaintiff informing two co-workers of her pregnancy was not significant when there was no evidence "that the decision-makers at WSM had actual knowledge of her pregnancy at the time they made the decision to discharge her").

329 *Cf.* Doe v. First Nat. Bank of Chicago, 865 F.2d 864, 876 (7th Cir. 1989) (affirming dismissal of plaintiff's Title VII sex discrimination claim because, among other reasons, there was a lack of knowledge by decision-makers of her abortion at the time they made the termination decision). In this case, the plaintiff, a paralegal, alleged that she was shamed and castigated by her immediate supervisor for having an abortion. *Id.* at 868–69. She therefore did not share the information with management. *Id.* at 866, 870. When she was subsequently terminated, the court held that the decision-maker did not know about her abortion when it made the decision, and, therefore, there could be no liability for sex discrimination. *Id.* at 876.

330 29 C.F.R. § 825.302(a) (2020).

day [after]" the employee becomes aware.[331] The required minimum notice can be verbal and must be "sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave."[332] The first time an employee seeks FMLA leave, they "need not expressly assert rights under the FMLA or even mention the FMLA."[333] However, "[w]hen an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave."[334] In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave.[335]

When an employer asks questions, "[a]n employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying" and "[f]ailure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying."[336] An employer may require an employee to comply with its own notice policy. For example, an employer may require the that the notice be in writing, set forth the reasons for the requested leave, or be submitted to a specific individual.[337]

One federal circuit has interpreted these regulations as requiring workers requesting FMLA leave based on pregnancy to disclose their pregnancies,[338] even though the relevant part of the regulation suggests that this should not be mandatory.[339] Even in circuits that do not require this, an employee

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[331] 29 C.F.R. § 825.302(b) (2020).

[332] 29 C.F.R. § 825.302(c) (2020).

[333] *Id.*

[334] *Id.*

[335] *Id.*

[336] *Id.*

[337] 29 C.F.R. § 825.302(d) (2020).

[338] *See, e.g.*, Avena v. Imperial Salon & Spa, Inc., 740 F. App'x 679, 681 (11th Cir. 2018) (citing § 825.302(c)) (stating that "notice must be 'sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave' and, if applicable, include 'that the employee is pregnant'").

[339] Specifically, the regulation states "such information *may* include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight[.]" 29 C.F.R.

will have to disclose her reproductive-health condition if her employer does not accept her notice at face value and seeks to determine if she qualifies for FMLA leave.[340] Given the FMLA's notice requirements, workers who might otherwise qualify for FMLA leave have been shut out of the statute's protections.[341]

c. *Notice and the ADA*

For ADA claims based on failure to accommodate, the statute states that discrimination based on disability includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[342] The statute includes the term "known," indicating that some notice is required. Courts have interpreted this language to mean that "[o]nly after the employee has satisfied this burden and the employer fails to provide that accommodation can the employee prevail on a claim that her employer has discriminated against her."[343] Thus, the ADA requires workers to disclose private reproductive-health information to access the Act's protections from discrimination. As discussed below, the ADA includes a confidentiality provision to limit the disclosure of health information once it has been obtained, but some courts have narrowed the scope of protected information through restrictive interpretations.[344]

2. *Privacy "Protections"*

a. *Privacy and the PDA*

There are no statutory provisions in Title VII, as amended by the PDA, protecting employees' private health information, even

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§ 825.302(c) (2020) (emphasis added). This language seems more like an example of a way to give notice than a mandatory disclosure of pregnancy.

340 *Id.*

341 *See, e.g.*, Sinico v. Cnty. of Lebanon, No. 18-cv-01259, 2022 WL 16552784, at *9–10 (M.D. Pa. Sept. 9, 2022) (ruling against plaintiff on her FMLA claim because she did not provide adequate notice to her employer of her need for FMLA leave for infertility treatment), *aff'd*, No 22-2998, 2024 WL 510521 (3d Cir. Feb 9, 2024).

342 42 U.S.C. § 12112(b)(5)(A) (2018).

343 Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1364 (11th Cir. 1999); *see also* Matuska v. Hinckley Twp., 56 F. Supp. 2d 906, 917 (N.D. Ohio 1999) (holding that an employee who fails to inform his employer of the specific limitations that he experienced as a result of his physical and mental impairments cannot establish that the employer knew or had reason to know of his disability and therefore the employer had no duty to provide a reasonable accommodation).

344 *See infra* subpart II.B.2.c.

though accessing equal accommodations such as additional bathroom breaks, schedule adjustments for infertility treatment (which potentially must take place out-of-state after *Dobbs*), or lifting restrictions for pregnancy under the PDA require an employee to share her medical status with her employer. The same lack of protection would exist, for example, if an employee who is an intended parent suffers depression after their partner or surrogate miscarries and the employee seeks temporary leave along the lines of accommodations afforded to coworkers with depression unrelated to pregnancy. That is, the PDA affords no privacy to employees affected by reproductive-health conditions, even though they will need to inform their employer of the condition in order to receive protection under the statute.

b. *Privacy and the FMLA*

Under the FMLA, employers must maintain employees' privacy with regard to medical information collected for the purposes of granting leave. The applicable regulation states, in relevant part:

> [M]edical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. . . . If the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that: (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations . . . .[345]

Although several courts have stated that it is "unsettled law" whether the FMLA creates a private cause of action for breach of confidentiality, no court has yet held that such a claim is impermissible.[346] Several courts have avoided the question by dismissing claims on other grounds or not addressing the issue because it was not raised by the defendant.[347] Other courts have been more open to entertaining breach of confidentiality claims.

345 Recordkeeping Requirements, 29 C.F.R. § 825.500(g) (2022).

346 *See, e.g.*, Ekugwum v. City of Jackson, No. 3:09CV48DPJ-JCS, 2010 WL 1490247, at *2 (S.D. Miss. Apr. 13, 2010) (stating that it is not settled whether FMLA creates a private cause of action for breach of confidentiality).

347 *See, e.g.*, Johnson v. Moundsvista, Inc., No. 01-915 DWF/AJB, 2002 WL 2007833, at *7 (D. Minn. Aug. 28, 2002) (dismissing claim without deciding whether or not FMLA allows for private cause of action for improper disclosure).

