

Addressing Periods at Work

Marcy L. Karin*

Structural workplace changes are needed to acknowledge, anticipate, and accommodate menstruation, without harming equity or economic security for current and former menstruators. The biological process of menstruation does not stop at work, but workplaces are not designed to support needs related to periods, perimenopause, or menopause. Specifically, some workers who menstruate have needs related to menstrual accommodations like time away from work or access to menstrual products and private and sanitary spaces to dispose of menstrual discharge and the products that absorb it. Workers also have needs related to working free from indignities and harassment because of menstruation. Yet, periods and blood are stigmatized, gendered, and subject to taboos. The corresponding shame, lack of menstrual education, gender composition and power dynamics of workplaces, and overall structural mismatch makes some menstruators susceptible to discrimination and harassment at work.

This article explores this landscape of menstruation, menopause, and work. After identifying and categorizing menstrual needs at work, it analyzes employer-provided policies and existing legal requirements that offer some protections and supports to current and former menstruators at work. It then explores how these existing policies and law fail to comprehensively address menstrual needs or corresponding problems such as absenteeism, lost wages, privacy violations, health implications, harassment, and other menstrual indignities. Building on available menstrual experiences, voluntary employer policies, international models, and analysis of applicable federal law and related litigation, the article recommends public policy interventions to minimize menstrual injustices and acknowledge that menstruation and menopause at work matter.

INTRODUCTION	451
I. PERIODS AT WORK	454
A. <i>The Biological Process and Culture Surrounding Menstruation</i>	455
1. <i>Menstrual Cycles, Symptoms, and Conditions</i>	456
2. <i>Lack of Information and the Culture of Silence about Menstruation</i>	459
B. <i>Naming Menstrual Needs and Developing Period Policies at Work</i>	461
1. <i>Categorizing Menstrual Needs</i>	462
a. <i>Menstrual Accommodations</i>	462
i. <i>Access to Paid Time Away from Work</i>	462
ii. <i>Access to Menstrual-Friendly Facilities and Products</i>	468

* Marcy Karin is the Jack & Lovell Olender Professor of Law & Director of the Legislation/Civil Rights Clinic at the University of the District of Columbia David A. Clarke School of Law. Thanks to the individuals who shared their menstrual experiences with the Clinic when it represented Bringing Resources to Aid Women's Shelters on public policy efforts to advance menstrual equity. Thanks also to Margaret Johnson, Monica Bhattacharya, Liz Cooper, Robin Runge, Leslie Mullins, Naomi Cahn, Bridget Crawford, Emily Gold Waldman, Muneer Ahmad, Sameer Ashar, Courtney Cross, Saleema Snow, Laurie Morin, Holly Seibold, Alexis Soterakis, Galina Abdel Azis, Pete Kimbis, Asia Hartsgrove, Chaz Hendrix, Tamara McGuire, and participants in the Colloquium on Scholarship in Employment and Labor Law, AALS Clinical, Clinical Law Review, Southern Clinical, New England Clinical, UDC Law, and Mid-Atlantic Clinical Writing Workshops.

	<i>b. Workplace Free from Menstrual Indignities, Harassment, and Discrimination</i>	466
	2. <i>The Development of Employer Provided Period Policies</i>	468
	<i>a. Collective Action Leads to Improved Menstrual Policies</i>	469
	<i>b. Employer Provided Period Policies and Practices</i>	466
II.	EXISTING EMPLOYMENT LAW FOR CURRENT AND FORMER MENSTRUATORS	474
	<i>A. Menstrual Accommodations</i>	474
	1. <i>Access to Job-Protected Time Away from Work</i>	474
	2. <i>Additional Protections for Menstruation-Related Disabilities</i>	477
	3. <i>Access to Menstrual Safety and Physical Accommodations</i>	482
	<i>a. Access to Toilets as Needed</i>	482
	<i>b. Limiting Exposure to Menses and Proper Disposal of Menstrual Discharge</i>	486
	<i>c. Limited Employer Liability for Failing to Provide Menstruators with a Safe Workplace that is Free from Harm</i>	488
	<i>B. Menstrual Discrimination</i>	490
	1. <i>Menstrual Discrimination as Sex/Gender/Pregnancy Discrimination</i>	490
	<i>a. Menstruation, Perimenopause, and Menopause are Sex-Linked Conditions</i>	491
	<i>b. Menstruation and Menopause are Covered Reproductive Conditions</i>	494
	<i>c. Theories to Prove Menstrual Discrimination</i>	496
	2. <i>Some Menstrual Discrimination is Disability Discrimination</i>	499
	3. <i>Some Menstrual Discrimination is Age Discrimination</i>	500
	<i>C. International Standards and Models</i>	501
	1. <i>Early Labor Standards Related to Menstruation</i>	502
	2. <i>Additional Menstrual Accommodation Models</i>	505
	3. <i>Other International Period Provisions and Pending Campaigns</i>	507
III.	PROPOSAL FOR MENSTRUAL JUSTICE AT WORK	510
	<i>A. Addressing Multiple Menstrual and Menopausal Needs</i>	512
	<i>B. Normalizing Menstruation and Addressing Dignitary Harms</i>	514
	<i>C. Advancing Worker and Menstrual Justice Movements</i>	516
	CONCLUSION	518

INTRODUCTION

“Every woman dreads getting period symptoms when they’re not expecting them, but I never thought I could be fired for it.” – Alicia Coleman.¹

Alicia Coleman was fired for damaging workplace property after she bled on a company chair and later on the carpet.² Sharone Hubert experienced heavy menstruation that required her to change her menstrual products regularly, which caused her to be late for work, leave work early, or “drench” her uniform with menses.³ Becky White’s supervisor asked her “How’s the hot flash queen [and] the menopause today?”⁴ Coleman, Hubert, White, and countless other American workers have been placed in the untenable position of having to choose between safely managing their menstruation, being subjected to discrimination, or harming their economic security.

Around the globe, employers have denied menstrual accommodations and violated workers’ dignity and privacy. In Norway, workers were required to wear red bracelets when menstruating to notify a supervisor why they needed to use the bathroom more frequently.⁵ In Spain, female factory workers had to wear a red sign with the word “toilet” on it “in a bid to humiliate them into taking less breaks.”⁶ The German supermarket Lidl spied on their staff to monitor menstrual cycles “to prevent shoplifting,” and according to an internal memorandum, menstruating workers in the Czech Republic were required to wear a headband to “enjoy this [bathroom use] privilege.”⁷ And

¹ Alanna Vagianos, *Georgia Woman Claims She Was Fired Because of Her Period*, HUFFPOST (Aug. 22, 2017, 12:04 PM), https://www.huffpost.com/entry/georgia-woman-claims-she-was-fired-because-of-her-period_n_599c34f0e4b04c532f445e76 [<https://perma.cc/9Y4A-B7GU>] (describing Coleman v. Bobby Dodd Inst., Inc., No. 4:17-CV-29, 2017 WL 2486080 (M.D. Ga. June 8, 2017), *appeal dismissed*, No. 17-13023-BB, 2017 WL 6762403 (11th Cir. Nov. 6, 2017)).

² Coleman, 2017 WL 2486080, at *1; see *infra* Section II.C.1 (citing *ACLU Appeals Case of Georgia Woman Fired for Getting Her Period at Work*, ACLU (Aug. 17, 2017), <https://aclu.org/aclu-appeals-case-of-georgia-woman-fired-for-getting-her-period-at-work/> [<https://perma.cc/S22C-K55M>]).

³ Hubert v. Dep’t. of Corr., No. 3:14-CV-476 (VAB), 2018 WL 1582508, at *5 (D. Conn. March 30, 2018) (dismissing sex-discrimination claims for failure to exhaust administrative remedies).

⁴ White v. Twin Falls Cnty., No. 1:14-CV-00102-ELJ-REB, 2016 WL 1275594, at *2, *8-9 (D. Idaho, Mar. 31, 2016) (allowing a hostile work environment claim to proceed).

⁵ Sarah House, Thérèse Mahon & Sue Cavill, *Menstrual Hygiene Matters: A Resource for Improving Menstrual Hygiene Around the World*, WATERAID 174 (2012) (noting that the supervisor was fined); Rosemary Black, *Outrageous! Women Must Wear Red Bracelets When It’s Their Time of The Month at Company in Norway*, NY DAILY NEWS (Dec. 2, 2010), <https://www.nydailynews.com/life-style/outrageous-women-wear-red-bracelets-time-month-company-norway-article-1.473656> [<https://perma.cc/48KN-V4MD>] (sharing that workers “quite justifiably feel humiliated by being tagged in this way”).

⁶ House, Mahon & Cavill, *supra* note 5, at 175.

⁷ *Period Power: Periods in the Workplace*, Lunette, <https://www.lunette.com/blogs/news/period-power-periods-in-the-workplace> [<https://perma.cc/RL6F-3ATV>]; Kate Connolly, *German Supermarket Chain Lidl Accused of Snooping on Staff*, GUARDIAN (Mar. 26, 2008, 20:54 EDT), <https://www.theguardian.com/world/2008/mar/27/germany.supermarkets> [<https://perma.cc/JD6D-BZVW>].

when menstruating workers at an Indonesian factory were regularly denied bathroom access at work, they started wearing dark clothing to make it harder to see menstrual stains.⁸

As these stories demonstrate, a myriad of menstrual indignities happen at work. The reality is that workers have needs related to menstruation, its cessation, and menstrual management that regularly go unmet. Periods do not stop when menstruating individuals are at work. Nor do needs or workplace harassment stop when periods do for workers in perimenopause or menopause. Of course, many workers have no problem addressing this biological reality—they have access to workplace structures and income that allow timely and safe access, application and disposal of menstrual products, for example. There is growing recognition, however, that this is not everyone's reality.

Workplaces are not universally designed to support menstrual needs. Some workers lack access to menstrual accommodations—be it paid breaks, time off, flexible scheduling, or telework; affordable menstrual products and safe spaces to apply them; or modifications like uniform changes, fans, or workstations placed in closer proximity to restrooms. Collectively, this access gap may lead to decreased productivity, absenteeism, privacy violations, or cause workers to risk their health or exacerbate pre-existing medical conditions with makeshift products. It also may cause some workers to stain their clothes, especially if one's period arrives unexpectedly or differently than it has in the past or over one's lifetime, which is common after pregnancy, for young menstruators, and during perimenopause.

Further, periods and blood are stigmatized, gendered, and subject to religious, social, and other lore. The corresponding shame and lack of menstrual education about who menstruates, the individualized nature of the biological process, and its evolution over one's lifespan makes some workers susceptible to discrimination, intimidation, and harassment.⁹ For example, a worker was repeatedly subjected to menstruation-related jokes and comments about premenstrual syndrome and "The Gift."¹⁰ Another worker was barred from work post-maternity leave until her cycle was "normal" again.¹¹

⁸ L. Kretsu, *Labour Rights in Indonesia: What is Menstruation Leave Labour Rights in Indonesia: What is Menstruation Leave?* CLEANCLOTHES.ORG (2000).

⁹ Kids are taught to keep their menstrual needs secret to prevent boys from being uncomfortable. See e.g., BRAWS & UNIV. OF D.C. DAVID A. CLARK SCH. OF L. LEGIS. CLINIC, PERIODS, POVERTY, AND THE NEED FOR POLICY: A REPORT ON MENSTRUAL INEQUITY IN THE UNITED STATES (2018) (sharing students' schooling to ask for turtles and penguins, not tampons and pads).

¹⁰ Robyn M. Duponte, Arnold Rubin, Gerard Thomsons & Aina Watkins, *Hostile Work Environment Based on Gender*, in U.S. EQUAL EMP. OPPORTUNITY COMM'N, DIG. EQUAL EMP. OPPORTUNITY L. VOL XV, NO. 2 (2004), <https://www.eeoc.gov/federal/digest/xv-2.cfm> [<https://perma.cc/3N7N-PBCY>]; Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1, 33–34 (2019).

¹¹ *Harper v. Thiokol Chem. Corp.*, 619 F.2d 489, 490 (5th Cir. 1980); see Hiebert v. Sec'y, Dep't of Transp., EEOC DOC 01A05253, 2003 WL 21302525, at *1–2 (May 30, 2003) (reversing the decision to find a hostile work environment based on menstrual references and jokes, resulting in EEO training being imposed on the agency and the claimant receiving \$11,590.09 for medical and \$31,000 in non-pecuniary damages).

Someone with a disorder related to menstruation was fired after she disclosed it to her supervisor, based on an unsubstantiated belief that it would impact her work.¹² Additionally, menstrual needs at work are further complicated for transgender, genderqueer/nonconforming, or intersex workers—who may not be out at work or whose experiences are counter to managers' understanding of who menstruates and/or has menstrual needs.

Currently, most workplaces fail to acknowledge, anticipate, and/or accommodate menstruation. As a result, some menstruators have been forced to choose between their health, dignity, and economic security. This catch-22 situation is indicative of the structural mismatch where workplace systems and cultures do not accommodate workers' needs to safely address periods at work nor work in a place free from menstrual discrimination. Indeed, workplace structures often ignore the adverse employment decisions that are made on the basis of menstruation or otherwise against current or former menstruators. Workers need to be able to manage menstruation and be a menstruator at work without (fear of) harassment, discipline, termination, or other retaliation. Until then, workplace justice is not achieved and equity and economic security for current and former menstruators remains out of reach.

Existing law does afford limited period-related workplace protections.¹³ The provisions create an imperfect pairing that leave some needs unaddressed, however; they simply were not designed to affirmatively address menstrual or menopausal needs. Relatedly, the workplace has largely been ignored in the American menstrual movement, including policy reform campaigns, the media, and scholarship.¹⁴ Although activists (and others) often mention work as a place in need of reform, providing products at work is generally the only identified solution, if one is mentioned at all. There is no question that this reform is needed. By itself, however, it is not enough. Additional interventions are necessary to comprehensively address the mismatch of how workplaces are structured and the needs of menstruating individuals. Beyond products, workers need access to paid and job-protected time away from work as needed, toilets, running water, trash disposal, col-

¹² EEOC v. The Goodyear Tire & Rubber Co., Civil Action No. 5:11-cv-00468, (E.D.N.C. 2011); see Press Release, EEOC, The Goodyear Tire & Rubber Company to Pay \$20,000 to Settle EEOC Disability Discrimination Suit (July 23, 2012), <https://www.eeoc.gov/newsroom/goodyear-tire-rubber-company-pay-20000-settle-eeoc-disability-discrimination-suit> [<https://perma.cc/9A67-EFGJ>].

¹³ See *infra* Section II.

¹⁴ Some seminal legal scholarship related to this movement and its theoretical, historical, and pedagogical impacts does mention work. See Bridget J. Crawford, Margaret E. Johnson, Marcy L. Karin, Laura Strausfeld & Emily G. Waldman, *The Ground on Which We All Stand: A Conversation About Menstrual Equity Law and Activism*, 26 MICH. J. GENDER & L. 341, 360–61, 379 (2020) (articulating the workplace as the next frontier for menstrual advocacy, and containing the author's early call for a policy response); Johnson, *supra* note 10 (naming menstrual injustices at work); JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUITY 16 (2017) (mentioning menstrual inequities at work). Recently, Professors Crawford, Johnson, and Waldman organized a cutting-edge symposium that explored menstruation and the law, including some workplace essays. See Symposium, *Are You There Law? It's Me, Menstruation*, 41 COLUM. J. GENDER & L. i (2021).

leagues and supervisors educated about menstruation, work with dignity, and a worksite free from menstrual harassment.

This article contributes to the burgeoning scholarship area of menstruation and the law by exploring periods at work. It centers experiences and needs related to menstruation and menopause at work in voluntary employer policies and applicable existing employment law. Building on early policy campaigns and experiences from litigation and laws around the globe, it then offers a proposal to revise the law to remove systemic barriers that create menstrual indignities. Unlike existing law, the policy proposal would explicitly cover menstruation, require employers to provide access to menstrual accommodations, and afford workers the right to work free from menstrual indignities, harassment, and discrimination.

Part I addresses the realities of menstruation at work and identifies and categorizes worker needs related to periods. It also introduces actions that workers have taken to bargain for structural changes and that employers have voluntarily adopted to address periods at work. Because those bargained for and voluntary workplace practices cover only a small percentage of workers, Part II provides an overview of how existing workplace laws impose requirements on employers that apply to each category of menstrual need. It also explores how existing laws fail to adequately address menstrual equity or otherwise live up to their promised protections for all current and former menstruators. It then looks internationally to explore how other countries' movements and laws are addressing menstrual accommodations and antidiscrimination protection. Finally, Part III offers a proposal to amend and clarify existing laws to rectify this mismatch, investigates additional reasons for it, and counters some anticipated critiques.