For example, in *Holtrey v. Collier County Board of County Commissioners*, the plaintiff claimed a breach of confidentiality after his employer disclosed information from his FMLA leave request about a "serious health condition with his genito-urinary system" to eight of the plaintiff's co-workers and subordinates in a staff meeting which resulted in those employees "making jokes and obscene gestures about [his] condition."[348] The court noted that the law is not settled as to whether the FMLA allows a private right of action for disclosure but "limit[ed] its review to the sufficiency of the . . . Complaint" because the defendant did not challenge the claim on these grounds.[349] The plaintiff's claim survived a motion to dismiss as the court found that the "[p]laintiff ha[d] sufficiently alleged a right of confidentiality and that [d]efendant [had] breached that right when it disclosed his protected medical information during a staff meeting and without his permission."[350]

However, plaintiffs are not consistently successful in their claims for breach of privacy under the FMLA. For example, in *Dodge v. Trustees of the National Gallery of Art*,[351] the plaintiff obtained FMLA leave to care for his son; the leave was approved through his employer's personnel office.[352] Subsequently, the plaintiff refused to work on a mandatory overtime assignment due to his FMLA leave status, and the employer released the plaintiff's son's medical records to his supervisor in order to allow the supervisor to decide whether the plaintiff's refusal to work was appropriate.[353] The court found that this release of records did not violate the FMLA's privacy requirements because "[i]n submitting his son's medical history for his FMLA claim, the plaintiff essentially waived his right to confidentiality."[354] Further, the court concluded that the defendant followed the regulations, because "the supervisor had to understand and evaluate the urgency of the plaintiff's family conditions" in order "to decide whether the plaintiff could be excused from his mandatory overtime work duties."[355] The

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348 No. 2:16-CV-00034-SPC-CM, 2017 WL 119649, at *1 (M.D. Fla. Jan. 12, 2017) (alteration in original).

349 *Id.* at *2.

350 *Id.*

351 326 F. Supp. 2d 1 (D.D.C. 2004).

352 *Id.* at 4.

353 *Id.* at 5.

354 *Id.* at 18.

355 *Id.* at 17.

court's reasoning was at direct odds with the FMLA's privacy provision,[356] yet no FMLA privacy violation was found.

c. *Privacy and the ADA*

An employer is required to keep all employee medical disclosures and examination results related to disability leave or accommodations confidential under the ADA.[357] Information obtained must be "maintained on separate forms and in separate medical files and . . . treated as a confidential medical record."[358] The EEOC has interpreted this requirement broadly to encompass more medical information than is protected by federal law, commonly known as "HIPAA."[359]

However, there are exceptions to these confidentiality requirements. According to the ADA, "(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations."[360] Additionally, while not a requirement of the statute and contrary to the EEOC's own guidance,[361] courts have interpreted

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356 *See* Recordkeeping Requirements, *supra* note 345. Specifically, supervisors and managers may be informed only of "necessary restrictions on the work or duties of an employee and necessary accommodations"; medical records are to be maintained as confidential in separate files from the usual personnel files. *Id.*

357 *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12112(d)(3)(B), (4)(C) (2018), 29 C.F.R. §§ 1630.14(b)(1), (c)(1), (d)(4); *see also* U.S. EQUAL EMP. OPPORTUNITY COMM'N, THE ADA: YOUR EMPLOYMENT RIGHTS AS AN INDIVIDUAL WITH A DISABILITY, https://www.eeoc.gov/eeoc/publications/ada18.cfm [https://perma.cc/9MHE-HDSE] (last visited Feb. 5, 2022) (requiring that "all medical examinations" be kept confidential).

358 42 U.S.C. § 12112(d)(3)(B) (2018).

359 *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996). HIPAA requires that the privacy and security of certain health information is protected. *Id.* at 2029 (making it a violation of HIPAA only to wrongfully disclose Individually Identifiable Health Information); *see also id.* at 2023 (defining Individually Identifiable Health Information as "any information, including demographic information collected from an individual that– (A) is created or received by a health[-]care provider, health plan, employer, or health[-]care clearinghouse; and (B) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and– (i) identifies the individual; or (ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.").

360 42 U.S.C. § 12112(d)(3)(B)(i). Additionally, "(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this chapter shall be provided relevant information on request." 42 U.S.C. §§ 12112(d)(3)(B)(ii)–(iii).

361 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE ADA (2000), at

the ADA confidentiality provisions such that they do not attach unless the medical information was received as a result of an employer-initiated medical inquiry or exam. Under this interpretation under-protecting worker privacy, some courts have decided that voluntarily disclosed health information is not confidential.

For example, in *Walker v. Gambrell*, the plaintiff brought suit claiming that her employer's disclosure of her miscarriage to co-workers violated the Privacy Act,[362] the ADA, and the FMLA.[363] The court disagreed and stated that both the FMLA and ADA confidentiality provisions only cover employee medical information that is obtained by an employer after a medical inquiry.[364] In this instance, the plaintiff's husband had called one of her co-workers to ask her to please report the plaintiff's absence and its cause to management.[365] The plaintiff's private medical information had been disclosed to a large number of co-workers without her permission.[366]

Perhaps of some small comfort, the ADA prohibits employers from asking invasive questions in the application process about pregnancy and related health conditions,[367] and, at least

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text accompanying notes 9–10 https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees [https://perma.cc/88LU-CB2N] ("The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination . . . as well as any medical information voluntarily disclosed by an employee, as a confidential medical record.").

362 The Privacy Act establishes regulations governing federal agency collection, use, and dissemination of individual information. Privacy Act of 1974, 5 U.S.C. § 552a (2014). The Privacy Act allows plaintiffs to bring suit when an agency's disclosures violate the Act, were committed willfully or intentionally, and adversely affected the plaintiff. *See also* 5 U.S.C. §§ 552a(g)(1)(D), 552a(g)(4).

363 Walker v. Gambrell, 647 F. Supp. 2d 529, 533–34 (D. Md. 2009).

364 *Id.* at 539 n.5.

365 *Id.* at 533–34.

366 *See id.* at 534–35; *see also, e.g.*, Bardell v. Banyan Delaware, LLC, No. 23-148-WCB, 2023 WL 6810092, at * 5 (D. Del. 2023) (dismissing a breach of confidentiality claim because the plaintiff did not allege that his employer obtained his confidential medical information through an employer-related medical examination or inquiry); Perez v. Denver Fire Dep't, 243 F. Supp. 3d 1186, 1197–98 (D. Colo. 2017) (holding that an employer cannot be liable for dissemination of medical information that Plaintiff voluntarily disclosed to co-workers outside the context of a medical examination or inquiry); EEOC v. Thrivent Fin. for Lutherans, 795 F. Supp. 2d 840, 843 (E.D. Wis. 2011) ("courts have consistently held that the confidentiality requirements of [§ 12112(d)(4)] do not protect medical information that is voluntarily disclosed by the employee and, thus, is not acquired as a result of a medical inquiry by the employer.").

367 The ADA provides: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures,

on the front end, when applying for a position, it appears that the ADA may protect applicants when they are denied employment for refusing to answer invasive questions regarding pregnancy or planned pregnancy. For example, in *Garlitz v. Alpena Regional Medical Center*, the court denied summary judgment for an employer on an ADA discrimination claim against that employer, which had rescinded its employment offer after the plaintiff complained about and refused "to answer questions regarding, inter alia, whether she was pregnant, had ever been pregnant, or was planning to become pregnant; whether she had ever had an abortion, miscarriage, or live birth, and if so, how many times; and whether she was on birth control and, if so, what type."[368]

However, the overall lesson from an analysis of the statute and cases is that the scope of information protected by the ADA's confidentiality provision is narrower than meets the eye. Employers can freely disclose health information without violating the ADA unless the information was obtained from the employee in response to a request by the employer for medical information, such as a request for a doctor's note to support a reasonable accommodation request, or from an employer-mandated physical-fitness-for-duty exam.

III
A Way Forward: The Pregnant Workers Fairness Act and Other Solutions

A. The Pregnant Workers Fairness Act

The PWFA makes it crystal clear that employers are obligated to provide reasonable accommodations for pregnancy and related conditions, including reproductive events such as abortion, infertility, and miscarriage.[369] It is also worth pausing here to advance the argument that the federal courts now have a duty, in light of *Dobbs*, to interpret and apply the PWFA in the most expansive and protective way possible and not undermine Congress's intent to require employers to accommodate pregnancy-related disabilities. After *Dobbs*, it is not an exaggeration to say we are entering a world of compelled

the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

[368] 834 F. Supp. 2d 668, 679, 683 (E.D. Mich. 2011).

[369] *See supra* subpart I.B.3.

pregnancy and parenting.[370] It is also a world in which even desired pregnancies have, overnight, become unnecessarily dangerous and potentially debilitating due to states' efforts to block access to safe drugs[371] and procedures,[372] including emergency medical care,[373] used to treat common pregnancy complications.[374] It is within this context that Congress passed the PWFA.

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370 "[T]he vast majority of women, either through choice or social expectation, will go on to raise a child that results even from an unwanted pregnancy." Meghan Boone, *Reproductive Due Process*, 88 Geo. Wash. L. Rev. 511, 556 (2020).

371 *See* National Acads. of Scis., Eng'g, and Med., The Safety and Quality of Abortion Care in the United States 57, 167 (2018) (discussing extensive clinical research demonstrating the safety and effectiveness of mifepristone and misoprostol, drugs used for medication abortion, surgical abortion, and miscarriage management).

372 *See* Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. Times (July 17, 2022), https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html [https://perma.cc/SX6V-6ZND] ("Delays in expelling tissue from a pregnancy that is no longer viable can lead to hemorrhaging, infections, and sometimes life-threatening sepsis, obstetricians say.").

373 *See* Moyle v. United States, 144 S. Ct. 2015 (2024) (Mem) (dismissing writs of certiorari before judgment as improvidently granted in action by the Federal Government against Idaho seeking an injunction to allow patients to receive emergency abortions, as required by the federal Emergency Medical Treatment and Labor Act (EMTALA), which obligates hospitals that participate in Medicare to provide stabilizing treatment). The Idaho law prohibits abortions only if necessary to prevent a pregnant woman's death; it makes no exception for abortions necessary to prevent grave harms to the woman's health, like the loss of her fertility. *Id.* at 2016 (Kagan, J., concurring). The Court's dismissal punts the question back to the lower courts, reinstating uncertainty about what protections EMTALA offers patients and providers for emergency abortions. *See Supreme Court Dismisses EMTALA Case*, Am. Hosp. Ass'n (June 27, 2024), https://www.aha.org/news/headline/2024-06-27-supreme-court-dismisses-emtala-case [https://perma.cc/A8TR-P4RL].

374 *See* Patricia J. Zettler & Ameet Sarpatwari, *State Restrictions on Mifepristone Access—The Case for Federal Preemption*, 386 New Eng. J. Med. 705, 706 (2022) ("[S]tates have long engaged in efforts to restrict mifepristone access . . . ."); Jennifer A. Staman, Cong. Rsch. Serv., LSB10919, Medication Abortion: New Litigation May Affect Access 3–4 (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10919 [https://perma.cc/V3UN-TP7L] (summarizing litigation challenging access to mifepristone). Most recently, the Supreme Court dismissed, on standing grounds, claims by doctors and medical groups challenging the FDA's approval of mifepristone and its later 2016 and 2021 actions expanding its availability. FDA v. All. for Hippocratic Med., 602 U.S. 367, 370 (2024). The decision maintains access to medication abortion for the time being, albeit under an unnecessary risk evaluation and mitigation strategy (REMS) program. *See Mifepristone in the Courts*, Am. Coll. Obstetricians & Gynecologists (July 24, 2024), https://www.acog.org/news/news-articles/2023/02/mifepristone-in-the-courts [https://perma.cc/C6RV-C3FX]. Further, it does not foreclose other challenges to the FDA's actions, and three states remain in the case. Access to mifepristone is still at risk nationwide. *See* Amy Howe, *Supreme Court Preserves Access to Abortion Pill*, SCOTUS Blog (June 13, 2024), https://www.scotusblog.com/2024/06/supreme-court-preserves-access-to-abortion-pill/ [https://perma.cc/7XPS-KGHB].

There can be no doubt that, in adopting the PWFA, Congress was aware of *Dobbs* and its impact on workers who may become pregnant.[375] The intended scope of the PWFA must be understood against this historical backdrop. Finally, the majority in *Dobbs*, while formally disclaiming the argument, implicitly suggested that the existence of "federal and state laws ban[ning] discrimination on the basis of pregnancy"[376] justified its decision to allow states to criminalize abortion. While the argument seems disingenuous given that the justices in the majority in *Dobbs* have shown no hesitation in whittling away employment protections, lower-court judges should take the Court's reasoning at face value. *Dobbs* provides lower courts an additional reason to interpret and apply the PWFA's accommodation provision generously. Such a generous reading of the PWFA should mean that even minor, temporary impairments related to pregnancy—including, for example, the right to take time off from work for an abortion without losing one's job—must be accommodated under the PWFA.

It should also not go unnoticed by federal judges, when they start hearing PWFA cases, that Congress chose to pass an entirely new law rather than amend the PDA, ADA, or the FMLA when it decided to add a duty by employers to accommodate pregnancy, childbirth, and pregnancy-related impairments. In shaping the future meaning and application of the PWFA, courts should not be drawing on restrictive understandings of impairments and reasonable accommodations that have flourished in lower-federal-court case law interpreting and applying the PDA, ADA, and FMLA. The EEOC's final rule implementing the PWFA further supports this broad interpretation.[377]

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375 Although blocked by the Senate, a law that would have legalized abortion was passed by the House in the very same period that it passed the PWFA. *See* Women's Health Protection Act of 2022, H.R. 8296, 117th Cong (2022).