I. PERIODS AT WORK

Many workers have no problems with menstruation at work. They have access to workplace structures that allow on-demand and safe use of menstrual products, and they work at places and with people who have been educated about menstruation and do not stigmatize, harass, or prevent opportunities because of it. To understand why the ability to safely address menstruation at work is not a universal reality and the need for public policy to intervene, this section starts with an overview of menstruation, perimenopause, and menopause. It then explains menstrual needs at work related to the biological process of menses, and how those needs are exacerbated by the culture of silence and lack of accurate menstrual education. Finally, it concludes with an overview of workers' collective action to change traditional workplace structures that acknowledge menstruation and the development of employer practices to support workers' needs to address periods at work.

A. *The Biological Process and Culture Surrounding Menstruation*

Approximately once a month, some people with uteruses experience the biological process of menstruation, which consists of the shedding of uterine lining causing the average discharge of two to five tablespoons of blood and tissue for around five days.¹⁵ Colloquially, this process is called a “period.”¹⁶ Periods are experienced by menstruators—people with a uterus and at least one ovary who have reached puberty and are not yet in menopause.¹⁷ Most menstruators, including those experiencing perimenopause or in menopause,¹⁸ are cis girls and women. Transgender boys, transgender men, and persons who are genderqueer/nonbinary or intersex also may be menstruators or in perimenopause or menopause.¹⁹

Menopause is the permanent cessation of menstruation, measured at the point of twelve months after a person’s last period.²⁰ Perimenopause is the approximately seven years before that moment during which the transi-

¹⁵ *What Happens During the Typical 28-Day Menstrual Cycle?*, U.S. DEP’T HEALTH & HUM. SERVS., OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle> [<https://perma.cc/ZP3S-ZFFJ>] (last visited Jan. 31, 2021); Marcy L. Karin, Margaret E. Johnson & Elizabeth B. Cooper, *Menstrual Dignity and the Bar Exam*, 55 UC DAVIS L. REV. 1, 22 (2021); *Menstrual Cycle*, U.S. DEP’T HEALTH & HUM. SERVS., OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle> [<https://perma.cc/49V6-RANB>] (last visited July 18, 2021); House, Mahon & Cavill, *supra* note 5, at tble.1.3, 33.

¹⁶ Abigail Durkin, *Profitable Menstruation: How the Cost of Feminine Hygiene Products is a Battle against Reproductive Justice*, 18 GEO. J. GENDER & L. 131, 135 (2017); *Menstrual Cycle*, *supra* note 15.

¹⁷ Karin, Johnson & Cooper, *supra* note 15, at 22 (citing Johnson, *supra* note 10, at 9) (explaining use of the term “menstruator”).

¹⁸ Unless otherwise specified, the term “menstruator” is used to refer to people who currently or formerly experienced menstruation including people who are in perimenopause and menopause. Similarly, “menstruation” is used as an umbrella term to refer to menstruation, perimenopause, and menopause.

¹⁹ Johnson, *supra* note 10, at 30–38; *Hysterectomy*, U.S. DEP’T HEALTH & HUM. SERVS., OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/a-z-topics/hysterectomy> [<https://perma.cc/B6QZ-CTWQ>] (periods are not possible if the uterus or both ovaries are removed). See Sarah E. Frank, *Queering Menstruation: Trans and Non-Binary Identity and Body Politics*, 90 SOCIO. INQUIRY 371, 382 (2020) (describing menstruation by people with diverse gender identities); Chris Bobel & Breanne Fahs, *The Menstrual Mark: Menstruation as Social Stigma*, in PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDS. 1009 (Chris Bobel, Inga T. Winkler & Breanne Fahs. eds., 2020) [hereinafter PALGRAVE HANDBOOK] (explaining why the gendered notion that “all women menstruate” is wrong, including reasons that women do not menstruate and “some men do menstruate”) (emphasis in original); Margaret E. Johnson, Emily G. Waldman & Bridget J. Crawford, *Title IX & Menstruation*, 43 HARV. J. L. & GENDER 225, 268 (2020) (“not all girls and women menstruate, and not all who menstruate are girls or women, but all who do have ‘female biology’”); Beth Goldblatt & Linda Steele, *Bloody Unfair: Inequality Related to Menstruation—Considering the Role of Discrimination Law*, 41 SYDNEY L. REV. 293, 295 (2019) (exploring why “feminine hygiene” is “problematically termed”); Cass Bliss, *Here’s What It’s Like to Get Your Period When You’re Not A Woman*, HUFF. POST (Aug. 20, 2018, 8:30am), https://www.huffpost.com/entry/nonbinaryperiod-menstruation_us_5b75ac1fe4b0182d49b1c2ed [<https://perma.cc/A9D4-3DAM>] (sharing some experiences of a nonbinary trans menstruator).

²⁰ *The Takeaway: Why are Workplace Menopause Polices Being Pushed for in the UK and Not the US?*, WNYC Studios (Sept. 3, 2019), <https://www.wnycstudios.org/story/workplace-menopause-polices-uk-us> [<https://perma.cc/92M7-8VJS>] (remarks of Chris Bobel).

tion of one's cycle changes, usually starting sometime between 44 and 55.²¹ Regardless of age, hysterectomies and other procedures also cause menopause.²² Most former menstruators spend as much time at work in menopause as they did while menstruating or in perimenopause.²³

1. Menstrual Cycles, Symptoms, and Conditions

On average, menstruators experience 480 menstrual cycles over a lifetime.²⁴ Each cycle's length and discharge level vary depending on the person and a series of factors such as stress and age. A minority of menstruators have a "regular" twenty-eight day cycle.²⁵ Others may have shorter, more frequent cycles characterized by heavy bleeding, "[p]assing blood clots larger than the size of quarters," and "[b]leeding that often lasts longer than eight days."²⁶ Further, menstruators may experience any number of medical conditions that co-occur or relate to periods, which may increase pain or flow significantly, such as dysmenorrhea or endometriosis.²⁷ Some of these conditions disproportionality impact certain groups of menstruators. For example, Black menstruators are more prone to uterine fibroids and undergo hysterectomies and myomectomies at substantially greater rates.²⁸

²¹ *What is Menopause?*, National Institute on Aging, <https://www.nia.nih.gov/health/what-menopause> [<https://perma.cc/CRS8-ELDV>] (last visited Aug. 15, 2021); Leslie Mullins, *Is It Hot in Here or is It Just Me?: A Call for Menopause Equity in the Workplace* (May 8, 2021) (ALWR, UDC Law) (manuscript at 2–3) (on file with author) (describing the menstrual lifespan and characteristics of menopause). Perimenopause can last between 4–12 years; the average age of menopause is 51. Kate Whiting, *MENOPAUSE SURVIVAL GUIDE* (Aug. 22, 2017, 10:03 AM), Belfast Tel., <https://www.belfasttelegraph.co.uk/life/health/5-point-survival-guide-to-getting-through-the-menopause-36053786.html> [<https://perma.cc/BFQ5-3ZMN>].

²² *What is Menopause?*, *supra* note 21.

²³ Naomi Cahn, *Justice for the Menopause: A Research Agenda*, 41 COLUM. J. GENDER & L. 27, 28 (2021).

²⁴ Astrid Krenz & Holger Strulikz, *Menstruation Hygiene Management and Work Attendance in a Developing Country* (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3305598 [<https://perma.cc/24AN-CMDX>].

²⁵ *Menstrual Cycle*, *supra* note 15; ELISSA STEIN & SUSAN KIM, *FLOW: THE CULTURAL STORY OF MENSTRUATION* 189 (2009) (61% of menstruators experienced at least one unpredictable period).

²⁶ Johnson, *supra* note 10, at 10.

²⁷ *Id.* at 14–15; House, Mahon & Cavill, *supra* note 5, at tbl.1.3 (defining common medical situations associated with menstruation, including menorrhagia, polymenorrhagia, amenorrhea, oligomenorrhagia, dysmenorrhea, and spotting); see also MAYO CLINIC, *Endometriosis*, <https://www.mayoclinic.org/diseases-conditions/endometriosis/symptoms-causes/syc-20354656> [<https://perma.cc/VH6H-JSPM>] (explaining that endometriosis exists when uterine tissues grows outside the uterus, which can cause significant pain during menstruation); Jyotsna Latha Belliappa, *Menstrual Leave Debate: Opportunity to Address Inclusivity in Indian Organizations*, 53 INDIAN J. INDUS. RELS. 604, 606 (2018) (noting that 10% of women of menstruating age are diagnosed with endometriosis); Mayo Clinic, *Menstrual Cramps*, <https://www.mayoclinic.org/diseases-conditions/menstrual-cramps/symptoms-causes/syc-20374938> [<https://perma.cc/9G4R-HVNC>] (explaining that dysmenorrhea, also known as menstrual cramps, consists of lower abdomen pains and ranges in severity).

²⁸ See Elizabeth A. Stewart, Wanda K. Nicholson, Linda Bradley & Bijan J. Borah, *The Burden of Uterine Fibroids for African-American Women: Results of a National Survey*, 22 J. WOMEN'S HEALTH 807, 807 (2013) (noting that African American women report greater rates,

Absent medical intervention or suppression, periods are often unpredictable. This characteristic inevitably causes some menstruators to be unprepared and in need of products and a bathroom to avoid leakage of menses onto clothes and other items, among other consequences.²⁹ Over the course of a menstruator's lifespan, however, it seems inevitable that one or the other will not be available at some point. This could be a result of a changing cycle or period poverty, which includes the lack of access to facilities, education, or finances to buy menstrual products.³⁰

Menstrual products include those items used to absorb discharge such as pads, tampons, menstrual cups, sponges, or period underwear, and those used to manage pain such as acetaminophen, ibuprofen, or heating pads.³¹ The type of absorption product a menstruator uses—and how often it is replaced—depends upon the menstruator's body at that particular time and the product's absorbency and size.³² On average, menstrual products using “absorbents” need to be changed every two to six hours.³³ If a menstruator's flow is heavier, as is true for twenty percent of menstruators, a tampon or

risks and earlier onsets of fibroids, and have a “higher likelihood of preoperative anemia[,] more severe pelvic pain,” and “2.4 times more likely to undergo hysterectomy and have an 6.8-fold increase of undergoing uterine-sparing myomectomy”); Heba M. Eltoukhi, Monica N. Modi, Meredith Weston, Alicia Y. Armstrong & Elizabeth A. Stewart, *The Health Disparities of Uterine Fibroids for African American Women: A Public Health Issue*, 210 AM. J. OBSTETRICS & GYNEC. 1, 4 (2014) (reporting that African Americans experience fibroids more frequently, with more severity, increased needs for surgical responses, and larger numbers of postoperative complications than other racial groups); Nancy E. Avis, Sybil L. Crawford & Robin Green, *Vasomotor Symptoms Across the Menopause Transition: Differences Among Women* 45(4) OBSTETRICS & GYNEC. CLINICS OF N. AM. 1, 7 (2018) (“[B]lack and Hispanic women are more likely. . .to report” vasomotor symptoms”, which “are the primary menopausal symptoms”).

²⁹ Karin, Johnson & Cooper, *supra* note 15, at 35; Johnson, Waldman & Crawford, *supra* note 19, at 232, 242, 244; Margaret E. Johnson, Marcy L. Karin & Elizabeth B. Cooper, *Stop the Stigma Against Menstruation: Starting with the Bar Exam*, NAT'L JURIST (July 28, 2020, 3:31 PM), <https://www.nationaljurist.com/national-jurist-magazine/stop-stigma-against-menstruation-starting-bar-exam>; see Elizabeth Montano, *The Bring Your Own Tampon Policy: Why Menstrual Hygiene Products Should Be Provided for Free in Restrooms*, 73 U. MIA. L. REV. 370, 373 (2018) (noting that 86% “of menstruators will unexpectedly start their period while in public without the necessary. . .products”).

³⁰ Karin, Johnson & Cooper, *supra* note 15, at 23; Alexandra Alvarez, *Period Poverty*, AM. MED. WOMEN'S ASS'N (Oct. 31, 2019), <http://amwa-doc.org/period-poverty/> [<https://perma.cc/7RNQ-NJ7K>] (articulating why it is important to have menstrual products in all restrooms as “a necessary supplement to—but not a replacement for—the personal menstrual products the menstruator chooses to carry to attend to their individual menstruation experience”).

³¹ Karin, Johnson & Cooper, *supra* note 15, at 23 (citation omitted); *Period Products, What are the Options?*, INT'L PLANNED PARENTHOOD FED'N (Nov. 18, 2020), <https://www.ippf.org/blogs/period-products-what-are-options> [<https://perma.cc/8BQC-ZKML>]; see Montano, *supra* note 29, at 370 n.1.

³² Karin, Johnson & Cooper, *supra* note 15, at 24.

³³ Julie Hennegan & Paul Montgomery, *Do Menstrual Hygiene Management Interventions Improve Education and Psychosocial Outcomes for Women and Girls in Low and Middle Income Countries? A Systematic Review*, 11 PLoS ONE (2016), <https://doi.org/10.1371/journal.pone.0146985> [<https://perma.cc/EX26-K7JP>]. Tampons must be changed as often as every four hours to avoid the rare risk of toxic shock syndrome. Durkin, *supra* note 16, at 135.

pad may need to be changed more frequently, such as every hour.³⁴ Menstruators also must determine which products are the safest for them in terms of size, absorbency, applicator, and material.³⁵ Sixty-two percent of American menstruators generally use disposable menstrual pads,³⁶ which means that proper waste disposal is needed too. It also means that menstruators spend significant money paying for products.³⁷ Some menstruators elect medical suppression, such as the use of birth control pills or hormonal medication, to reduce costs or for other reasons.³⁸

At some point during the menstrual cycle, many menstruators experience “period pains” including “abdominal cramps, nausea, fatigue, feeling faint, headaches, back ache and general discomfort.”³⁹ A significant minority of menstruators (approximately 20%) experience migraines.⁴⁰ Fluctuations in hormones also may cause “emotional and psychological changes”⁴¹ and premenstrual syndrome (“PMS”).⁴² PMS manifestations include anxiety and a range of “physical symptoms” including “constipation or diarrhea[,] bloating and gassy feeling[,] cramping[,] headache[s,] or backache[s.]”⁴³ Menstruation also correlates with susceptibility to infection.⁴⁴

Perimenopause may cause erratic and heavy bleeding.⁴⁵ Menopause often leads to hot flashes, palpitations, sleep disturbances, fatigue, poor concentration, urinary complaints, and mood changes.⁴⁶ It is often “control[led]”

³⁴ *Id.* at 133 (medical conditions may exacerbate bleeding); *Period Problems*, U.S. DEP’T HEALTH & HUM. SERVS., OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/menstrual-cycle/period-problems> [<https://perma.cc/7CBK-FXTA>].

³⁵ Johnson, Karin & Cooper, *supra* note 29.

³⁶ Alexandra Geertz, Lakshmi Iyer, Perri Kasen, Francesca Mazzola & Kyle Peterson, *An Opportunity to Address Menstrual Health and Gender Equity*, FSG, 6 (FIG. 1) (2016), https://www.fsg.org/sites/default/files/An%20Opportunity%20to%20Address%20Menstrual%20Health%20and%20Gender%20Equity_0.pdf [<https://perma.cc/FRF8-Q7R9>].

³⁷ Given educational opportunities, job insecurity, and other social determinants of health, the cost of these products disproportionately impacts menstruators of color. Letter from Grace Meng (and 27 other MOCs) to Joe Biden, Jr. (March 5, 2021), <https://meng.house.gov/sites/meng.house.gov/files/Letter%20to%20Biden.pdf> [<https://perma.cc/RZ98-6KE7>].

³⁸ STEIN & KIM, *supra* note 25, at 23–27, 30; Bobel & Fahs, *PALGRAVE HANDBOOK*, *supra* note 19, at 1009 (some trans men engage in menstrual suppression to counter distress about mixed messages surrounding menstruation and masculinity); Gina Shaw, *The No-Period Pills: The Newest Birth Control Pills Suppress Women’s Menstrual Cycles. But Is This Wise?*, WEBMD, <https://www.webmd.com/sex/birth-control/features/no-period-pills> [<https://perma.cc/9636-F5PN>] (last visited on July 21, 2021) (exploring the impact of period suppression).

³⁹ House, Mahon & Cavill, *supra* note 5, at 24; Karin, Johnson & Cooper, *supra* note 15, at 24–25 (quoting Johnson, *supra* note 10, at 14).

⁴⁰ Laura A. Payne, Andrea J. Rapkin, Laura C. Seidman, Lonnie K. Zeltzer & Jennie Ci Tsao, *Experimental and Procedural Pain Responses in Primary Dysmenorrhea: A Systematic Review*, 10 J. PAIN RES. 2233, 2234 (2017); *Period Problems*, *supra* note 34.

⁴¹ House, Mahon & Cavill, *supra* note 5, at 24.

⁴² Johnson, *supra* note 10, at 14–15.

⁴³ *Id.* at 14.

⁴⁴ House, Mahon & Cavill, *supra* note 5, at 36.

⁴⁵ *What is Menopause?*, *supra* note 21; Initial Brief of Plaintiff-Appellant at n.1, *Coleman v. Bobby Dodd Inst.*, No. 17-13023-BB (11th Cir. Aug. 14, 2017).

⁴⁶ *Dealing with Symptoms of Menopause*, Harvard Health, <https://www.health.harvard.edu/womens-health/dealing-with-the-symptoms-of-menopause> [<https://perma.cc/D76S-EH6M>] (last visited Oct. 29, 2019); UNISON, *The Menopause and Work. A Guide for UNISON Safety*

with hormone replacement therapy, which may lead to heart disease and other complications.⁴⁷ The age at onset, occurrence, and severity of these symptoms vary, often significantly; relatedly, not all menstruators or people in menopause experience all symptoms all the time, and some experience more severe levels and frequency of symptoms or have them manifest differently over time.⁴⁸

2. *Lack of Information and the Culture of Silence about Menstruation*

Historically, Americans (and others) are undereducated about menstruation.⁴⁹ Few states have a requirement to teach medically accurate information about menstruation, perimenopause, menopause, or how to safely, adequately, and appropriately manage them.⁵⁰ In addition to providing critically important information about people's bodies and choices, medically-accurate menstrual education helps combat related stigma.⁵¹ Menstrual distress increases without it and some remain unaware how to address menstruation when not at home.⁵² Compounding the problem, schools that do include menstrual education in their curriculum often do so too late or in sex-segregated capacities. This deepens misunderstandings about how menstruation enters the workplace and workers' potential menstrual needs, further fosters hiding menstruation, and tells non-menstruators that they do not need to engage with, learn about, or discuss menstruation. Collectively, this facilitates a culture of silence around menstruation (and menopause) that nurtures harassment, including at work.

Reps (December 2011), <https://www.unison.org.uk/content/uploads/2013/06/On-line-Catalogue204723.pdf> [<https://perma.cc/C7H4-6QZD>].

⁴⁷ Cahn, *supra* note 23, at 2; see Mullins, *supra* note 21, at 3 (discussing acceptance and common complications with hormone therapy); ROBERT WILSON, *FEMININE FOREVER* (1968) (characterizing menopause as a "disease" to treat with estrogen replacement); *Hormone Therapy: Is it Right for You?*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/menopause/in-depth/hormone-therapy/art-20046372> [<https://perma.cc/M7GB-SFDH>].

⁴⁸ *What is Menopause?*, *supra* note 21.

⁴⁹ See Ann Herbert, Ana Maria Ramirez, Grace Lee, Savannah J. North, Melanie S. Askari, Rebecca L. West & Marni Sommer, *Puberty Experiences of Low-Income Girls in the United States: A Systematic Review of Qualitative Literature From 2000 to 2014*, 60 J ADOLESC HEALTH 363, 366, 376-77 (2016); Margaret L. Schmitt, Christine Hagstrom, Azure Nowara, Caitlin Gruer, Nana Ekua Adenu-Mensah, Katie Keeley & Marni Sommer, *The Intersection of Menstruation, School and Family: Experiences of Girls Growing Up in Urban Cities in the U.S.A.*, 26 INT'L J. OF ADOLESCENCE & YOUTH 94 (2021).

⁵⁰ Johnson, Waldman & Crawford, *supra* note 19, at 258; Guttmacher Institute, *Sex and HIV Education*, <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> (summarizing existing requirements).

⁵¹ Johnson, Waldman & Crawford, *supra* note 19, at 260; Julie Hennegan, Amy O. Tsui & Marni Sommer, *Missed Opportunities: Menstruation Matters for Family Planning*, 45 INT'L PERSPECTIVES ON SEXUAL & REPRO. HEALTH 55, 57 (2019); Coshandra Dillard, *Equity, Period.*, 61 TEACHING TOLERANCE (Spring 2019), <https://www.tolerance.org/magazine/spring-2019/equity-period>.

⁵² Johnson, Waldman & Crawford, *supra* note 19, at 259. This is further compounded for unhoused menstruators. Marni Sommer, Caitlin Gruer, Rachel Clark Smith, Andrew Maroko, & Kim Hopper, *Menstruation and Homelessness: Challenges Faced Living in Shelters and on the Street in New York City*, 66 HEALTH & PLACE 1 (2020) (identifying barriers from the lived experiences of unhoused menstruators in New York City).

Few talk about menstruation, and those that do may be spreading misinformation.⁵³ Problems stemming from the lack of menstrual education are made worse by religious customs,⁵⁴ taboos, and a broader cultural norm of silence, shame, and stigma.⁵⁵ Menstruation (and menstruators) also may be viewed as “dirty” or othered. Further, while the stigma does not end when menstruation does, the stereotypes and related assumptions alter for menopause.⁵⁶ Plus, the voices and experiences of some menstruators (including some in menopause)—such as those with disabilities who may experience menstruation differently—are often missing altogether.⁵⁷ Collectively, these practices restrict current and former menstruators from being fully visible and out in society, including at work.⁵⁸

Indeed, menstruation, menopause, and the ways in which they are managed often involve complicated issues that intersect with sex, gender, disability, age, race, nationality, religion, class, housing, health, environment, and other components of people’s lives. Accordingly, an intersectional lens is needed to fully understand menstruators’ experiences.⁵⁹ As Professor Margaret Johnson recently explained, society must remember to ask “the menstruation question” to understand intersectional menstrual oppression and experiences.⁶⁰ The rest of this article explores potential answers to that question with respect to work.

⁵³ U.N. WOMEN & WATER SUPPLY & SANITATION COLLABORATIVE COUNCIL, MENSTRUAL HYGIENE MANAGEMENT: BEHAVIOR AND PRACTICES IN THE LOUGA REGION, SENEGAL (2014), https://www2.unwomen.org/-/media/field%20office%20africa/attachments/publications/2015/07/louga_study_en_lores.pdf?la=EN&cs=2335 [<https://perma.cc/5W2W-GW6Y>] [hereinafter U.N. WOMEN].

⁵⁴ See generally House, Mahon & Cavill, *supra* note 5, at 25–27 (explaining how Buddhism, Christianity, Hinduism, Islam, and Judaism view menstruation).

⁵⁵ See *id.* at 27 (module on “Evil spirits, shame and embarrassment” explaining the connection between culture, religious taboos, evil spirits, shame, embarrassment, and menstruation).

⁵⁶ Mullins, *supra* note 21, at 1, 3–6; Johnson, *supra* note 10, at 10, 26; see also Jennifer Weiss-Wolf, *The Fight for Menstrual Equity Continues in 2021*, MARIE CLAIRE (Jan. 27, 2021), <https://www.marieclaire.com/politics/a35280718/menstrual-equity-2021-goals/> [<https://perma.cc/RCF6-SDMP>] (advocating for the role that the “other M-word” can play as a catalyst for lawmaking).

⁵⁷ See BRAWS, *supra* note 9; PALGRAVE HANDBOOK, *supra* note 19, at 193; Cahn, *supra* note 23, at 3; U.N. WOMEN, *supra* note 53, at 34 (sharing that some visually impaired menstruators have a hard time knowing when their periods start).

⁵⁸ See Johnson, *supra* note 10, at 28–36; House, Mahon & Cavill, *supra* note 5, at 25; Julie Hennegan, Alexandra K. Shannon, Jennifer Rubli, Kellogg J. Schwab & G. J. Melendez-Torres, *Women’s and Girls’ Experiences of Menstruation in Low- and Middle-Income Countries: A Systematic Review and Qualitative Metasynthesis*, 16 PLoS Med 1, 17 (2019), <https://doi.org/10.1371/journal.pmed.1002803> [<https://perma.cc/5XBV-NKC8>] (explaining that menstrual stigma, shame, and distress exists and is a “pervasive influence” across cultures, and may result in “self-imposed expectations to keep menstrual status hidden”).

⁵⁹ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1265 (1991); Margaret E. Johnson, *Asking the Menstruation Question to Achieve Menstrual Justice*, COLUM. J. GENDER & L. 158 (2021); U.N. WOMEN, *supra* note 53, at 3; see generally PALGRAVE HANDBOOK, *supra* note 19 (exploring menstruation and the experiences of menstruators in multiple aspects of society around the world).

⁶⁰ Johnson, *supra* note 59.

B. Naming Menstrual Needs and Developing Period Policies at Work

Given that women currently constitute approximately half of the global workforce,⁶¹ and 46.8% of American workers in 2020 were women aged 16 and over,⁶² biology dictates that periods happen at work. Indeed, on any given day, more than 800 million people aged 15–49 are menstruating in the world.⁶³ The percentage of workers experiencing perimenopause or in menopause has grown, and approximately 61 million American workers are in perimenopause or menopause.⁶⁴ Especially given these numbers, workers' lived menstrual experiences must be considered in the structure of work and the laws governing it.

Currently, the realities of these lived experiences, the impact of menstruation on specific problems and needs, and potential structural reforms to support menstruators at work all are understudied.⁶⁵ The data that does exist, however, clearly demonstrates that menstruation and menopause impact work.⁶⁶ For example, multiple international surveys report findings that menstruators report to work with menstrual pain, even when it impacts their work.⁶⁷ Other surveys similarly found that menopausal workers experience

⁶¹ Marni Sommer, Sahani Chandraratna, Sue Cavill, Therese Mahon & Penelope Phillips-Howard, *Managing Menstruation in The Workplace: An Overlooked Issue in Low-and Mid-Income Countries*, 15 INT'L J. FOR EQUITY HEALTH 86, at 2 (2016).

⁶² *Household Data Annual Averages 18. Employed Persons by Detailed Industry, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. BUREAU LAB. STATS. (July 30, 2021), <https://www.bls.gov/cps/cpsaat18.htm> [<https://perma.cc/KY9P-5GAQ>]. The data in this paragraph does not include transgender, genderqueer/nonbinary, or intersex workers who menstruate.

⁶³ Sommer, Chandraratna, Cavill, Mahon & Phillips-Howard, *supra* note 61, at 2; Geertz, Iyer, Kasen, Mazzola & Peterson, *supra* note 36, at 5.

⁶⁴ Mullins, *supra* note 21, at 6 (citing Hilary Weaver, *Menopause Discrimination Affects Millions of American Women*, Supermajority Ed. Fund (Feb. 7, 2020), <https://supermajority.com/2020/02/menopause-discrimination-affects-millions-of-american-women/> [<https://perma.cc/3P2Y-MSMX>]). About 20% of the current workforce are women who are at least 45 years old, just under half of whom are 50–59. See *The Takeaway*, *supra* note 20; *Employee Status of The Civilian Noninstitutional Population by Age, Sex, & Race*, U.S. BUREAU LAB. STATS. (2020), <https://www.bls.gov/cps/cpsaat03.pdf> [<https://perma.cc/D4Z5-R4AX>] (the 2018 civilian workforce includes 14.6 million women in this age group).

⁶⁵ See Hennegan, Shannon, Rubli, Schwab & Melendez-Torres, *supra* note 58, at 32 (these experiences are under-researched); Jonah E. Rockoff & Mariesa A. Herrmann, *Does Menstruation Explain Gender Gaps in Work Absenteeism?* NBER WORKING PAPER SERIES, at 12 (2010), <http://www.nber.org/papers/w16523.pdf> [<https://perma.cc/TXA6-TMSK>] (acknowledging “the link between menstruation and absenteeism,” but calling for more research into the impact of menstruation on the gender gap related to absenteeism); House, Mahon & Cavill, *supra* note 5, at 176 (more research is needed on “workers’ rights in relation to menstruation and sanitation”); Rachel B. Levitt & Jessica L. Barnack-Tavlaris, *Addressing Menstruation in the Workplace: The Menstrual Leave Debate*, in PALGRAVE HANDBOOK, *supra* note 19, at 561–62 (more studies are needed, especially vis-à-vis impact on discrimination and wages).

⁶⁶ Few studies have measured the reduction of menstrual harms from specific policies, however. See Hennegan & Montgomery, *supra* note 33, at 1, 5, 11 (a literature review failed to find menstrual management interventions that reduce the impact on attendance and absenteeism).

⁶⁷ See e.g., Suzannah Weiss, *A Shocking Number of Women Deal with Period Pain at Work*, GLAMOUR (Oct. 3, 2016), <https://www.glamour.com/story/a-shocking-number-of-women-deal-with-period-pain-at-work> [<https://perma.cc/5CNL-N459>] (over half of BBC survey participants noted that menstrual pain impacted their work); Valentin Etancelin, *French Women*

symptoms that impact work.⁶⁸ Further, few workers felt comfortable disclosing to their supervisors that they were “struggling” in whole or part due to menstruation or menopause.⁶⁹ The rest of this section offers a typography of menstrual and menopausal needs to explain how periods impact work and supports needed to minimize any negative consequences. It also contains an overview of voluntary actions taken by employers to address periods at work.

1. *Categorizing Menstrual Needs*

Menstrual needs at work fall into two broad categories: (1) menstrual accommodations, including the ability to temporarily leave work to address menstruation and to access the physical products and structures needed to safely manage menstruation; and (2) access to a workplace free from menstrual indignities and discrimination.

a. *Menstrual Accommodations*

Structurally, accommodations are needed to engage in proper menstrual health management.⁷⁰ At a minimum, effective menstrual management requires access to time, products, and menstrual-friendly restrooms.⁷¹ Without this access, some menstruators will leave the workforce, be forced to forgo certain opportunities, or experience poor attendance, decreased productivity, exacerbated medical conditions, or other negative consequences.

i. *Access to Paid Time Away from Work*

Workers need the ability to take time during a work shift to address menstruation without fear of harm or retaliation. Policies such as paid break time, other paid time off, flexible schedules, or telework provide some workers with the ability to meet this need. But not all workers are able to take a

Get Real About Periods in the Workplace, HUFF. POST (March 14, 2019), https://www.huffpost.com/entry/french-women-periods-workplace_n_5c894ac3e4b0fbd7662047d3 [<https://perma.cc/2BHD-JRUJ>] (82% of 18–24-year-olds and 53% of people aged 54+ in a YouGov/HuffPost survey of over 1000 adults responded that menstruation impacted work; further sharing overwhelming support for menstrual accommodations, almost 75% of 18–24-year-olds and 36% of 54+ support menstrual leave).

⁶⁸ See e.g., Jennifer Wolff, *What Doctors Don't Know About Menopause*, AARP THE MAGAZINE (Aug. 2018), <https://perma.cc/GZ6U-KJ25> (AARP survey finding that 84% of 50–59-year-old women reported menopause symptoms impacting their work).

⁶⁹ See e.g., Weiss, *supra* note 67 (only 27% of participants that reported work impact shared why with supervisors).

⁷⁰ See e.g., Vilayphone Choulamany, *Menstrual Health Management: A South Korean Case Study*, THE ASIA FOUND. 3 (2018), <http://asiafoundation.or.kr/annual-report/annual-report-2017/documents/MHM-A-South-Korean-Case-Study.docx> [<https://perma.cc/94AS-SZC3>]; Bonnie Keith, *Girls' and Women's Right to Menstrual Health: Evidence and Opportunities*, OUTLOOK ON REPROD. HEALTH 2 (2016), https://path.azureedge.net/media/documents/RH_outlook_mh_022016.pdf [<https://perma.cc/5M6D-TYPD>] (sharing the UNICEF/WHO definition of “good” menstrual management).

⁷¹ See *infra* Section I.B.1B.

break from work without penalty.⁷² As a result, as global studies have demonstrated, people miss work when they are menstruating.⁷³ Andrea Ichino and Enrico Moretti conducted one of the most well-known studies of menstruation and absenteeism.⁷⁴ It analyzed the absences of full-time employees at an Italian bank from 1993–1995 to study whether biology explained “the male-female difference in earnings.”⁷⁵ The study found a significant gender-gap difference in absences for workers aged 45 years or younger, about a third of which were taken in 28-day cycles.⁷⁶ Finding this to be statistically significant, they concluded that there is “evidence that the menstrual cycle increases female absenteeism,” with 1.5 days of absences relating to the 28-day menstrual cycle.⁷⁷ As the authors appropriately cautioned, reliance on one firm’s information is not necessarily transferable;⁷⁸ however, this study is cited widely to justify menstruation-specific workplace policies and the results are consistent with other data linking menstruation to absenteeism.⁷⁹

Presenteeism, when someone goes to work sick or distracted, may be a larger menstruation-related problem than absenteeism. Eighty-one percent of respondents in a Dutch survey reported that they were less productive at work or school due to characteristics of their menstruation.⁸⁰ On average, the

⁷² See e.g., Klara Rydström, Rebecka Hallencreutz & Antonia Simon, *It’s Time to Bring Menstrual Awareness to Workplaces*, SOC. EUR. (April 9, 2019), <https://socialeurope.eu/menstrual-awareness-workplaces> [<https://perma.cc/EPK7-7JLU>] (“Only 25.4[%] of [800] respondents [to an online survey of Swedish workers] said they were able to rest when necessary. . .”).