376 *Dobbs*, 597 U.S. at 258; *see id.* n.42.

377 *See* 29 C.F.R. §§ 1636.3–1636.4 (requiring qualified employees to receive a wide variety of reasonable accommodations for known limitations "related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," whether physical or mental, even if "modest, minor, and/or episodic," and even if the employee is unable to perform one or more essential job functions so long as the inability will be temporary (generally, 40 weeks in the case of pregnancy) and there is a reasonable accommodation to address it. According to the final rule, "'Pregnancy' and 'childbirth' . . . include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery)." *Id.* at § 1636.3(b). "Related medical conditions" are also defined broadly, and may include, for example:

However, even if federal judges take an expansive view of the PWFA, additional legal interventions may be necessary to fully address the confidentiality and antiretaliation gaps in federal employment discrimination and leave laws. In particular, although the EEOC's final PWFA rule limits the circumstances when supporting documentation may be asked of a worker who seeks an accommodation,[378] the PWFA does not include a provision specifically requiring covered entities to maintain the confidentiality of medical information obtained in support of accommodation requests.[379] Rather, the PWFA's medical

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> termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections.

Id. "This list is non-exhaustive." *Id.*

378 Under the final rule, an employer may only seek supporting documentation from a worker if it is reasonable to require documentation under the circumstances, and in that case, the requested documentation itself must be reasonable. *See id.* at § 1636.3(l). Further, "it is not reasonable under the circumstances" for an employer to ask for supporting documentation when a limitation and the needed work adjustment "are obvious" (such as the need for a modified uniform) and the employee self-confirms the condition; when the employer already has sufficient information to determine whether the employee has a qualifying condition; when the employee is pregnant and seeks one of four accommodations that are "commonly sought" and "widely known to be needed during an uncomplicated pregnancy" (i.e., carrying water and drinking, as needed; taking additional restroom breaks; sitting, for those whose work requires standing, and standing, for those whose work requires sitting; and breaks, as needed, to eat and drink); "when the reasonable accommodation is related to . . . pump[ing] . . . or . . . nurs[ing]" at work, or "[w]hen the requested accommodation is available to employees without known limitations under the PWFA . . . without submitting supporting documentation." *Id.*

379 Because of this statutory silence, the EEOC decided confidentiality would be more appropriately discussed in its interpretive guidance on the PWFA than in the statute's implementing rule. Toward that end, it explains in the guidance that any medical information obtained during the interactive process under the PWFA is subject to the ADA's confidentiality rules. *See* Prohibition on Disability-Related Inquiries and Medical Examinations and Protection of Medical Information, 29 C.F.R. § 1636, app. 1636.7(a)(1) ¶ 14 ("[T]he rules limiting the ability of covered entities to make disability-related inquiries or require medical exams in the ADA apply to all disability-related inquiries and medical exams including those made in the context of requests for PWFA accommodation."). Further, the

privacy protections are contained in the EEOC's rule on employer document requests and (by reference to the ADA) in its interpretive guidance,[380] which may not receive deference from the federal courts.[381] And while the PWFA's retaliation provisions make it unlawful to discriminate against an employee for opposing any act made unlawful by the PWFA or for participating in a PWFA proceeding; to coerce, threaten, or intimidate an employee; or to interfere with the exercise of PWFA rights,[382] the statute is silent as to the causation standard for retaliation. Lower federal courts must now fill in the blanks left by these statutory omissions, a disheartening prospect given their past record of "impeding the realization of rights congressionally bestowed on workers."[383] Therefore, however potentially transformative, the PWFA may not be enough to address all of the gaps in protections for pregnant and potentially pregnant workers under Title VII, the PDA, and the ADA. As the next subparts

EEOC's interpretative guidance advises that seeking documentation or information that goes beyond the parameters of permissible documentation requests or disclosing medical information obtained through the PWFA's reasonable accommodation process may violate the PWFA's prohibitions against retaliation and/or coercion. *Id.* at § 1636.5(f) ¶¶ 5, 14, 15.

380 *See supra* discussion notes 378–79.

381 As this Article is being finalized for publication, twenty states have already filed lawsuits specifically objecting to the abortion provisions in the PWFA regulations, but also raising more general arguments against the regulations and the statute. *See* Complaint for Injunctive and Declaratory Relief at ¶¶ 118, 137, Tennessee v. Equal Emp. Opportunity Comm'n, 2024 WL 3012823 (E.D. Ark. 2024) (No. 2:24-CV-84-DPM), 2024 WL 1836066 (suit by seventeen red-leaning states alleging, *inter alia*, that the EEOC's regulations encompassing abortion in the PWFA violate the Administrative Procedure Act and the "EEOC's independent commission structure violates" the U.S. Constitution); Louisiana v. Equal Emp. Opportunity Comm'n, 2024 WL 3034006, at *2 (W.D. La. 2024) (suit by Louisiana and Mississippi alleging that the EEOC exceeded its statutory and constitutional authority in issuing a final rule requiring employers covered by the PWFA to accommodate elective abortions); Texas v. Garland, 2024 WL 967838, at *1 (N.D. Tex. Feb. 27, 2024) (suit by Texas alleging that Congress improperly employed proxy voting in passing the Consolidated Appropriations Act of 2023 (including the PWFA) in violation of the Quorum Clause of the Constitution). The Supreme Court's recent decision overturning *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), which held that courts should defer to an agency's reasonable interpretations of ambiguous statutory language, presents further uncertainty for the EEOC's PWFA rule, at least with regard to its provisions covering abortion. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024). In separate works, Deborah Widiss and Madeleine Gyory persuasively argue that the EEOC rule is valid and should receive deference by courts notwithstanding *Loper Bright*. *See* Widiss, *supra* note 219, at 97 n.62; Madeleine Gyory, *The Reasonable Pregnant Worker*, 113 CALIF. L. REV. (forthcoming 2025) (manuscript at 40–45) (on file with author).

382 *See* 42 U.S.C. § 2000gg-2(f).

383 Kevin M. Clermont & Stewart J. Schwab, E*mployment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 132 (2009).

discuss, enhanced antiretaliation and privacy protections further strengthening pregnant workers' ability to exercise their statutory rights under the PWFA and other federal employment statutes may also be required.