⁷³ See U.N. WOMEN, *supra* note 53, at 57 (96.4% of surveyed women “regularly” missed work, “prefer[ing] to stay at home because their periods made them weaker, because they experienced pain, stomachache or cramps, or because. . .they had nowhere to wash or to change their sanitary protection”).

⁷⁴ Andrea Ichino & Enrico Moretti, *Biological Gender Differences, Absenteeism, and the Earnings Gap*, 1 AM. ECON. J. APPLIED ECON. 183 (2009).

⁷⁵ *Id.* at 184, 187.

⁷⁶ *Id.* at 184.

⁷⁷ *Id.* at 183, 200 (noting this does not include lost productivity from presenteeism).

⁷⁸ *Id.* at 213.

⁷⁹ For example, a study of American women about menstruation’s impact on lost work found that it caused weeks of absences annually, with “heavier bleeding” having “a considerable impact on work loss.” Isabelle Côté, Philip Jacobs & David Cumming, *Work Loss Associated with Increased Menstrual Loss in the United States*, 100 OBSTET. & GYNECOL. 683, 683, 686 (2002). Responses from 3,133 women aged 18–64-years-old who did not take medication containing estrogen, never had reproductive cancer, and had a “natural” period for the past year were counted. *Id.* See Geertz, Iyer, Kasen, Mazzola & Peterson, *supra* note 36, at 5; Annakeara Stinson, *A New Survey Says Period Pain Affects Your Ability to Work & Women Are Like “Duh,” ELITE DAILY* (Oct. 13, 2017), <https://www.elitedaily.com/p/period-pain-at-work-can-be-super-distracting-according-to-a-new-survey-women-are-like-duh-2911368> [<https://perma.cc/LVH7-5PHX>] (62% of over 1,000 Australian women surveyed reported that they have had to leave work early or not attend when they were on their period).

⁸⁰ Katie Hunt, *Period Pain Linked to Nearly 9 Days of Lost Productivity for a Woman in a Year*, CNN (June 27, 2019, 9:01 PM EDT), <https://www.cnn.com/2019/06/27/health/period-pain-productivity-study-intl/index.html> [<https://perma.cc/8DVC-M7H6>] (over 32,000 15–45 year old women were surveyed); Gabrielle Moreira, *Period Pain Causes Almost 9 Days of Productivity Loss at Work or School for Women, Study Suggests*, FOX29 PHILA. (June 29, 2019), <https://www.fox29.com/news/period-pain-causes-almost-9-days-of-productivity-loss-at-work-or-school-for-women-study-suggests> [<https://perma.cc/VDV4-AGJK>] (citing Mark Schoep, Eddy Adang, Jacques Maas, Bianca De Bie, Johanna W. M. Aarts & Theodoor E. Nieboer,

study determined that workers lost just under nine days of productivity annually due to menstruation-related presenteeism or absenteeism, with presenteeism being the “bigger contributor.”⁸¹ The survey also illustrated that menstruators’ needs are not the same every cycle as only 3.5% of respondents said they needed or took leave every month.⁸² A 2011 ten-country study of workers with endometriosis estimated the lost productivity to be about 11 hours weekly during menstruation, averaging £6,300 annually per worker.⁸³ In addition to lost productivity and its financial costs, presenteeism may result in mistakes in the work itself.⁸⁴

Restrictive policies that prevent workers from taking time away from work to address menstruation without penalty also can impact a worker’s internal response to menstruation, causing irregularities or exacerbating pre-existing conditions.⁸⁵ Moreover, the lack of job security or control over schedules and worksites correlates with a higher risk of menstrual pain—and menstrual pain is often linked to other physical responses such as headaches, sweating, and nausea.⁸⁶

These policies also impact menopausal workers. One third of British women surveyed by the Chartered Institute of Personnel and Development experiencing menopausal symptoms took sick leave, only a quarter of whom told their supervisor the reasons for the leave.⁸⁷ Another study from the

Productivity Loss Due to Menstruation-Related Symptoms: A Nationwide Cross-Sectional Survey Among 32,748 Women, 9 *BMJ OPEN*, Mar. 12, 2019)).

⁸¹ Hunt, *supra* note 80 (68% of respondents wanted scheduling flexibility during their period); Moreira, *supra* note 80.

⁸² Hunt, *supra* note 80.

⁸³ *Period Power*, *supra* note 7; Personnel Today, *Report Calls for Action on Women’s Health Issues at Work*, OCCUPATIONAL HEALTH & WELLBEING PLUS (Jan. 4, 2018), <https://www.personneltoday.com/hr/report-calls-for-action-on-womens-health-issues-at-work/> [<https://perma.cc/75R5-EPB5>] (calculating the cost of the survey’s results).

⁸⁴ For example, one early study examined whether menstruation had a role in accidents involving female pilots. Katharina Dalton, *Menstruation and Accidents*, *BRIT. MED. J.* 1425, 1426 (1960) (52% of women studied “were involved in an accident” during or around menstruation). The study “suggested that the increased lethargy of menstruation and the premenstruum is responsible for both a lowered judgment and slow reaction time.” *Id.* at 1426; see Racheal Yeager, *HERproject: Health Enables Returns. The Business Returns from Women’s Health Programs*, *BUS. FOR SOC. RESP.* 7 (2011) (data from a health intervention found production errors resulting from menstruation’s effect on work).

⁸⁵ See Karen Messing, Marie-Josèphe Saurel-Cubizolles, Madeleine Bourguine & Monique Kaminski, *Menstrual-Cycle Characteristics and Work Conditions of Workers in Poultry Slaughterhouses and Canneries*, 18 *SCANDINAVIAN J. WORK, ENV’T & HEALTH* 302, 303–07 (1992) (1980s study of 726 female workers in French canneries and slaughterhouses found menstrual irregularities and amenorrhea related to work schedules and factory temperatures). Breaks also promote productivity, help workers overcome fatigue, and provide freedom. MARC LINDER & INGRID NYGAARD, *VOID WHERE PROHIBITED: REST BREAKS AND THE RIGHT TO URINATE ON COMPANY TIME* 5 (1998).

⁸⁶ Krisztina D. László, Zsuzsa GyOrffy, Szilvia Ádám, Csilla Csoboth & Mária S. Kopp, *Work-Related Stress Factors and Menstrual Pain: A Nation-Wide Representative Survey*, 29 *J. PSYCHOSOMATIC OBSTET. & GYNECOL.* 133, 133 (2008).

⁸⁷ Megan Reitz, Marina Bolton & Kira Emslie, *Is Menopause a Taboo in Your Organization*, *HARV. BUS. R.* (Feb. 4, 2020), <https://hbr.org/2020/02/is-menopause-a-taboo-in-your-organization> [<https://perma.cc/48XY-G78Z>] (citing *Majority of Working Women Experiencing the Menopause Say It Has a Negative Impact on Them at Work*, CHARTERED INST. OF PERS.

United Kingdom reported that more than half of workers in menopause had trouble obtaining the workplace flexibility they needed to address their symptoms.⁸⁸ There is room for additional study of these needs, corresponding costs, and potential policy interventions.

ii. Access to Menstrual-Friendly Facilities and Products

In addition to a lack of break time or other flexibilities, workers report not having the tools for proper menstrual management at work such as consistent access to menstrual-friendly bathrooms, menstrual products, and other accommodations.⁸⁹

Menstrual-friendly restrooms provide “safe and conveniently located” facilities that: offer privacy; are accessible; contain toilets, soap, water, and disposal options; and contain an adequate and varied supply of menstrual products.⁹⁰ This design, however, is contrary to the configurations of many workplace bathrooms, which disproportionately impacts “productivity, well-being and attendance.”⁹¹ Indeed, studies document limited access to restrooms (of any design), menstrual products, or other needed menstrual health tools.⁹² A 2000 person study in the United Kingdom uncovered that a third of respondents work without “constant access to a toilet” and a quarter

DEV. (Mar. 26, 2019), <https://www.cipd.co.uk/about/media/press/menopause-at-work> [https://perma.cc/BK2N-H93A]; Mullins, *supra* note 21, at 14–15.

⁸⁸ UNISON, *supra* note 46, at 5 (“The survey showed that it was the working environment that was responsible for making these symptoms worse. Two-thirds of the safety representatives reported that high workplace temperatures were causing problems for menopausal women, and over half blamed poor ventilation. Other complaints were about poor or non-existent rest facilities or toilet facilities, or a lack of access to cold drinking water.”).

⁸⁹ Academics and activists have used the phrase “period-friendly,” “female-friendly,” and “menstrual-friendly” to describe structural restroom designs that support menstrual management. See Swarnima Bhattacharya, *Menstruation at Work: Why We Must Have Period-Equipped Workplaces in the 21st Century*, THEACARE 6, 13 (2021), <https://thea.care/wp-content/uploads/2021/03/Menstruation-At-Work.pdf> [https://perma.cc/G6E7-KJ3K] (defining period-friendly toilets); Colum. Univ. Mailman Sch. of Pub. Health, *Period Posse Presents: “Changing the Norm: Mainstreaming Female Friendly Toilets,”* YOUTUBE (Nov. 13, 2019), <https://youtu.be/zudAyQgVqv8> (defining a “female-friendly toilet”).

⁹⁰ Margaret L. Schmitt, David Clatworthy, Tom Ogello & Marni Sommer, *Making the Case for a Female-Friendly Toilet*, 10 WATER 1193, 1194–99 (2018) (supporting access to female-friendly toilets is significant for economic empowerment, health, and gender).

⁹¹ See Colum. Univ. Mailman Sch. of Pub. Health, *supra* note 89. The development community has focused on facility design and its impact on menstrual management, especially for “vulnerable groups.” See e.g., U.N. WOMEN, *supra* note 53, at 29–33 (finding that menstruators with motor impairments have difficulty navigating wheelchairs and crutches through narrow door frames; further noting additional aggravations if workers of different genders share toilets).

⁹² See e.g., OSHA, U.S. DEP’T OF LAB., WOMEN IN THE CONSTRUCTION WORKPLACE: PROVIDING EQUITABLE HEALTH AND SAFETY PROTECTION (1999), <https://www.osha.gov/advisorycommittee/acsh/products/1999-06-01> [https://perma.cc/VK4R-SVP6] (including “restricted access to sanitary toilets as a core safety issue for women in construction trades;” further observing the “lack of water for washing[,] especially during monthly menstrual cycles”).

do not have trash cans in the toilets they can access.⁹³ Moreover, lack of access to menstrual management tools is exacerbated in certain occupations such as construction and transportation trades. For example, an online study of Swedish workers found that bus drivers, outdoor workers, and those with multiple worksites considered accessing bathrooms a “big obstacle during days of bleeding.”⁹⁴ Even those with bathroom access reported being denied the ability to use and/or travel to them.⁹⁵

Further, 72% of respondents shared that they cannot obtain menstrual pads and tampons at work if they did not bring them.⁹⁶ Another recent study found that approximately a third of menstruating workers leave to find these types of products.⁹⁷ There also is a need for menstrual products beyond tampons and pads. Workers report that they do not have the ability to regulate the temperature of their worksites, for example, which significantly impacts perimenopausal and menopausal workers experiencing hot flashes.⁹⁸ This need also disproportionately impacts occupations with strict rules against opening windows, leading this to be one of the “biggest problems” reported by menopausal teachers.⁹⁹ Other reported needs include access to fans, heating pads for cramps, wellness rooms, and pain relievers.¹⁰⁰ Exceptions to uniform rules to minimize anxiety around leakage also may be needed.

Providing these accommodations would increase productivity,¹⁰¹ and additional access to tools to facilitate menstrual management, including menstrual-friendly restrooms and menstrual products (broadly defined), is needed.

b. Workplace Free from Menstrual Indignities, Harassment, and Discrimination

Menstruators should have the right to work free from dignity harm, harassment, or discrimination. Indeed, the ability to engage in proper management—with or without accommodations—impacts workers’ dignity and

⁹³ Theresa Mayne, *Overcoming Period Stigma in the Workplace*, DBG BLOG (May 14, 2019), <https://www.dpgplc.co.uk/2019/05/overcoming-period-stigma-in-the-workplace> [<https://perma.cc/VA9P-KD4Z>].

⁹⁴ See e.g., LINDER & NYGAARD, *supra* note 85, at 8 (1996 study showed that problems accessing restrooms prevented two out of five teachers from changing menstrual products as needed and caused absences for one in twenty respondents “on their heaviest flow day”).

⁹⁵ See Rydström, Hallencreutz & Simon, *supra* note 72.

⁹⁶ Mayne, *supra* note 93.

⁹⁷ Bhattacharya, *supra* note 89, at 7, 13 (sharing Harris Interactive study results).

⁹⁸ Gavin Jack, Marian Pitts, Kathleen Riach, Emily Bariola, Jan Schapper & Philip Sarrel, *Women, Work and the Menopause: Releasing the Potential of Older Professional Women*, LA TROBE UNIV. (Sept. 2014), <https://womenworkandthemenopause.files.wordpress.com/2014/09/women-work-and-the-menopause-final-report.pdf>; British Occupational Health Research Foundation, *Work and the Menopause: A Guide for Managers* (2010), https://www.som.org.uk/sites/som.org.uk/files/BOHRF_Menopause_Guide_Managers.pdf.

⁹⁹ See Virginia Matthews, *Menopause at Work: How Employers Can Help Staff Manage “The Change,”* PERS, TODAY (April 29, 2015), <http://www.personneltoday.com/hr/menopause-at-work-how-employers-can-help-staff-manage-the-change/> [<https://perma.cc/6ANH-GBRF>].

¹⁰⁰ *Id.*

¹⁰¹ WEISS-WOLF, *supra* note 14, at 199.

sense of self-worth. Among other things, bleeding is a bodily expression and menstruators are rarely indifferent to the process;¹⁰² without menstrual management, workers may suffer a menstrual indignity. This individual response may be amplified by the general shame, culture of silence, and lack of awareness surrounding menstruation that permeates workplaces. Further, general societal pressures to keep female bodies covered and other menstrual stigma flow into the workplace.¹⁰³ For example, almost three out of every four menstruating workers in a United Kingdom study reported that they had to “hide” menstrual products at work.¹⁰⁴ Collectively, this makes it harder to discuss periods or potential workplace responses to them, and it causes some individuals to be subjected to harassment and discrimination.

This reality is further complicated by power dynamics at work. Menstruators are rarely in management or positions of power to change workplace cultures and policies.¹⁰⁵ Moreover, non-menstruators usually control access to breaks, and supervisors who do not menstruate may not understand the biology, needs, or variances to menstrual experiences over time or people.¹⁰⁶ Relatedly, most menstruators do not want to talk about periods with their (primarily) non-menstruating supervisors or in front of colleagues.¹⁰⁷ Menopausal workers similarly decline to discuss their symptoms or needs with managers.¹⁰⁸

Non-menstruating supervisors also are uncomfortable talking about periods. More than being uncomfortable, 51% of men in a Thinx study reported that it was “inappropriate” for someone to “openly mention” menstruation at work.¹⁰⁹ Consequently, it is not surprising that one out of ten respondents to a United Kingdom survey reported that they were directly

¹⁰² See generally Elizabeth B. Cooper, *What's Law Got to Do with It? Dignity and Menstruation*, 41 COLUM. J. GENDER & L. 39, 41 n.10 (2021) (discussing how menstruators are “rarely ambivalent” about their periods; further explaining how menstrual management is an act of personal autonomy); Karin, Johnson & Cooper, *supra* note 15, at 26 (observing that “institutional policies directly affect menstruators’ ability to engage equally in the external world [and] an affront to [menstrual] dignity. . .reinforces the negative [body] messages[.]” reiterating that people who bleed “do not belong”).

¹⁰³ See e.g., Rydström, Hallencreutz & Simon, *supra* note 72 (sharing results from an on-line Swedish survey that confirmed that workplace menstruators “were still affected by stigmas, taboos and adverse norms”).

¹⁰⁴ Mayne, *supra* note 93.

¹⁰⁵ See WEISS-WOLF, *supra* note 14, at 198 (noting that women hold only 5.8% of CEO positions of Fortune 500).

¹⁰⁶ See *supra* Section I.B.1.A.

¹⁰⁷ Stinson, *supra* note 79 (just over a third of Austrian women studied shared the impact of menstruation on work with their employer); Hunt, *supra* note 75 (only one in five respondents that reported taking sick leave informed their employer it was for their periods in a Dutch survey); Bhattacharya, *supra* note 89, at 7 (Clue reported that 68% of women did not feel comfortable speaking to men at work about their period).

¹⁰⁸ See e.g., UNISON, *supra* note 46, at 4 (only half of menopausal workers participating in a 2011 British Foundation study who took time off to address their symptoms informed their managers about the underlying reason).

¹⁰⁹ MENSTRUAL HYGIENE DAY, *Nearly Half of US Women Have Experienced ‘Period Shaming’*, <http://menstrualhygieneday.org/nearly-half-us-women-experienced-period-shaming> [perma.cc/SCG7-DPNA] (last visited Aug. 14, 2021).

subjected to derogatory menstrual-related comments.¹¹⁰ These comments ranged from justifying behavior “because she’s on the rag” to “you’re just lazy” and “it’s just an excuse to act like a bitch.”¹¹¹ Others were told to “man up” and handle their pain.¹¹² Stereotypes about menopause also foster workplace taunts, often related to temperature or an inability to remain productive.¹¹³ Among other things, being subject to harassment and discrimination at work impacts physical and mental health (including stress and related conditions) and one’s ability to concentrate, engage with colleagues, or otherwise successfully perform tasks.¹¹⁴

Periods are viewed as an invisible problem for individuals to both hide and handle,¹¹⁵ these experiences reflect a need for a systematic response.

2. *The Development of Employer Provided Period Policies*

Employer recognition and responses to these needs for menstrual accommodations and workplaces free from menstrual indignities, harassment, and discrimination have varied significantly over time and industry. Historically, some workplaces were segregated or prohibited women from working while on their periods.¹¹⁶ For example, female pilots were prevented from flying during World War II when they were menstruating.¹¹⁷ Today, American employers do not outright ban menstruators from holding a particular class of jobs. In practice, however, numerous policies exist that continue to harm them. Some employers have affirmatively developed positive period policies—either in response to workers who have collectively acted to improve conditions or to otherwise support and retain workers. The rest of this section covers the role of collective action and the creation of workplace period policies.

¹¹⁰ Mayne, *supra* note 93 (47% of 2000 UK respondents answered that “there is a definite stigma around periods in the workplace”).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Katie Grant, *Women in Midlife are The Butt of Jokes: How Ignorance Around the Menopause is Driving Women out of Work*, iNEWS (Mar. 20, 2021), <https://inews.co.uk/news/long-reads/menopause-women-jokes-ignorance-workplace-921945> [<https://perma.cc/54PC-C4CF>]; see also Reitz, Bolton & Emslie, *supra* note 87, at 8 (observing that cultural stereotypes at the intersection of age and sex “are so pervasive and accepted as the norm”).

¹¹⁴ See APA, STRESS IN AMERICA: THE IMPACT OF DISCRIMINATION (March 10, 2016), <https://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf> [perma.cc/N98A-6KXW]; Ellyn Maese & Camille Lloyd, *Understanding the Effects of Discrimination in the Workplace*, GALLUP (May 26, 2021), <https://www.gallup.com/workplace/349865/understanding-effects-discrimination-workplace.aspx> [perma.cc/4RUD-2D48].

¹¹⁵ Johnson, *supra* note 10, at 2.

¹¹⁶ Robin Hilmantel, *A History of How Employers Have Addressed Women’s Periods*, TIME (March 3, 2016, 2:43 PM EST), <https://time.com/4246662/period-policies-at-work/> [perma.cc/6HAV-G2MM].

¹¹⁷ Aneri Pattani, *In Some Countries, Women Get Days Off For Period Pain*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/24/health/period-pain-paid-time-off-policy.html> [perma.cc/ZE3J-28BA].

a. *Collective Action Leads to Improved Menstrual Policies*

The scope and frequency of menstrual-related collective action is unknown, but personal narratives, public grievances, and other cases demonstrate the power of organizing on these issues. Organizing by SEIU Local 925 in the 1970s provides an excellent example. A group of female employees of a Boston company walked out of work in frustration and asked to speak with management. In preparing for the negotiations, the workers considered an agenda that would lead to needed structural reforms like pay equity, access to promotions, and eliminating sexual harassment. Rather than move forward with those (yet), the workers elected to strategically bargain for tampon machines in the bathrooms, which galvanized their colleagues and demonstrated they mattered and had some power—without causing management to leave the table.¹¹⁸

Tampon dispensers had recently been removed from company restrooms as a “cost-cutting measure,” and the bargaining team knew that workers wanted them back. While some “people used it against [them, workers] need tampons in the bathroom” [and they knew it would] just drive [male managers] insane” to talk about it.¹¹⁹ Using the cultural discomfort and silence around menstruation to their advantage, the workers obtained 15 machines to be placed back in restrooms of their choice.¹²⁰

Negotiations between labor and management have resulted in the creation of menstrual-friendly provisions in collective bargaining agreements (CBAs), which contain the agreed upon workplace rules and policies. Even if they do not mention menstruation specifically, many CBAs have provisions that allow workers governed by them to address some menstrual needs. For example, Section 13.03 of the AFSCME Local 11 CBA with Ohio State authorizes flex time “for a given day to accommodate personal

¹¹⁸ 9 TO 5: THE STORY OF A MOVEMENT at 17:48 (PBS television broadcast Feb. 1, 2021), <https://www.pbs.org/independentlens/documentaries/9to5-the-story-of-a-movement/> [<https://perma.cc/H785-JMYP>] (“What kind of a union are you that you’re bargaining about tampon machines? It wasn’t like the number one issue. . .but. . .”); Heiela Salhieh & Salha El-Shwehdi, Film Review, *Lessons Learned From 9to5: The Story of a Movement, on How to Generate a Human Rights-Based Social Movement*, UNIV. DAYTON BLOG (March 26, 2021), <https://udayton.edu/blogs/udhumanrights/2021/2021-03-25-lessons-from-9to5.php> [perma.cc/TH7A-GH2R] (noting, “[t]he women were unapologetic in their identity [and] in control of their own agenda”).

¹¹⁹ 9 TO 5, *supra* note 118, at 17:48.

¹²⁰ *Id.* (sharing, “[w]e had people who would knit while they were in the bargaining meetings, just drive these guys crazy.”). This success led other workers to join and the bargaining team evolved into District Council 925 (and later SEIU Local 925). Sherry Halbrook, *Women in the Workplace Ignored No More*, Communicator, Apr. 2021, at 25, <https://www.pef.org/media-center/the-communicator/women-in-the-workplace-ignored-no-more> [perma.cc/6FHZ-W6WH] (postulating that the bargaining team was able to use this win to demonstrate the need for organizing).

needs,”¹²¹ which presumably includes menstrual management. Other CBAs provide for bathroom breaks or more paid time off.¹²²

Of course, organizing campaigns are not always successful. For example, the Australian Manufacturing Workers’ Union campaigned for 12 days of menstrual leave a year for Toyota workers in 2005.¹²³ According to the union, “standing, welding, painting and other production line work was especially tough. . . during [workers’] menstrual cycle[s].”¹²⁴ Toyota declined to agree to this leave, despite workers’ support for it.¹²⁵

Nonetheless, when successful, CBAs offer structured mechanisms to enforce their provisions, often through a grievance process. Grievances have been filed to enforce CBA provisions related to menstruation on both collective and individual bases. Local 315 of the Retail, Wholesale and Department Store Union offers an example of a group grievance, which was filed against Cagle’s Poultry and Egg Company alleging that a new policy limiting toilet access denied production workers promotion opportunities.¹²⁶ It was filed after the plant manager issued a verbal warning to a member for using the restroom too much, telling her that she should “train herself to go to the bathroom” outside of work hours; he knew she could do it because his dog was trained not to relieve himself for eight hours.¹²⁷ In response, the company’s expert justified the policy because menstrual cycles had “elements of predictability.”¹²⁸ Ultimately, the policy was changed, but the union accurately described it as “manifestly unfair,” “undignified,” and “not in keeping with. . . biological variances.”¹²⁹

Palmitessa v. Dep’t of Navy offers an individual grievance example. Here, the Merit Systems Protection Board (“MSPB”) ruled for a menstruator who was removed from work after using the restroom to address menstrual cramps and related nausea without obtaining supervisory approval.¹³⁰ Palmitessa took two restroom breaks (for under 15 minutes each); she also was “seen eating ‘corn curls[,]’ to alleviate her discomfort.”¹³¹ The Navy

¹²¹ Collective Bargaining Agreement between AFSCME Local 11 and Ohio State (Contract Beginning March 25, 2012) (on file with author).

¹²² See *Labor Project for Working Families CBA Database*, Family Values @ Work, <https://familyvaluesatwork.org/laborproject/resource-network> [perma.cc/WLA5-LSV9] (last visited Feb. 8, 2019).

¹²³ Hazel Sheffield, *Should Women Have the Right to Take Time Off During Their Periods?*, INDEP. (Mar. 2, 2016), <https://www.independent.co.uk/news/business/news/menstrual-leave-pain-womens-rights-a6907261.html> [https://perma.cc/S9HX-GGF7].

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ MARC LINDER, VOID WHERE PROHIBITED REVISITED: THE TRICKLE-DOWN EFFECT OF OSHA’S AT-WILL BATHROOM-BREAK REGULATION 256, 264–65 (2003). According to management, the policy was created in response to “abuse[s] of emergency restroom privileges.” *Id.* (further alleging that it was directed by white male management to Black women line workers).

¹²⁷ *Id.* at 267.

¹²⁸ *Id.* at 271.

¹²⁹ *Id.* at 268.

¹³⁰ *Palmitessa v. Dep’t of Navy*, 22 M.S.P.B. 220 (MSPB 1984).

¹³¹ *Id.* at 222.

claimed that the CBA's sick leave provision required workers who became ill to obtain approval to leave their worksite, including to address menstruation.¹³² The MSPB disagreed, instead finding that the CBA was not practically enforced and coping with "menstrual discomfort on . . . restroom breaks" was not leaving work.¹³³

Especially with the increase of menstruators in unions and those serving in leadership roles, such as the election of Liz Schuler as President of the AFL-CIO,¹³⁴ organized labor will continue to play a role in advancing menstrual justice at work in negotiations and by encouraging employers to voluntarily develop better policies that enhance workers dignity and offer menstrual accommodations and antidiscrimination protections.¹³⁵

b. Employer Provided Period Policies and Practices

In addition to CBA provisions, voluntary business practices have the potential to address menstrual and menopausal needs at work. Indeed, some high profile examples of best practices exist. For example, during the Obama Administration, a tampon dispenser was installed in the West Wing.¹³⁶ Some Members of Congress also provide free menstrual products in their office.¹³⁷ And the U.S. Women's Soccer Team tracked their periods to enhance collective peak performance during the 2019 World Cup¹³⁸—a practice called "menstruality."¹³⁹ Other employers offer paid time off for any reason, scheduling flexibility, wellness rooms, and other menstrual accommodations.

Recently, there has been a global push to promulgate workplace policies in this space and new policies from Australia, India, and the United King-

¹³² *Id.*

¹³³ *Id.*

¹³⁴ AFL-CIO Pass the #PROAct (@AFLCIO), TWITTER (Aug. 20, 2021, 10:32AM), <https://twitter.com/AFLCIO/status/1428726627115143168> [<https://perma.cc/5BLS-63CS>].

¹³⁵ Julie Anderson, Ariane Hegewisch & Jeff Hayes, *Union Advantage for Women*, IWPR R409 (2015), <http://statusofwomendata.org/wp-content/uploads/2015/08/R409-Union-Advantage.pdf> [<https://perma.cc/LW67-Z8XS>].

¹³⁶ Jennifer Weiss-Wolf, *Could Your Period Get You Fired?*, MARIE CLAIRE (Oct. 12, 2017), <https://www.marieclaire.com/politics/a12832430/workplace-menstrual-equity/> [<https://perma.cc/W2B4-T3RC>] (quoting Alyssa Mastromonaco, former White House Deputy Chief of Staff) ("If we were truly serious about running a diverse operation and bringing more women in[,] we should give the office a basic level of comfort[. It is] better than menstruating all over the Oval.").

¹³⁷ See Letter from Zoe Lofgren, Chair, Committee on House Administration, to U.S. Reps. Debbie Wasserman Schultz, Sean Patrick Maloney & Grace Meng (Feb. 11, 2019), <http://cdn.videos.rollcall.com/author/2019/02/2.11.19-zl-to-dws-meng-spm-re-menstrual-products.pdf> [<https://perma.cc/6NHV-CW8U>] (instructing Congress's Office Supply Store to stock products).

¹³⁸ Katie Kindelan, *How Tracking Their Periods Helped USA Women's Soccer Team Win the World Cup*, GMA (Aug. 8, 2019), <https://www.goodmorningamerica.com/wellness/story/uswnt-period-tracking-win-world-cup-64709450> [<https://perma.cc/V3MC-CTSR>].

¹³⁹ Menstruality "leverage[s] women's cycles" to match work needs and tasks with the natural effects of certain hormones present at different stages in menstrual cycles. Weiss-Wolf, *supra* note 136 (identifying antidiscrimination and privacy concerns with applying a menstrual mapping practice to maximize productivity).

dom in particular have received international attention. In Australia, the Victorian Women's Trust created a *Menstrual Leave Policy Template* to help “shift attitudes and behaviors”¹⁴⁰ The policy provides for up to twelve days of paid leave annually, telework, or “stay[ing] in the workplace under circumstances which encourage the comfort of the employee” such as taking a break in a wellness room.¹⁴¹

Wet & Dry Personal Care was the first Indian company to offer menstrual leave or telework.¹⁴² In 2017, Culture Machine created a *First Day of Period Leave* (“FOP Leave”) policy to provide one paid leave day a month that does not count as sick or vacation leave.¹⁴³ Also in 2017, Gozoop, a digital communications agency, enacted a one day a month telework policy for menstruators “to take away the stress of travel, crowded environments, uncomfortable chairs, [and] fear of stains.”¹⁴⁴ Over 75% of the company's female workers have worked from home under the policy since it began.¹⁴⁵

In 2016, British social enterprise Coexist created a worker driven period policy after a manager saw colleagues in pain at receptions, including someone “doubled over. . . and white as a sheet” and realized that “something ha[d] to shift.”¹⁴⁶ Coexist invited all employees to a “closed-door meeting,” which resulted in a new menstruation policy that affords workplace flexibility and time off for painful menstruation-related moments.¹⁴⁷ The goal was to

¹⁴⁰ Victorian Women's Trust, *Menstrual Leave Policy Menstrual Policy Template* <https://www.vwt.org.au/menstrual-policy-2/> [<https://perma.cc/V8J3-PQ2Y>] (last visited Aug. 1, 2021); see Jacqueline Howard, *Employer's Paid Period Leave Policy in Australia Stirs World Debate*, CNN (Oct. 4, 2018), <https://edition.cnn.com/2018/10/03/health/period-leave-australia-explainer-intl/index.html> [<https://perma.cc/6K4Z-6DSX>] (describes the voluntary period policy, which does not cut into sick leave).

¹⁴¹ Howard, *supra* note 140; Goldblatt & Steele, *supra* note 19, at 308.

¹⁴² Ratna Bhushan, *Breaking Paradigm: Wet & Dry Personal Care to Start 'Menstrual Leave' for Staff*, ECON. TIMES (March 6, 2016) (policy offered two days unpaid leave monthly or telework from home). Other Indian companies then followed. See Supriya Dedgaonkar, *City Firm Allows Menstrual Leave*, PUNE MIRROR (July 2, 2020), <https://punemirror.indiatimes.com/pune/civic/city-firm-allows-menstrual-leave/articleshow/76737946.cms> [<https://perma.cc/9MLF-JP6K>] (announcing two days of paid menstrual leave and noting that employees “are not mandated to give any kin[d] of notice in advance”).

¹⁴³ Belliappa, *supra* note 27; Somya Abrol, *Do Women in India Need Period Leave? Will it Ostracize Women in the Work Space?*, INDIA TODAY (July 13, 2017), <https://www.indiatoday.in/lifestyle/health/story/india-period-leave-culture-machine-menstruation-cramps-debate-lifest-1024164-2017-07-13> [<https://perma.cc/6RKA-H5JQ>]. It provided one paid day monthly, apart from sick or vacation leave. Pattani, *supra* note 117.