B. Enhanced Antiretaliation and Privacy Protections

Women and pregnant people who miscarry, undergo fertility treatment, have abortions, experience the symptoms of menopause, or experience myriad other common reproductive-health conditions may not feel comfortable sharing their health information with employers, given the prevailing stigma many attach to pregnancy, disability, and women's bodies and sexuality more generally.[384] The need for privacy is particularly acute for the most vulnerable workers, as outing oneself comes with a risk of workplace retaliation,[385] including job loss or even prosecution for harming an embryo or a fetus.[386] Yet, the major federal employment statutes require workers to provide notice of their reproductive health conditions in order to be protected, despite insufficiently reliable (or nonexistent) privacy provisions for their shared health information.[387] The net result is a mutually reinforcing dynamic of cultural taboo and legally coerced invisibility surrounding workers' reproductive lives. Under this framework, workers affected by common reproductive life events (such as abortion, infertility, pregnancy, and miscarriage) may not even request small changes related to their work that would help keep them stay safe and healthy; that is, they are unlikely even to pass "go." Employment law functions, in a sense, as a legally constructed closet.

In order for employees affected by common reproductive events such as abortion, infertility, and miscarriage to have an opportunity to access the protections intended by Congress when it enacted the PDA, ADA, FMLA, and PWFA, these statutes should, ideally, include strong privacy and antiretaliation provisions. Such provisions could be shored up by Congress via the legislative process or through judicial interpretations consistent with the clear and broad protective purpose of these statutes, as indicated by both Congress and the EEOC.

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384 *See supra* notes 255–97 and accompanying text.

385 *See supra* subpart II.A.

386 *See supra* notes 270–72 and accompanying text.

387 *Id.*

1. *Enhanced Antiretaliation Protections*

Let's start with retaliation. As expert commentators have already argued, the Supreme Court's 2013 decision in *University of Texas Southwestern Medical Center v. Nassar*,[388] increasing plaintiffs' burden of proof for retaliation claims under Title VII, was wrongly decided, as the "but-for" causation standard announced by the Court is at odds with the plain language of the statute.[389] Contrary to the majority's interpretation, Congress clearly indicated in the plain language of the Civil Rights Act of 1991 that the standard of proof for all "unlawful practices" under Title VII, including retaliation, is the "motivating-factor" standard.[390] Further, several scholars have persuasively argued that the Supreme Court's latest Title VII decision[391] clarifies that the "but-for" standard is not a sole-cause standard for any category of Title VII claims.[392] Whether the lower federal courts will agree with these interpretations of Title VII remains an open question. In the interim, there are other legal arguments available to limit the impact of *Nassar* in the retaliation context. Let us start with the FMLA.

It is alarming how many lower federal courts have imported the Supreme Court's flawed construction of the causation standard for Title VII retaliation claims into the FMLA,[393] an entirely different statute with a different structure, purpose, and scheme. The FMLA is not even an antidiscrimination statute. It is a minimum labor standard providing for entitlements to unpaid leave for a minimum period of time for the birth or adoption of a child or a covered employee's own

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388 570 U.S. 338, 360 (2013).

389 *See* Zimmer, *supra* note 317, at 712–13.

390 *See id.*; *see also* Nassar, 570 U.S. at 371–72 (Ginsburg, J., dissenting).

391 Bostock v. Clayton County, 590 U.S. 644 (2020) (holding that employment discrimination on the basis of homosexuality or transgender status is illegal sex discrimination under Title VII).

392 *See* D'Andra Millsap Shu, *The Coming Causation Revolution in Employment Discrimination Litigation*, 43 Cardozo L. Rev. 1807, 1849 (2022); Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 Va. L. Rev. 1621, 1679–80 n.274 ("*Bostock*—which makes absolutely clear that the "but[-]for" standard is not a sole[-]cause standard—should lead to a reversal of these precedents."); Melissa Essary, *Bostock: A Clean Cut Into The Gordian Knot Of Causation*, 75 SMU L. Rev. 769, 769 (2022) ("*Bostock* creates a new mixed-motive paradigm that, if correctly applied, should transform individual discrimination law . . . ."); Deborah A. Widiss, *Proving Discrimination by the Text*, 106 Minn. L. Rev. 353, 362–63 (2022) (asserting the Supreme Court has "consistently held that Title VII does not require a plaintiff to prove a protected trait was the only cause of an adverse employment action . . . and it reaffirmed this conclusion in *Bostock*").

393 *See supra* notes 310–16 and accompanying text.

or qualifying family member's serious health condition.[394] The FMLA's "antiretaliation" provision is modeled on the National Labor Relations Act's[395] antiretaliation provision and is different in language and structure from Title VII's antiretaliation provision.[396] Indeed, the FMLA does not include the word "retaliation." Rather, the statute speaks of an employer's "interference" with an employee's exercise of rights protected by the FMLA and "interference" with proceedings, such as filing a charge or suit for violation of FMLA rights.[397] As such, there is no basis for courts to require proof of discriminatory intent to establish a claim of interference under the FMLA at all.

Some courts have established a distinction between an outright denial of FMLA leave rights *ex ante* from an adverse employment action that occurs after an employee exercises FMLA rights. Such courts categorize the former scenario as FMLA interference, which does not require proof of intent to discriminate, and the latter scenario as "retaliation," which does.[398] But even this slightly more generous interpretation is not supported by the plain language of the statute.[399] Discrimination is a foreign concept under the FMLA. Yet, courts have held that once an employee takes protected FMLA leave (or is even just approved for a leave), any adverse employment action that occurs is a discrimination claim requiring proof of intent to retaliate for exercising FMLA rights.[400] And then many courts have, in turn, applied *Nassar's* "but-for" causation standard

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394 *See supra* notes 222–25 and accompanying text.

395 29 U.S.C. § 158(a)(1). Congress passed the National Labor Relations Act in 1935 "to encourage collective bargaining" (i.e., unionization) and "to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy." *The Law*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law [https://perma.cc/YS6Z-JV9R] (last visited Feb. 22, 2022).

396 *See* Malin, *supra* note 311, at 349.

397 29 U.S.C. §§ 2615(a), (b).

398 *See, e.g.*, Goelzer v. Sheboygan Cnty., 604 F.3d 987, 995 (7th Cir. 2010) ("The difference between a retaliation and interference theory is that the first 'requires proof of discriminatory or retaliatory intent while [an interference theory] requires only proof that the employer denied the employee his or her entitlements under the Act.'") (alteration in original) (citations omitted); Malin, *supra* note 311, at 358–61 (collecting and discussing cases).

399 Malin, *supra* note 311, at 358–61.

400 *See id.* Other courts have drawn the line between outright denials of protected leave and terminations while on protected leave on the one hand (categorized as FMLA interference), and lesser adverse employment actions such as demoting an employee while on leave (categorized as FMLA "retaliation") on the other hand. *See id.* Neither of these distinctions is supported by the plain language or legislative history of the FMLA. *See id.*

to analyze whether the employer intended to "retaliate" under the FMLA. Which means, for example, that if a worker is laid off while out on FMLA leave due to pregnancy complications such as miscarriage, being ordered on bed rest to reduce the risk of a miscarriage or recover from a difficult childbirth (or if a worker is terminated after taking a leave to care for a family member affected in these ways), they must prove that the termination was because they exercised their rights under the FMLA, rather than because of the all-too-common explanation that their position was eliminated. That is a heavy burden given lower courts' skepticism of retaliation claims and general eagerness to accept the employer's explanation for adverse employment actions.

In sum, whether the adverse employment action occurs in response to an employee's request for FMLA leave or takes place after the employee is granted and takes FMLA leave, and whether the adverse employment action is an outright denial of leave, termination while on leave, or some lesser action, intent to discriminate is simply not properly an element of a claim of interference under the FMLA.[401] Under this framework, the burden of persuasion should be on the defendant to show that the reason for an adverse employment action around the time of a requested, approved, or completed FMLA leave is unrelated to the request for FMLA leave or exercise of an FMLA-protected right.[402] And if courts were to properly analyze the FMLA interference claims in this manner, which is consistent with Congress's purpose and the plain language of the statute, *Nassar*'s but-for causation standard would be wholly irrelevant to these claims under the FMLA. However, if courts are to persist in improperly constructing the FMLA as an antidiscrimination statute and equate FMLA interference with Title VII retaliation, they should at least evaluate FMLA "retaliation" claims under

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[401] An example of this correct approach can be seen in *Gordon v. U.S. Capitol Police*, 778 F.3d 158 (D.C. Cir. 2015), which held that "an employer action with a reasonable tendency to 'interfere with, restrain, or deny' the 'exercise of or attempt to exercise' an FMLA right may give rise to a valid interference claim under § 2615(a)(1) even where the action fails to actually prevent such exercise or attempt." Gordon, 776 F.3d at 165.

[402] Rachel Arnow-Richman has made a similar proposal that would apply in a narrower set of circumstances. *See* Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 56 (2007) (arguing for "a judicially created burden shift on proof of substantive violations of the FMLA and Title VII in cases where employers fail to engage in a good-faith process [to consider an employee's request] and the plaintiff can demonstrate a prima facie case of retaliation or discriminatory failure to accommodate").

the less onerous, pre-*Nassar* "motivating-factor" causation standard, which would permit a finding that an employer engaged in FMLA interference even if the exercise of FMLA rights was not the but-for cause of the employer's action.

And finally (and more broadly) with regard to retaliation, there are common-sense reasons to believe employees who claim they are victims of retaliation for exercising their rights to leave or work accommodations under the FMLA, PDA, PWFA, and ADA—and thus not to place additional hurdles in their way when they claim retaliation (or, in the case of the FMLA, interference) under these statutes. This is because workplace leave and alternative work arrangements are perceived as (and can be) disruptive to employers' day-to-day operations and bottom line. In contrast, when an employee complains about disparate treatment under Title VII or the ADA, that is, when an employee is asserting a simple right to nondiscrimination, and then, subsequently, something bad happens to them at work, it may be more reasonable to give the employer the benefit of the doubt and require the employee to bring forth strong evidence connecting the adverse employment action to their complaints of discrimination. After all, bad things happen to employees for legitimate and illegitimate reasons unrelated to illegal discrimination all the time. In contrast, being demoted or losing a job after asking for or receiving a leave or workplace accommodation for a pregnancy-related complication, serious health condition, or disability is inherently suspect. Therefore, when an employee is seeking to vindicate their right to leave or accommodations under the FMLA, PDA, PWFA, or ADA and claims retaliation, it is not appropriate to require that she establish that her protected activity was the "but-for" cause of retaliation or interference by the employer just to have a jury consider her claim.

Admittedly, the typical employee is not going to consider evidentiary standards or burdens of proof when deciding whether to ask for FMLA leave or workplace accommodations for reproductive-health conditions or treatment. Yet, the systemic impact of making retaliation claims hard to win is that employers can deny leave or accommodations or punish employees for exercising or attempting to exercise their rights without consequences, which creates space for this behavior to flourish. This frustrates Congress's intent to broadly protect workers from discrimination in passing the PDA, PWFA, and ADA and provide protected leave under the FMLA. But it is doubly problematic for workers who experience miscarriage, abortion, infertility, menstrual irregularities, or other reproductive

health conditions, given the culture of secrecy surrounding reproductive experiences. Therefore, as discussed previously, it will be especially important and appropriate given the legislative history of the PWFA for judges to avoid bootstrapping into the PWFA Title VII case law placing an unjustifiably elevated burden on workers to prove retaliation. Moreover, in order for workers with reproductive health conditions to come out of the shadows, federal antiretaliation provisions may need to be strengthened through further Congressional action.

2. *Enhanced Privacy Protections*

Employers must have a clear duty to keep private health information confidential when an employee shares reproductive-health or medical information pursuant to a request for a leave or workplace accommodation under the PDA, PWFA, FMLA, or ADA. Ideally, there must be a remedy for such breaches independent of an employee's remedies for discrimination under these statutes, so that there is a meaningful incentive to protect employee health information in its own right.[403] Toward that end, a private cause of action for breaching confidentiality should be established under all of these statutes, including Title VII and the PWFA, which presently have no privacy provisions. It may be that courts will not be willing to read such a cause of action into Title VII (and hence the PDA) or the PWFA absent further elaboration by Congress. In that case, Congress must act to add a confidentiality provision, with a corresponding right to sue for a breach.

The PWFA, in particular, is modeled on the ADA; therefore, by design, it contemplates that employees will share private health information in order to receive reasonable workplace accommodations for pregnancy, childbirth, and related medical conditions. As such, it would be entirely appropriate and logical for Congress to add a comparably strong and explicit duty of confidentiality to the PWFA. To address Congress's silence on this question, in its interpretive guidance on the PWFA, the EEOC cross-referenced the ADA's rules regarding confidentiality of medical information, asserting the PWFA's confidentiality obligations arise from the ADA, not the PWFA.[404] But under this approach, courts and employers may, wrongly, assume

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[403] For a discussion of the EEOC's rule limiting medical documentation requests by employers for PWFA accommodations, see *supra* note 378.