¹⁴⁴ Levitt & Barnack-Tavlaris, *supra* note 65, at 564.

¹⁴⁵ *Id.*

¹⁴⁶ Juliette Astrup, *Bringing Period Policy Up to Date*, Cmty. PRAC. at 15 (Nov. 2018); Bex Baxter, *Ending a Workplace Taboo. Period.*, YOUTUBE https://www.youtube.com/watch?v=0wWUAX_1JDw [<https://perma.cc/Y3C5-G4K4>]; Kayleigh Lewis, *Company Gives Women 'Period Leave' to Make Them More Productive*, INDEP. (Mar. 1, 2016), <https://www.independent.co.uk/life-style/health-and-families/period-leave-menstruation-work-employment-uk-women-a6905426.html> [<https://perma.cc/9A5B-8NXC>]; Steven Morris, *UK Company to Introduce 'Period Policy' for Female Staff*, GUARDIAN (Mar. 2, 2016), <https://www.theguardian.com/lifeandstyle/2016/mar/02/uk-company-introduce-period-policy-female-staff> [<https://perma.cc/Y9C8-7LW4>] (explaining the anticipated return on investment).

¹⁴⁷ Eun Kyung Kim, *Britain's Coexist to Offer Flexible 'Period Policy' For Women With Painful Cycles*, TODAY (Mar. 4, 2016), <https://www.today.com/health/britain-s-coexist-offer-flexi->

destigmatize menstruation, normalize it, and empower workers by respecting them and their bodies.¹⁴⁸ It also led to increased productivity.¹⁴⁹ A few years later, approximately half of Coexist's menstruating workers reported using the policy by leaving early, using flextime, or teleworking.¹⁵⁰

Leaders of these companies also successfully supported broader campaigns to encourage other local employers to create menstrual supports.¹⁵¹ For example, some Indian teachers are now offered FOP Leave,¹⁵² as are employees of Zomato (an Indian food delivery company).¹⁵³ In an email to employees, Zomato's founder and CEO shared, "There shouldn't be any shame or stigma attached to applying for a period leave. You should feel free to tell people. . .that you are on your period leave for the day."¹⁵⁴

Employers have implemented other innovative policies too. For example, every time someone purchases menstrual products from Aunt Flow LLC, the company supplies a pack of menstrual products to a business that voluntarily provides them for free in their restrooms.¹⁵⁵ There also is an international push—led by U.K. politicians, business leaders, and advocacy groups—for voluntary employer practices to address menopause at work, including by providing accommodations like fans and water.¹⁵⁶

ble-period-policy-women-painful-cycles-t77941 [https://perma.cc/NFS9-AJY3]; Morris, *supra* note 146. Coexist was not the first UK business to offer menstrual leave. Since 2008, the standard contract of the Women's Environmental Network provides menstruating workers with one paid leave day each cycle. Astrup, *supra* note 146, at 16.

¹⁴⁸ Astrup, *supra* note 146, at 15–16. Bex Baxter posits that it is "good for business" to have workers take leave; it "empower[s] workers to be their optimum selves." Morris, *supra* note 146 (noting a goal of "break[ing] down that shame").

¹⁴⁹ Lewis, *supra* note 146.

¹⁵⁰ HAMILTON HOUSE, ENDING A WORKPLACE TABOO. PERIOD. (Jan 11, 2018) (Coexist's primarily female workers have "created a contingency agreement to accommodate staff needing time off").

¹⁵¹ See Howard, *supra* note 140 (describing efforts by the Victorian Women's Trust to advocate for other employers to provide the same); Blush Originals, *First Day of Period Leave*, YOUTUBE (Dec. 1, 2017), https://www.youtube.com/watch?v=AVPgUxGC1Sg [https://perma.cc/VD85-74FH] (Culture Machine staff discussing their FOP policy to "legitimate [it] across the country" and pitch a petition asking the Indian government to create a FOP leave law); Josie Cox, *Menstrual Leave: Indian Company Offers Women Day Off on First Day of Their Periods*, INDEP. (July 11, 2017), https://www.independent.co.uk/News/business/news/menstrual-leave-indian-company-culture-machine-period-women-workers-first-day-off-holiday-a7834796.html [https://perma.cc/MSH9-K7V4] (noting that Culture Machine wants other women in India "to have the same right"); Belliappa, *supra* note 27, at 604 (FOP leave has prompted a "[n]ew convo").

¹⁵² NDTV, *Now Some Kerala Schools Offer Teachers 'First Day of Period Leave'*, YOUTUBE (Aug. 2, 2017), https://perma.cc/5DQS-4FQV (sharing a new FOP policy for teachers and describing the taboo-breaking experience of discussing periods).

¹⁵³ Julia Hollingsworth, *Should Women Be Entitled to Period Leave?*, CNN (Nov. 20, 2020), https://perma.cc/3CUE-M583.

¹⁵⁴ *Id.*

¹⁵⁵ Montano, *supra* note 29, at 393–94 (sharing that a college student created the company after she missed a networking event because she had no products). It also created an app that displays a map of nearby businesses with products available to the public and staff. *Id.*; see also Belliappa, *supra* note 27, at 614 (describing a "menstrual flexibility" proposal that allows menstruators to take leave during their cycle and make up later).

¹⁵⁶ Mullins, *supra* note 21, at 13–14.

This increase in voluntary employer practices and collective action is important. Unfortunately, many workplaces and period needs continue to go unmet. Thus, the next section examines how existing laws address menstruation at work.

II. EXISTING EMPLOYMENT LAW FOR CURRENT AND FORMER MENSTRUATORS

Existing workplace laws can—and sometimes do—cover the needs identified in the last section by offering current and former menstruators limited rights related to menstrual accommodations and menstrual antidiscrimination protection. But that coverage is neither explicit in the relevant statutory text nor comprehensive in scope. Nonetheless, this section explains the complicated patchwork of relevant existing laws. Specifically, Part A covers the promise—and ultimate failure of existing labor standards and tort law to require menstrual accommodations on demand.¹⁵⁷ Similarly, Part B tackles the partial application of existing antidiscrimination statutes to menstrual discrimination. Part C explores how international movements and menstrual accommodation and discrimination laws have developed and offer variations on the models outlined in the rest of this section.

A. Menstrual Accommodations

No American labor standard offers designated rights to menstrual accommodations. Employers are not required to provide paid menstrual breaks, leave, or scheduling flexibility qua menstruation. Nor are employers required to offer physical accommodations like access to menstrual-friendly bathrooms, menstrual products, uniform modifications, or other items. Nonetheless, employers may be required to provide some of these accommodations for other reasons that de facto cover some menstrual needs.

1. Access to Job-Protected Time Away from Work

Structurally, the last section demonstrated a need for menstruators to access work breaks. The Fair Labor Standards Act (“FLSA”), which governs some time-related obligations, is silent on breaks for workers, with one notable exception.¹⁵⁸ The exception is a 2010 FLSA amendment that requires that some workers be provided “reasonable,” job-protected break time and private space accommodations for breastfeeding “each time” a covered

¹⁵⁷ See *infra* Section II.A.

¹⁵⁸ See 29 U.S.C. § 203–209; see also LINDER & NYGAARD, *supra* note 85, at 9 (only workers “whose fatigue might cause them to injure or kill nonworkers,” such as pilots and truck drivers, are subject to mandatory breaks).

worker “has need.”¹⁵⁹ These expression breaks, along with any other breaks of twenty minutes or less, are deemed work time, which means they must be paid if provided.¹⁶⁰

No other federal law generally requires bathroom breaks.¹⁶¹ Workers must be provided designated, paid breaks under some state laws, however.¹⁶² For example, California requires workers be given a 10-minute uninterrupted, paid break after someone works three and half hours in the same day and a second 10-minute paid break after six hours.¹⁶³ Washington entitles workers to 10-minutes of break every three hours.¹⁶⁴ Menstrual management presumably could occur during these covered breaks, although doing so means that workers would not have the ability to use that time to rest as other workers are able to do.

Under the Family and Medical Leave Act (“FMLA”), certain employers must provide up to twelve weeks of job-protected, unpaid leave to some workers to address the birth of a child or a serious health condition, among other reasons.¹⁶⁵ Menstruation, which normally stops during pregnancy and childbirth, and menopause, during which time pregnancy is biologically not possible, are not explicitly covered leave reasons. Relatedly, a “serious health condition” is “an illness, injury, impairment or physical or mental condition” that requires inpatient care or “continuing treatment by a health care provider.”¹⁶⁶ Neither menstruation nor menopause fall squarely in this definition, but some menstruation-related conditions, such as endometriosis, may be covered if menstruators meet the FMLA’s other eligibility requirements and can afford unpaid leave. If those conditions are met and it is medically necessary, covered workers may take FMLA leave intermittently in one hour blocks of time.¹⁶⁷ Breaks of shorter increments are not required.

¹⁵⁹ 29 U.S.C. § 207(r)(1); see generally Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 CATH. L. REV. 329 (2014) (exploring these accommodations and situating them in other employment laws with a health purpose).

¹⁶⁰ See 29 C.F.R. § 785.18 (breaks under 20 minutes “must be counted as hours worked”); *Breaks and Meal Periods*, U.S. DEP’T OF LABOR, [dol.gov/general/topic/workhours/breaks](https://www.dol.gov/general/topic/workhours/breaks), [<https://perma.cc/S8ZF-3GT9>]. Neither menstruation nor menopause are mentioned in the FLSA or implementing regulations.

¹⁶¹ See *OSHA Restroom Break Laws*, OSHA EDUC. CENT., (2019), <https://perma.cc/62K6-JU47>.

¹⁶² See Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL’Y J. 71, 91 (2016) (nine states required paid breaks in 2016); LINDER & NYGAARD, *supra* note 85, at 4 (observing that required breaks used to be more prevalent).

¹⁶³ Cal. Indus. Welfare Comm’n Wage Order 9-2001 § 12(A), <https://www.dir.ca.gov/IWC/IWCArticle09.pdf> [<https://perma.cc/QK89-73ZG>].

¹⁶⁴ Wash. Admin. Code § 296-126-092(4) (2021).

¹⁶⁵ 29 U.S.C. § 2612(a)(1)(D). The FMLA’s eligibility criteria is notoriously limiting. See e.g., Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, A New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 327–28 (2014) (cataloguing critiques with the FMLA due to eligibility limitations and not requiring pay).

¹⁶⁶ 29 U.S.C. §§ 2611(2), (4), 2612(a). These conditions require: at least two visits with a medical provider; an overnight stay in a facility; or incapacity for more than three consecutive days with ongoing medical treatment. 29 C.F.R. §§ 825.113–.115.

¹⁶⁷ 29 U.S.C. § 2612(b)(1) (authorizing intermittent leave to care for a serious health condition or for other FMLA-qualifying reasons with the employer’s permission); 29 C.F.R.

Compliance with the FMLA's technical requirements have stymied more than one menstruator's claim. For example, an African American tractor-trailer driver successfully obtained FMLA leave a few days a month for the serious health condition of menorrhagia and fibroid tumors in *Taylor v. Giant of Md.*¹⁶⁸ She later lost access to it after a dispute over the need to comply with the employer's absence notification procedures.¹⁶⁹

In *Stephens v. Treasury*, the MSPB upheld the suspension of a worker who failed to follow the employer's procedures for requesting FMLA leave.¹⁷⁰ The worker notified her employer of a "menstrual problem." She then submitted medical paperwork that said she might "occasionally" be late or miss work for menstrual bleeding and suggested that she stay home during menses until after surgery rectified her condition. No formal medical certification was provided. The Administrative Law Judge ("ALJ"), who did not apply the serious health condition standard, held that Stephens needed significantly more time away from work than the medical note suggested, finding the paperwork insufficient to demonstrate "that her menstrual cycle difficulties incapacitate her from work. . . more than a few days per month."¹⁷¹ These cases show that FMLA leave may be available, but only to eligible workers who can navigate the complicated threshold requirements, which is much harder to do if someone has an unpredictable period.

Most states have medical leave laws that parallel the FMLA or offer greater protections.¹⁷² Coverage thresholds are often lower, which means that these leave protections may apply to more workers.¹⁷³ Other state and local laws also offer protections. For example, 36 jurisdictions require paid sick leave and others provide small necessities leave, i.e., time off for needs that are not covered under other laws such as taking a child to be vaccinated or attending a parent/teacher conference.¹⁷⁴ Even when they offer broader coverage, these laws also have strict access requirements. For example, in *Turner v. Newark Housing Authority*, a security guard was fired for absences, including some related to "menstrual problems. . . exacerbated by [job] stress."¹⁷⁵ The guard only explained that she "wasn't feeling well," which did

§ 825.203(d) ("[A]n employer may limit leave increments to the shortest period of time that the employer's payroll system uses[,] provided it is one hour or less."). This means that eligible workers may need to forgo pay for time spent on the remaining part of an hour if they needed less time to address their covered menstrual/menopausal needs.

¹⁶⁸ 33 A.3d 445 (Md. 2011).

¹⁶⁹ *Id.*

¹⁷⁰ *Stephens v. Treasury*, No. CH-0752-05-0258-I-1, 2005 WL3593348 (MSPB Sept. 28, 2005).

¹⁷¹ *Id.*

¹⁷² NCSL, *Family Medical Leave* (updated Dec. 2014), <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> [<https://perma.cc/VK5T-LFEQ>].

¹⁷³ *Id.*; see e.g., D.C. Code § 32-501.

¹⁷⁴ NAT'L PARTNERSHIP FOR WOMEN AND FAMS., *Chart—Paid Sick Days Statutes* (July 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-sick-days/paid-sick-days-statutes.pdf> [<https://perma.cc/GMM6-Z36S>]; see e.g., MASS. GEN. LAWS ch. 149, § 52D (1998).

¹⁷⁵ 92 N.J.Admin. 2d 403 (1992).

not satisfy the employer's policies.¹⁷⁶ In upholding the ALJ's decision, the Office of Administrative Law agreed that the termination was justified for failure to follow leave-notification policies.¹⁷⁷ Essentially, these laws only offer limited protections to some menstruators at work.

2. *Additional Protections for Menstruation-Related Disabilities*

Though the Americans with Disabilities Act ("ADA") requires limited time and space accommodations for some menstruation or menopause-related disabilities, it does not offer universal accommodations for all menstruating or menopausal workers.¹⁷⁸ Specifically, under the ADA, as amended by the ADA Amendments Act ("ADAAA"), covered employers must furnish reasonable accommodations to qualified individuals with a disability if doing so does not impose an undue hardship on business operations.¹⁷⁹

An individual with a disability is someone with a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.¹⁸⁰ A physical or mental impairment includes "[a]ny physiological disorder or condition. . . affecting one or more body systems," including reproduction.¹⁸¹ Major life activities include "caring for oneself[,] concentrating[,] working[,] and "the operation of a major bodily function, including. . . bowel, bladder[,] and reproductive functions."¹⁸² Only qualified individuals with an actual disability or a record of having one are entitled to reasonable accommodations.¹⁸³

Before the ADAAA, courts uniformly denied disability-status to people alleging that menstruation, perimenopause, or menopause were qualifying disabilities. For example, Iris Klein, who had bleeding, sleeping, and nausea problems at the start of menopause, asked for and was denied flex time ac-

¹⁷⁶ *Id.* at 403.

¹⁷⁷ *Id.*

¹⁷⁸ 42 U.S.C. § 12101 *et seq.*; see *infra* Section II.C.2.

¹⁷⁹ 42 U.S.C. § 12111(a); 29 C.F.R. § 1630.9(a). See also 42 U.S.C. § 12112(B) (defining discrimination as the failure to provide reasonable accommodations).

¹⁸⁰ 42 U.S.C. § 12102(1).

¹⁸¹ Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(h)(1)–(2) (2021); Price v. UTI Inc., No. 4:11-CV-1428CAS, 2013 WL 798014, at *3 (E.D. Mo. Mar. 5, 2013) ("‘physical impairment’ includes. . . an impairment or complication related to pregnancy").

¹⁸² 42 U.S.C. § 12102(2)(A)–(B); see *Summary of the ADAAA*, THE ADA PROJECT <http://www.adalawproject.org/summary-of-the-adaaa#anchor-link1> [<https://perma.cc/44N9-XKK3>] (noting the ADAAA's instruction to generously interpret the law to find a disability).

¹⁸³ 42 U.S.C. §§ 12112–13; 29 C.F.R. § 1630.2(o); EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, Notice No. 915.002 (Oct. 17, 2002), <http://www.eeoc.gov/policy/docs/accommodation.html> [<https://perma.cc/WRC5-CZX3>]. An undue hardship is something that requires significant difficulty or expense given the employer's size, industry, and resources. 42 U.S.C. § 12111(10). An interactive process or conversation between employer and employee must be used to find an appropriate accommodation. 29 C.F.R. §§ 1630.2(o), 1630.9.

commodations to arrive at work after 8am.¹⁸⁴ The Southern District of Florida held that Klein’s menopause-related complications, which admittedly “temporarily interfere[d] with [her] ability to satisfactorily perform employment tasks,” was not a disability. After acknowledging that “complicated menopause” may be a disability, the court noted that “[m]enopause, generally, is not a handicap or disability.”¹⁸⁵

Linda McGraw faced the same fate. McGraw told her supervisor that “she was in early menopause” in response to allegations of poor work performance. Interpreting federal law, a Minnesota court recognized that the inability to have children is a cognizable disability, but it declined to read precedent as requiring *every* menopausal worker—especially those in menopause due to an “entirely normal consequence of human aging” to be deemed disabled.¹⁸⁶ This “unremarkable proposition” was then used by the Southern District of New York to find that an infertile store manager who had a miscarriage was not disabled.¹⁸⁷ After citing *McGraw*, the decision declared, seemingly out of nowhere, that this was “a proposition that enlightened women have been espousing for centuries.”¹⁸⁸ Then, in dicta, the decision stated that “[a] post-menopausal woman. . . is not ‘disabled’ [as] her. . . non-reproductive system—is in fact functionally normally.”¹⁸⁹

Post-ADAAA, courts have been more generous covering period-related conditions. With respect to menstruation, in *Schmidt v. Solis*, the District Court for the District of Columbia found that the U.S. Department of Labor failed to accommodate and retaliated against an employee with endometriosis.¹⁹⁰ Her endometriosis, which caused “abnormal, painful” menstrual cycles that were “often accompanied by profuse and uncontrollable bleeding,” was considered a disability.¹⁹¹ For some time, Schmidt obtained scheduling flexibility or telework.¹⁹² Then, after she cited privacy concerns and declined to submit a “revised medical report” directly to a new supervisor, Schmidt ultimately had her work hours decreased and was required to be in

¹⁸⁴ *Klein v. Florida*, Dept. of Child. & Fam. Serv., 34 F. Supp. 2d 1367, 1369 (S.D. Fla. 1998).

¹⁸⁵ *Id.* at 1368, 1371–72.

¹⁸⁶ *McGraw v. Sears*, 21 F. Supp. 2d 1017, 1021 (Minn. 1998) (“The Court takes judicial notice of menopause as an entirely normal consequence of human aging. As such, it is clearly distinguishable from early loss or impairment of childbearing resulting from a communicable viral illness.”).

¹⁸⁷ *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318, 326 (S.D.N.Y. 2000), *aff’d in part, remanded in part*, 316 F.3d 336–37 (2d Cir. 2003); *see also* *Kelley v. Yeutter*, No. 03900092, 1990 WL 1111023, at *1–4 (EEOC 1990) (interpreting the Rehabilitation Act, the MSPB held that there was no handicap discrimination for a terminated government auditor for “bleeding and other manifestation of irregular menstruation” because “her headaches, bleeding or depression” had not substantially limited a major life activity).

¹⁸⁸ *Saks*, 117 F. Supp. 2d at 326.

¹⁸⁹ *Id.* at 326.

¹⁹⁰ 891 F. Supp. 2d 72, 75–76, 89–93 (D.D.C. Sept. 18, 2020) (analyzing a disability discrimination claim under the Rehabilitation Act).

¹⁹¹ *Id.* at 76–77.

¹⁹² *Id.*

person at times.¹⁹³ When yet another set of supervisors asked for additional medical records, the anxiety this produced caused her to change jobs. In upholding her damages award, the court chided the employer for repeatedly failing to properly engage in the interactive process, changing accommodations without reason, and inappropriately using the fact that she would not disclose personal medical information to a supervisor against her.¹⁹⁴

Chipman v. Cook provides an example of better coverage of menopause post-ADAAA.¹⁹⁵ Here, the Eastern District of Arkansas allowed the ADA claim of a terminated office manager to proceed because there was a question about whether her “severe and debilitating symptoms related to menopause,” which made her tired for two to three days at the start of her cycle, constituted a disability.¹⁹⁶ In analyzing whether this constituted a disability, her employer conceded and the court observed that Chipman’s menstrual cycle may “temporarily impact [her] ability to stand, lift, walk, and work because she needed to lay down when her symptoms required it.” Accordingly, the court was unwilling to say that she did not have a disability as a matter of law.¹⁹⁷

In *Mullen v. New Balance*, the District of Maine allowed a 35-year-old’s claim to proceed to determine whether she had a disability after a hysterectomy to remove ovarian cysts induced early menopause.¹⁹⁸ Mullen alleged that she was pressured to resign after crying, experiencing hot flashes, and having an “outburst” at a feedback meeting.¹⁹⁹ The parties agreed that a hysterectomy generally impacts the major life activity of reproduction, but the employer argued that should not govern here because Mullen had eliminated her reproductive capacity with tubal ligation a decade earlier.²⁰⁰ In response, the court noted that tubal ligation is not permanent, while hysterectomies represent a permanent reproductive-impairment.²⁰¹ In allowing the case to proceed, the court focused on her young age, the reality that the condition was the result of a medical procedure, and the impact it has on child-rearing.²⁰²

Even under the ADAAA’s expanded definition of disability, a “regular” period—or “being in menopause”—without associated symptoms or condi-

¹⁹³ *Id.* at 78–85.

¹⁹⁴ *Id.* at 89–93. Damages were statutorily capped at \$300,000 and back pay. *Id.*

¹⁹⁵ No. 3:15-CV-143, 2017 WL 1160585 (E.D. Ark. Mar. 28, 2017) .

¹⁹⁶ *Id.* at 1, 5, 7–8 (also alleging gender, age, and disability discrimination; noting that management explained that “female issues” were the reason for her conduct).

¹⁹⁷ *Id.* at 8.

¹⁹⁸ No. 17-CV-194-NT, 2019 WL 958370, at *5 (D. Me. Feb. 27, 2019) (mentioning multiple cases finding disability after a hysterectomy, given its impact on reproduction or support of an inference that someone was regarded as disabled).

¹⁹⁹ *Id.* at *1–2.

²⁰⁰ *Id.* at *5.

²⁰¹ *Id.*

²⁰² *Id.* at *1–2; Cahn, *supra* note 23, at 7–8 (concluding, her case was different “from that of a person in menopause due to regular aging”); Mullins, *supra* note 21, at 11 (arguing that this case showed a broader bias against “older menopausal individuals”).

tions likely would not be deemed a disability.²⁰³ Nonetheless, these cases collectively demonstrate that the ADAAA made it easier for some qualified workers with menstruation- or menopause-related impairments to meet their burden of demonstrating a covered disability for ADA protection.

Assuming some period-related impairments constitute a disability, the next question is whether reasonable accommodations must be provided.²⁰⁴ Reasonable accommodations are changes to the work environment that provide an equal opportunity, such as scheduling flexibility, part-time opportunities, or modifying existing facilities.²⁰⁵ As discussed above, the most common anticipated accommodations here include: time (e.g., break time, leave, or scheduling flexibility);²⁰⁶ space (e.g., menstrual-friendly facilities such as toilets, temperature modifications, or location of work); and other menstrual management tools (e.g., the provision of products, uniform changes). Employers and employees must engage in an interactive process to determine if/what accommodations are reasonable given circumstances.²⁰⁷

In *Brown v. Georgia Dep't of Driver Servs.*, a customer service examiner ultimately was denied accommodations for menorrhagia under the Rehabilitation Act.²⁰⁸ Menorrhagia led to heavy bleeding and an elongated period, which in turn “caused fatigue; mental confusion; and loss of memory, appetite, and sleep.”²⁰⁹ Her menstrual discharge also covered her clothing and work furniture, “causing her intense embarrassment.”²¹⁰ This impairment required her to sit during her period, especially cycles where the “heaviest bleeding” could last for nine days and “sudden blood flows” could be triggered by essential work tasks.²¹¹ Eventually, Brown was hospitalized, underwent a hysterectomy, and needed six weeks of post-surgery recovery. She exhausted her FMLA leave and lost her job after complications with her hysterectomy caused her to stay away from work longer. The court held it was not discrimination because she could not perform the essential functions of the job.²¹² Thus, even if someone meets the burden of demonstrating a disability, they may not be able to prove other required elements to obtain liability for failing to provide menstrual accommodations.

²⁰³ 42 U.S.C. §§ 12102(2), 12111(8); Karin, Johnson & Cooper, *supra* note 15, at 65 n.309; *see also* Cahn, *supra* note 23, at 6 (exploring how menopause differs from menstruation under the ADA).

²⁰⁴ 42 U.S.C. § 12111(10)(A)–(B); *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act*, 29 C.F.R. § 1630.2(o)(i–iii), (p) (2021).

²⁰⁵ 42 U.S.C. § 12111(9).

²⁰⁶ EEOC, *supra* note 183 (explaining that a reasonable accommodation may include a modified or part-time schedule that “adjust[s] arrival or departure times, provid[es] periodic breaks, alter[s] when certain functions are performed, allow[s] an employee to use accrued paid leave, or provid[es] additional unpaid leave”).

²⁰⁷ *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act*, 29 C.F.R. §§ 1630.2(o), 1630.9.

²⁰⁸ *Brown v. Georgia Dep't of Driver Servs.*, 2014 WL 1686833, at *5–6 (M.D. Ga. April 29, 2014).

²⁰⁹ *Id.* at 8.

²¹⁰ *Id.*

²¹¹ *Id.* at 19–23.

²¹² *Id.* at 9–11.

In addition to the ADA, some state and local laws offer broader rights to accommodations.²¹³ For example, in *Martinell v. Montana Power Co.*, a Montana court held that endometriosis was a covered disability in a discrimination lawsuit related to a constructive discharge.²¹⁴ Before she resigned, the employer denied Martinell's request to cap work at 40 hours per week or provide sick leave, and then refused to talk further. After she left the job, Martinell underwent a hysterectomy and sued. In response, the employer claimed that endometriosis was not a disability since it "was at all times curable by means of a hysterectomy, and that the curable character of her illness defies classification. . . because her activities were limited only to the extent she wished them to be limited."²¹⁵ The employer further claimed that Martinell's "choice of living with" endometriosis instead of "abating her symptoms temporarily by becoming pregnant" was fatal to her claim.²¹⁶ The court found this position "untenable" and "unreasonable," holding that endometriosis "substantially limited [the] major life activity [of] work."²¹⁷ Accordingly, it should have been reasonably accommodated.²¹⁸

In *Sipple v. Crossmark, Inc.*, the Eastern District of California, which relied on pre-ADAAA cases, declined to find menopause to be a per se disability under either the ADA or California's Fair Employment and Housing Act²¹⁹ Without disclosing why, Sipple asked for a dress code modification after she began experiencing menopause. Ultimately, she submitted a medical certification justifying the change. The court declined to find a disability, observing that Sipple alleged only that "she cannot work wearing the particular uniform for this particular position."²²⁰ Nonetheless, it left open the possibility that "the effects of menopause" may be a disability if they "affect a body system. . . and sufficiently limit a major life activity."²²¹

In addition to disability accommodations, state and local Pregnant Worker Fairness Acts may require accommodations for some menstrual needs like "more frequent or longer breaks" and temporarily altered or restructured job duties to alleviate strain or hazard.²²² For example, D.C.'s Protecting Pregnant Workers Fairness Act requires employers to provide reasonable accommodations to workers whose ability to perform the essen-

²¹³ See e.g., D.C. Code § 2-1401.02(1).

²¹⁴ 886 P.2d 421 (1994).

²¹⁵ *Id.* at 428.

²¹⁶ *Id.*

²¹⁷ *Id.* at 428–29. The decision relies on *Illinois Bell Tel. Co. v. Hum. Rts. Comm'n*, 190 Ill. App. 3d 1036, 1047 (1989), which found that endometriosis was a covered "handicap," but dysmenorrhea was "transitory and insubstantial." Martinell, 886 P.2d at 428–30 ("We are mindful of the plight. . . of women who are afflicted by severe menstrual pain, and we recognize that all such conditions are not necessarily physical handicaps, but must be determined from the facts of each case.")

²¹⁸ *Id.* at 431–35.

²¹⁹ No. 10–cv–00570, 2012 WL 2798791, at *1, *5 (E.D. Cal. July 9, 2012).

²²⁰ *Id.* at *7.

²²¹ *Id.* at *5.

²²² D.C. OFF. OF HUM. RTS., *Protecting Pregnant Workers Fairness Act* (rev'd Jan. 3, 2019), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/PregnantWorkers_WorkplacePoster_rev010319.pdf [<https://perma.cc/8URB-6G6N>].

tial functions of their jobs are limited due to “pregnancy, childbirth, breastfeeding, or a related medical condition.”²²³ Unless it causes an undue hardship, employers arguably already must provide menstrual accommodations in those states that require pregnancy accommodations. Taken together, these federal, state, and local laws provide a right to disability or reproductive-related menstrual accommodations to some workers, but gaps remain.

3. *Access to Menstrual Safety and Physical Accommodations*

In addition to time and disability-related accommodations, menstruators may need physical accommodations to ensure a safe work environment such as access to menstrual-friendly facilities, menstrual products, fans, and ventilation.²²⁴ Employers have a general duty to provide a safe work environment; the failure to do so may impose liability under occupational safety and health, workers compensation, or tort laws. Without these protections as explored below (and sometimes even with them), periods will cause some workers to experience bodily harm and/or menstrual indignities. This section explores current obligations to specific physical accommodations to comply with existing safety and health laws.

Under the Occupational Safety and Health Act (“OSH Act”), employers must provide a workplace environment that conforms to subject-specific safety standards and meets a general duty to provide a worksite free from recognized harms.²²⁵ Some of the OSH Act’s regulations clearly apply to menstrual management at work—even if the words menstruation and menopause are absent from the promulgated standards and guidance disclaims agency responsibility by giving employers discretion over menstrual blood exposure. Workers compensation and tort law also impose safety-related duties on employers.

a. *Access to Toilets as Needed*

The OSH Act is silent on menstruation and menstrual products. Similarly, the regulations promulgated by the Occupational Safety and Health Administration (“OSHA,” the agency responsible for enforcing the OSH Act) do not mention menstruation, menopause, or related products.²²⁶ Despite this gap, the OSH Act and its standards govern components of men-

²²³ *Id.* (emphasis added); see *infra* Section II.C.1 (explaining why the italicized phrase covers menstruation and menopause).

²²⁴ See *supra* note 89 and accompanying text.

²²⁵ 29 U.S.C. §§ 651, 654(a)(1) (employers must provide worksites that are “free from recognized hazards that are causing or are likely to cause death or serious physical harm”).

²²⁶ See 29 C.F.R. § 1910.141. Despite providing a list of products that must be provided (e.g., soap, toilet paper), “[m]enstrual products are conspicuously excluded.” Jennifer Weiss-Wolf, *U.S. Policymaking to Address Menstruation: Advancing an Equity Agenda*, in PALGRAVE HANDBOOK, *supra* note 19, at 497; WEISS-WOLF, *supra* note 14, at 202 (asking why OSHA fails to consider the “hygiene impact of blood running down the leg of workers” in calculating risk exposure to bloodborne pathogens at work).

strual management at work. Specifically, employers must provide access to clean water and safe, sanitary, sex-segregated bathroom facilities.²²⁷ OSHA Act standards also prevent employers from creating “unreasonable restrictions on the facilities’ use,” in recognition that “individuals need[s] to use [the] facility var[y] significantly.”²²⁸

Given the culture of silence and shame around menstruation generally and in the law specifically, the lack of inclusion is not surprising. However, it is noteworthy, given the topics were explicitly part of the regulatory history that led to these rules. For example, the toilet access standard was developed at least in part from a desire to “prevent workers from urinating, *menstruating* or defecating in their pants on the grounds that it creates health and safety problems.”²²⁹ High profile litigation involving the inability of women in non-traditional jobs to access toilets also influenced the rule’s creation.