[404] *See supra* discussion note 379.

that narrow court constructions[405] of the ADA's medical confidentiality rule apply to the PWFA. Moreover, the EEOC's rule limiting the circumstances when an employer may seek medical documentation before granting a request for an accommodation under the PWFA will not apply to many pregnancy-related conditions,[406] and the remedy for violations of this provision is only addressed in the EEOC's interpretive guidance in any case.[407] Again, depending on how courts interpret and apply the PWFA, congressional action may be necessary to address its privacy gaps.[408]

Further, courts should interpret the existing confidentiality provisions in the FMLA and ADA expansively. This could easily be achieved, for example, through judicial interpretations that protect employee's health information, whether shared voluntarily by an employee in the process of seeking to exercise statutory rights or in response to a formal request for health information by the employer. This is easily justifiable in light of the existing FMLA and ADA statutory and regulatory language, which protects employee health information without distinctions as to whether the information was shared by an employee or requested by an employer.[409]

Establishing and expanding the scope of confidentiality provisions in these ways would further the purposes of the PDA, PWFA, FMLA, and ADA by making it possible for employees to provide the notice that is required to receive statutory rights without fearing that their health information will be shared beyond particular decision-makers responsible for

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405 *See supra* discussion notes 361–66.

406 *See supra* discussion note 378.

407 *Id.*

408 Some courts, as discussed *supra* subpart II.B.2.b, have construed this type of breach as form interference under the FMLA. While this may be another reasonable approach, a separate cause of action would more clearly put employers on notice that they are expected to protect employee health information.

409 For example, the FMLA confidentiality requirements say nothing about the source of information having any bearing on whether health information is protected. *See* Recordkeeping Requirements, *supra* note 345 ("Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential . . . ."). As for the ADA, as amended, the regulation governing confidentiality specifies that health information gathered pursuant to an employer required medical examination must be treated as a confidential medical record, *see* 29 C.F.R. § 1630.14 (2022), but this should not preclude a court or the EEOC from interpreting the ADA, 42 U.S.C. § 12112(d), to also protect voluntarily shared health information. Indeed, the EEOC has endorsed this interpretation. *See supra* note 361.

determining eligibility for accommodations or leave.[410] No employee should be faced with a choice between having their private health information protected and receiving a reasonable workplace accommodation or statutorily protected leave for a reproductive-health condition.

C. Paid Personal and Sick Leave

Having access to paid sick and personal leave is important for pregnant and potentially pregnant workers for a number of reasons. First, the FMLA only guarantees a right to unpaid leave.[411] Therefore, many eligible workers simply cannot afford to take it.[412] The ability to use accrued sick leave to replace pay while taking FMLA or other leave is a crucial benefit for making the protections of the FMLA and other federal employment statutes accessible to lower-wage workers. Second, although sick and personal leave are best suited for relatively short-term, routine reproductive impairments such as morning sickness, fatigue, or menstrual cramps and back pain and are less equipped to address more serious reproductive-health conditions (including complicated pregnancies and deliveries) that may require weeks or months away from work, paid sick and personal leave can at least protect the most vulnerable workers who can lose their job for missing even a day of work.[413] As such, sick and personal leave can fill in the gaps when reproductive-health conditions do not rise to the level of a serious health condition under the FMLA, a disability under the ADA, or an eligible impairment under the PWFA.[414]

Additionally, employers may be less likely to require employees to divulge private medical information to use intermittent

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[410] *See supra* subpart II.B.1, discussing notice requirements of the PDA, FMLA, and ADA.

[411] *See supra* subpart I.B.4.

[412] *See, e.g.*, Elise Gould, *Providing Unpaid Leave Was Only the First Step; 25 Years After the Family and Medical Leave Act, More Workers Need Paid Leave*, ECON. POL'Y INST. (Feb. 1, 2018), https://www.epi.org/blog/providing-unpaid-leave-was-only-the-first-step-25-years-after-the-family-and-medical-leave-act-more-workers-need-paid-leave/ [https://perma.cc/DF3P-97HC] (reporting that about 45% of "FMLA-eligible workers did not take leave because they could not afford unpaid leave" and that among workers who took FMLA leave, about one-third "cut their time off short due to cover lost wages").

[413] *See, e.g.*, Love v. First Transit, Inc., No. 16-CV-2208, 2017 WL 1022191, at *1 (N.D. Ill. Mar. 16, 2017) (recounting the facts of a call-center worker fired for missing less than a day of work when she was experiencing a miscarriage).

[414] *See* Widiss, *supra* note 36, at 188–89 (advocating sick days as an attractive, universal measure for acute menstrual symptoms).

sick or personal leave, which would protect the privacy of workers who have abortions, experience miscarriages, or experience other reproductive-health challenges.[415] Gender-neutral policies, such as paid sick leave, are also less subject to criticisms about "special treatment" for pregnant women and thus more likely to gain widespread public support. Paid sick and personal leave could also benefit trans and non-binary pregnant workers who do not easily fit within employers' and judges' vision of those whom the PDA and PWFA are intended to protect. Therefore, while not a stand-alone solution, having access to paid sick leave and personal days is an important supplement to the rights afforded by the PDA, ADA, PWFA, and FMLA, especially for low-wage workers.[416]

Sadly, however, low-wage workers are least likely to have paid sick or personal leave. Only eleven countries do not provide guaranteed paid sick leave, and the United States is one of them.[417] Faced with the health and labor crisis caused by the COVID-19 pandemic, Congress enacted emergency federal legislation that provided enhanced sick-leave benefits, but these benefits were temporary, and most have expired.[418] Despite lacking a federal right to paid sick leave, almost 80% of workers in the United States had access to paid sick leave as of March 2021.[419] But a closer look reveals a correlation between income and paid sick leave: while 95% of workers in the top 10%

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415 *See supra* Part II for a discussion of the cultural norm of secrecy surrounding miscarriage.

416 There are many proposals in this vein. For example, Nicole Porter has proposed a federal law, the "Short-Term Absences Act (STAA), which would provide up to ten days of paid absences that can be used for any reason." NICOLE BUONOCORE PORTER, THE WORKPLACE REIMAGINED 139 (2023).

417 *Paid Sick Leave to Protect Income, Health and Jobs Through the COVID-19 Crisis*, OECD (July 2, 2020), https://www.oecd.org/coronavirus/policy-responses/paid-sick-leave-to-protect-income-health-and-jobs-through-the-covid-19-crisis-a9e1a154/ [https://perma.cc/G9XG-GD6Z] (noting that South Korea is the only other OECD member who does not mandate paid sick leave); Editorial Board, *A Pandemic Shows Why the United States Should Not Be One of Only 11 Nations Without Paid Sick Leave*, WASH. POST (Jan. 15, 2022), https://www.washingtonpost.com/opinions/2022/01/15/pandemic-shows-why-united-states-should-not-be-one-only-11-nations-without-paid-sick-leave [https://perma.cc/PG56-9REQ].

418 *Paid Leave in the U.S.*, KFF (Dec. 17, 2021), https://www.kff.org/womens-health-policy/fact-sheet/paid-leave-in-u-s/ [https://perma.cc/K38C-62WL]; *Paid Sick Leave*, Nat. Conf. State Legislatures (July 21, 2020), https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx [https://perma.cc/5XZL-MWWQ].

419 *Paid Sick Leave Was Available to 79 Percent of Civilian Workers in March 2021*, U.S. BUREAU OF LAB. STAT.: ECON. DAILY (Oct. 12, 2021), https://www.bls.gov/opub/ted/2021/paid-sick-leave-was-available-to-79-percent-of-civilian-workers-in-march-2021.htm [https://perma.cc/3UKX-U7K7].

earnings bracket receive sick pay, only 35% of workers in the bottom 10% bracket have access to sick pay,[420] a disparity that had already been exacerbated by the pandemic.[421] Somewhat alleviating the lack of coverage, about one-third of U.S. states now guarantee paid sick leave, as do Washington, D.C. and more than twenty cities and counties.[422] Further, Maine and Nevada recently enacted general paid-time-off laws that workers may use for any purpose, including sickness.[423] The specifics of these laws vary by state, such as differences in waiting periods before accruing leave and exemptions for small employers of different sizes, but most provide thirty to forty hours of leave per year.[424] Finally, about ten states have passed paid-family-and-medical-leave laws, although, like state sick-leave laws, these laws vary in how they define who is qualified for leave, how leave is funded, and how much leave is provided.[425] All of these laws represent progress, but the fact remains that they create a patchwork of protection, at best, and the United States has no law guaranteeing its workers paid sick leave.

Since at least 2004, many bills have been introduced in Congress that would address some of the problems caused by insufficient paid sick leave in the United States. These proposed laws include the Family and Medical Insurance Leave Act,[426] which would create a national family-and-medical-leave insurance fund to provide workers with up to twelve weeks of partial income when they take time off for their own serious health conditions (including pregnancy-related health conditions and childbirth) or for the serious health conditions of qualified family members, among other benefits, and the Healthy Families Act,[427] which mandates that employers with more than fifteen employees provide paid sick days for all employees. A Republican proposal is the Strong Families Act,[428] which would provide

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420 *Id.*

421 WASH. POST, *supra* note 417.

422 *See Paid Leave in the U.S.*, *supra* note 418; Jennifer Bennett Shinall, *Paid Sick Leave's Payoff*, 75 VAND. L. REV. 1879, 1886–87, 1887 tbl.1 (2022) (reporting that seventeen states and D.C. mandate paid sick leave).

423 *See* ME. STAT. tit. 26, § 637 (2019); NEV. REV. STAT. § 608.0197 (2021).

424 *See Paid Leave in the U.S.*, *supra* note 418.

425 *See* Molly Weston Williamson, *The State of Paid Family and Medical Leave in the U.S. in 2023*, CTR. FOR AM. PROGRESS (Jan. 5. 2023), https://www.americanprogress.org/article/the-state-of-paid-family-and-medical-leave-in-the-u-s-in-2023/ [https://perma.cc/323S-UF4D].

426 H.R. 804, 117th Cong. (2021); S. 248, 117th Cong. (2021).

427 H.R. 2465, 117th Cong. (2021); S. 1195, 117th Cong. (2021).

428 H.R. 3595, 115th Cong. (2017); S. 1716, 115th Cong. (2017).

tax credits to employers that offer paid leave to employees on FMLA leave. Finally, President Biden's Build Back Better Act[429] proposed four weeks of paid family and medical leave as part of a $2 trillion economic-relief package. While the spending legislation passed the House of Representatives in November 2021,[430] it stalled and died in the Senate when all the Republicans and one Democrat refused to support the package.[431]

As a recent student note on paid sick leave correctly asserts, "[t]he United States needs a national paid[-]sick[-]day standard to protect all working people."[432] While leave to attend to reproduction is not unique in this regard, such a development is an important component of any response to the common experiences of abortion, miscarriage, infertility, and other reproductive life events.[433]

CONCLUSION

Abortion, infertility, and miscarriage are experienced by up to one-fourth of pregnant people; these and other common reproductive-health conditions, including lactation, menstruation, and menopause, affect hundreds of thousands of American workers. Despite this, until the PWFA was passed, none of our country's federal employment laws adequately protected workers from discrimination on the basis of pregnancy and reproductive health. The PWFA is an excellent first step to address these shortfalls in federal law, especially if the lower federal courts take seriously Congress's purpose in enacting a major new employment-discrimination statute. But it is not enough. The entrenched culture of secrecy surrounding women's reproductive lives is reinforced by legal doctrines that, on

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429 H.R. 5376, 117th Cong. (2021). The Senate did not take up the bill and it did not become law.

430 Emily Cochrane & Jonathan Weisman, *House Narrowly Passes Biden's Social Safety Net and Climate Bill*, N.Y. TIMES (Nov. 21, 2021), https://www.nytimes.com/2021/11/19/us/politics/house-passes-reconciliation-bill.html [https://perma.cc/P5UG-8JAE].

431 Alan Fram, *Manchin, Key Dem, Says Build Back Better Bill Is 'Dead'*, AP News (Feb. 1, 2022), https://apnews.com/article/joe-biden-business-environment-and-nature-environment-joe-manchin-c2e743dbb3978a9e-780779fa4fec09b7 [https://perma.cc/ES63-E8XE].

432 Dylan Karstadt, Note, *Too Sick to Work? Defending the Paid Sick Leave Movement and the New Jersey Paid Sick Leave Act*, 44 SETON HALL LEGIS. J. 145, 174 (2020).

433 A state-by-state and city-by-city response may also help, and this patchwork approach may be all that is politically feasible at the present time. But, ideally, the response should be in the form of a federal law that uniformly protects the maximum percentage of the U.S. workforce.

the one hand, require workers to divulge private health information in order to receive necessary leave or work adjustments for pregnancy, childbirth, and related medical conditions, yet insufficiently protect them from retaliation and breaches of confidentiality when they do. The potential post-*Dobbs* repercussions of telling one's employer that one has had an abortion or miscarriage further exacerbate employment law's inadequacies. A more comprehensive approach is required. This includes enhanced antiretaliation and privacy protections and access to paid sick and personal leave. For there to be true reproductive justice at work, workers who need workplace accommodations or leave due to their reproductive capacity and conditions must not be deterred from exercising or enjoying rights under federal employment statutes. For there to be reproductive justice at work, they must be able to safely come out of the shadows.