A class of street cleaners brought one of these cases against New York City, alleging non-compliance with an earlier rule that required employers to provide mobile crews with transportation to “nearby toilet facilities.”²³⁰ As part of that litigation, the named plaintiff shared that there was nowhere to go to change products during her period. Instead, she had “to wait until the end of [the] shift and by then [her] clothes [were] soaked with blood.”²³¹ In 1997, the case ended with a preliminary injunction that prevented the city from having workers outside if toilets could not be provided. The NPRM for the current OSHA rule, which requires that bathroom access be provided “when [workers] need to use them,” was published a week later.²³²

Soon thereafter, in 1999, OSHA’s Health and Safety of Women in Construction workgroup included menstrual experiences and lack of access to sanitary facilities—including washing water and toilets—as “[s]afety and health problems in construction [that] create barriers to women entering and remaining in this field.”²³³

These rules have been enforced against at least some employers, who have been cited for denied bathroom access after incidents that led to menstrual leaking and other dignitary harms. For example, a ConAgra subsidiary’s Marshalltown, Iowa plant settled a June 2000 citation for a \$1,000

²²⁷ 29 C.F.R. § 1910.141(c)(1)(i) (bathrooms for each sex “shall be provided”); see OSHA, Interpretation Letter on 29 C.F.R. § 1910.141(c)(1)(i): Toilet Facilities (April 6, 1998), <https://www.osha.gov/laws-regs/standardinterpretations/1998-04-06-0> [<https://perma.cc/EG3D-4A59>] (confirming that “employers [must] make toilet[s] available so that employees can use them when they need to do so”); Weiss-Wolf, *supra* note 226, at 539, 541.

²²⁸ OSHA, Interpretation Letter on 29 C.F.R. § 1910.141(c)(1)(i): Toilet Facilities (April 6, 1998), <https://www.osha.gov/laws-regs/standardinterpretations/1998-04-06-0> [<https://perma.cc/R3X3-MBS6>].

²²⁹ LINDER, *supra* note 126, at 242–43 (emphasis added) (providing examples of problems from denying toilet access, including “accidents and injuries attendant on workers’ being inattentive and preoccupied with their wet, soggy, and smelly pants”).

²³⁰ *Id.* at 8, 16–17 (describing *Capers v. Giuliani*, No. 97-402894 (Sup. Ct. N.Y. Cnty, 1997)).

²³¹ *Id.* at 17 (citing *Capers’s* affidavit).

²³² *Id.*

²³³ OSHA, U.S. DEP’T OF LAB., *supra* note 92 (mentioning judicial holdings that “the lack of appropriate sanitary facilities is discriminatory and violates OSHA standards”).

penalty. Toilet access was delayed or denied to workers who “urinated and menstruated on themselves.”²³⁴ In 2001, the John Morell & Company of Sioux City Iowa paid an uncontested penalty of \$2,000 to resolve a series of OSHA citations issued in response to employees being denied timely bathroom access, causing “urination, defecation, and/or a heavy menstruation in their clothing.”²³⁵

The following year, a Morell supervisor prevented another worker from using the restroom by telling her that she did not need to go, even though the worker explain that she had to “deal with menstrual bleeding.” The threat of another OSH Act complaint from the union—coupled with the poor publicity the company received after the first citation went public, caused the company to discipline the supervisor instead of the worker.²³⁶

A worker at another Iowa Morrell plant took a bathroom break while experiencing a heavy menstrual flow but realized that she did not have a quarter to purchase a pad from the restroom’s dispenser. She went back to the line to ask a colleague for money, and then returned to the restroom. Upon seeing her return to the restroom so quickly, her supervisor told her to get back to work and made a reference to the “hog’ blood” with which they worked. By the time this exchange finished, the worker leaked through her clothes.²³⁷ There is no record of whether she was paid for this time and OSHA did not cite the plant as it could not prove a violation.²³⁸ However, John Morrell & Co. faced Title VII liability for related conduct, including damages of over \$1.5 million dollars on disparate treatment, hostile work environment, and other related violations.²³⁹

Menstrual indignities also were at the center of a two-day Kentucky Occupational Safety and Health Review Commission hearing when Jim Beam Bourbon Company contested a citation about its bathroom policy. Jim Beam created the policy after estimating that some workers were taking up to four “mini breaks” daily to use the bathroom for an average of 28 minutes total.²⁴⁰ According to the union, workers were told to “train their bladders. . .or face discipline, including dismissal.”²⁴¹ One worker described this

²³⁴ LINDER, *supra* note 126 (citing Iowa Occupational Safety and Health Administration, In the Matter of Swift and Company, IOSH No. 300378031 (Oct. 13, 2000)). A settlement led to a \$1,000 penalty. *Id.*

²³⁵ *Id.* at 188–94.

²³⁶ *Id.* at 306 (citing Bill Buckholtz, the secretary-treasurer of UFCW Local 1142 of the slaughter plant in Sioux City, Iowa).

²³⁷ *Id.* at 308 (citing Oct. 14, 2002 telephone interview with Ron Brown, the president of UFCW Local in Ottumwa, about bathroom breaks).

²³⁸ *Id.* at 309 (citing OSHA personnel).

²³⁹ *Baker v. John Morrell & Co.*, 382 F.3d 816, 819 (8th Cir. 2004) (affirming a jury award of \$839,470 in compensatory damages, \$33,314 in back pay and \$650,000 in punitive damages as well as \$38,921 in front pay that was judicially added).

²⁴⁰ LINDER, *supra* note 126, at 246–47 (alleging 29 C.F.R. §1910.141(c) was violated).

²⁴¹ Sandy Smith, *Bourbon Maker Fights Citation for Denial of Bathroom Access*, EHS TODAY (Aug. 29, 2002) <https://www.ehstoday.com/archive/article/21914262/bourbon-maker-fights-citation-for-denial-of-bathroom-access> [<https://perma.cc/4BU5-TSU3>] (quoting the union’s president: “It’s a shame when you feel you have the need to go to the bathroom, but [ask] ‘Do I soil myself or do I protect my job?’”).

as “the potty police” because the company tracked bathroom use on a spreadsheet.²⁴²

At the hearing, Jim Beam’s HR director testified that some temporary illnesses such as diarrhea were accommodated. The state’s lawyer asked whether workers with “an onset of menses [and] heavy flow” would be treated the same, and uncovered that menstruation required a case-by-case determination.²⁴³ The HR director then was asked if it was “a bit personal” for a worker who had “a menstrual accident” and received a counseling for taking a “very rapid trip so as to prevent embarrassment” had to “explain [this] to the gentleman in personnel” to avoid discipline.²⁴⁴ The answer was yes, but the company believed that this could be done “in a way that even a man would understand without having to get terribly embarrassed”²⁴⁵

Next, a local Kentucky urologist testified in support of Jim Beam’s policy. According to the doctor, menstruation did not require an accommodation. He said it “was [n]ot likely” that a menstruating worker would take longer to use the bathroom, “because younger women tend to use tampons, while older women tend to use sanitary napkins and when they urinate, they would probably change their napkin but not a tampon.”²⁴⁶ Despite this testimony, the doctor admitted that “menstrual needs” were not included in his analysis of the “normal” length of time needed for a restroom break.²⁴⁷

By contrast, the state’s expert, Dr. Ingrid Nygaard, explained six reasons that the policy was wrong, including the impact on “menstruating women” who “require restroom breaks to change menstrual . . . products” perhaps “as frequently as every 30 minutes on the first day of their period and up to every eight or 12 hours on later days.”²⁴⁸ Ultimately, Jim Beam removed the policy after bad publicity.²⁴⁹

Another company’s policy required employees “to register with their foremen when leaving for and returning from relief” so management could “exercise proper control of personal time” and avoid the “disastrous” consequences of workers “taking too much time off[.]”²⁵⁰ In a decision interpreting this policy, the arbitrator notes that it is “well known in industrial relations” that this leads to “workplace embarrassment” and “the virtually inevitable affront to the sensitivities of these workers which administration of the rule entails.”²⁵¹ Despite this industry knowledge, these cases demonstrate that

²⁴² *Id.*

²⁴³ LINDER, *supra* note 126, at 246–47.

²⁴⁴ *Id.* (citing Aug. 29, 2000 Hearing Transcript at 242, 245–46).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 214 (citing Stivers Deposition at 40–41).

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 215–16 (citing Nygaard Deposition at 58–59) (continuing, “the most typical range is every one to three hours”).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 200 (citing Detroit Gasket & Mfg. Co., 27 LAB. ARB. REPS. (BNA) 717 (1956)).

²⁵¹ *Id.*

both the OSH Act and OSHA can do more to facilitate employer practices related to safe access to menstrual-friendly toilets at work as needed.

b. Limiting Exposure to Menses and Proper Disposal of Menstrual Discharge

In addition to toilet access, safety provisions designed to limit exposure to blood theoretically apply to menstruation. Unfortunately, neither the OSH Act nor any other law specifically requires employers to provide products to absorb menstrual discharge or otherwise limit exposure to it. OSHA does regulate exposure to and disposal of bloodborne pathogens, which are the “infectious microorganisms in human blood that can cause disease.”²⁵² OSHA requires that “appropriate” personal protective equipment (“PPE”) be provided to anyone with blood exposure at work at no cost to the worker.²⁵³ PPE is “only [deemed acceptable] if it does not permit blood. . . to pass through to or reach the employee’s work clothes, street clothes, undergarments. . . under normal conditions of use[.]”²⁵⁴ PPE must be provided in “appropriate sizes” and be “readily accessible at the worksite.” Hypoallergic (or other) PPE must be provided to counter any worker allergies,²⁵⁵ and some PPE—like gloves—must be made available to any worker who wants to use them, even if they must be disposed of after a single use.²⁵⁶ Although the reasons underlying these PPE and bloodborne pathogen rules apply to the need, use, and disposal of menstrual products; OSHA has declined to interpret the rule in a way that universally and clearly applies it in this way.

Instead, OSHA has issued a series of non-binding interpretations that exclude menstruation from protection. For example, in response to employer questions, OSHA has explained that “discarded [menstrual] products, used to absorb menstrual flow, [are not] regulated waste.”²⁵⁷ Each employer must decide for itself if anything rises to the level of occupational exposure that

²⁵² *Bloodborne Pathogens and Needlestick Prevention*, OSHA, <https://www.osha.gov/bloodborne-pathogens> [<https://perma.cc/Q7XK-KQDR>]; see e.g., 29 C.F.R. § 1910.1030(a) (containing a command that “applies to all occupational exposure to blood”); § 1910.1030(d)(2)(xi) (work exposed to blood “shall be performed in such a manner as to minimize splashing, spraying, spattering, and generation of droplets of these substances”); § 1910.1030(d)(3)(vi) (clothing “penetrated by blood. . . shall be removed immediately or as soon as feasible”).

²⁵³ 29 C.F.R. § 1910.1030(d)(3)(i).

²⁵⁴ *Id.*

²⁵⁵ *Id.* § 1910.1030(d)(3)(iii).

²⁵⁶ *Id.* § 1910.1030(d)(3)(ix).

²⁵⁷ See e.g., OSHA Response Letter to Employer Regarding 29 C.F.R. § 1910.1030 to Feminine Hygiene and Incontinence Products (Oct. 23, 2015), <https://www.osha.gov/laws-regs/standardinterpretations/2015-10-23> [<https://perma.cc/4GNL-6FVT>] (“OSHA stands by its current policy.”). According to OSHA, “[t]he intended function of products such as sanitary napkins is to absorb and contain blood; the absorbent material of which they are composed would, under most circumstances, prevent the release of liquid or semi-liquid blood or the flaking off of dried blood. . .” OSHA Response to Application of Bloodborne Pathogen Standard Number 1910.1030 to Feminine Hygiene Products, Q37 (Oct. 8, 1992), <https://www.osha.gov/laws-regs/standardinterpretations/1993-02-01-0> [<https://perma.cc/Q6JG-XAW4>].

must be addressed.²⁵⁸ Further, OSHA does not prevent employers from providing menstrual products; however, it also does not require them, despite reserving the authority to do so on a case-by-case basis.²⁵⁹

Even absent this guidance, the OSH Act offers little solace to individually harmed menstruators. First, OSHA primarily takes reactionary responses to accidents or complaints. Many workers are unaware that the OSH Act might protect against certain employer-created harms from a lack of access to safe and dignified menstrual management harms. Or that they have the ability to file a complaint notifying OSHA of an alleged safety or health violation. Second, the OSH Act does not contain a private right of action that allows workers to hold employers responsible for any standard violations.

No other existing law requires employers to provide free menstrual products either. The Menstrual Equity for All Act of 2021, introduced by Congresswoman Grace Meng, would amend the OSH Act to require employers with at least 100 workers to supply them at no cost.²⁶⁰ It also would require every federal agency to stock free menstrual products in restrooms that are open to the public, which would provide products to workers in those buildings too.²⁶¹

Some local legislators are also moving access to menstrual products at work in legislation. For example, in New York, the proposed Total Access to Menstrual Products (“TAMP”) Act would require employers to make menstrual products available in restrooms.²⁶² According to the Committee Report, this proposal responds to menstruators “report[ing] missing days from work. . .or being late as a result of unexpected menstruation or the inability to access or afford menstrual hygiene products, such as tampons or sanitary napkins.”²⁶³ The TAMP act aims to minimize this impact by treating menstrual products similar to toilet paper, since both address biological functions.²⁶⁴

Similarly, no state law requires that menstrual products be available in public buildings or facilities. However, New York’s TAMP Act aims to provide menstrual products in every bathroom in the state, including public buildings.²⁶⁵ A few other states also have proposed legislation to provide

²⁵⁸ See OSHA Response (Oct. 8, 1992), *supra* note 257 (“[T]hese products [should] be discarded into waste containers which are lined in such a way as to prevent contact with the contents. [But] it is the employer’s responsibility to determine” who is exposed and “procedures” for exposure.).

²⁵⁹ See *id.* (“If OSHA determines, on a case-by-case basis, that sufficient evidence exists of reasonably anticipated exposure, the employer will be held responsible for providing the [OSH Act’s protections] to the employees with occupational exposure.”).

²⁶⁰ Menstrual Equity for All Act of 2021, H.R.3614, § 7 (117th Cong. 2021).

²⁶¹ *Id.* at § 8.

²⁶² A.B. 137, 244th Leg. Sess. (N.Y. 2021).

²⁶³ N.Y. State Assembly Memo in Support of A.B. 137, 244th Leg. Sess. (N.Y. 2021).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

products in public buildings.²⁶⁶ On the local level, Brookline, Michigan was the first jurisdiction to enact a law requiring menstrual products in public bathrooms.²⁶⁷ Others have followed suit with menstrual access laws for public buildings or recreational facilities, and more are coming.²⁶⁸ Currently, however, neither the OSH Act nor any other law requires employers to provide menstrual products to minimize exposure to blood—or for any other reason.

c. Limited Employer Liability for Failing to Provide Menstruators with a Safe Workplace that is Free from Harm

Beyond the OSH Act's protections, workers compensation and tort law offer limited avenues to someone subjected to menstruation-related harm at work to obtain compensation. A description of each follows.

Workers compensation is a no fault insurance scheme that is funded by mandatory employer contributions and offers wage replacement and the cost of medical care to workers who obtain an injury—including one related to menstruation—in the course of employment. Although the scope is limited, workers compensation could be available if workplace injuries cause “menstrual disturbances” or impact the path to menopause.²⁶⁹

When it is available, workers compensation usually provides the exclusive remedy for injuries that occur at work, but state tort law may provide relief if an injury was the result of an intentional act. The most applicable workplace tort is intrusion upon seclusion—also known as invasion of privacy. Intentional infliction of emotional distress (“IIED”) and negligent in-

²⁶⁶ See e.g., H.4784, 123rd Sess., Gen. Assemb. (S.C. 2019); A.B. 381, 104th Leg. Sess. (Wisc. 2019).

²⁶⁷ Town of Brookline, Mass. Town Meeting, Warrant Art. 20 29, 31 (May 21, 2019), <https://www.brooklinema.gov/DocumentCenter/View/18846/2019-Annual-Town-Meeting-Article-Explanations> [<https://perma.cc/32V7-B6XG>]; Ally Jarmanning, *Student Spurs Brookline, Mass., to Offer Free Tampons and Pads in Public Buildings*, NPR (June 9, 2019), <https://www.npr.org/2019/06/09/730885382/student-spurs-brookline-mass-to-offer-free-tampons-and-pads-in-public-buildings> [<https://perma.cc/W3VJ-VHSE>].

²⁶⁸ See e.g., *City Council Approves Free Hygiene Products*, SALT LAKE CITY BLOG (June 18, 2019), <https://www.slcc.gov/blog/2019/06/18/council-city-council-approves-free-hygiene-products/> [<https://perma.cc/EXZ6-FZDU>] (city appropriated money for free products in some city facilities and public buildings); Dane Cty., Wisc. Res. 317 (2015) (authorizing provision of menstrual products in county building public restrooms); Bob Blumenfeld, Motion, L.A., Cal. City Council (Aug. 6, 2019), http://clkrep.lacity.org/onlinedocs/2019/19-0882_mot_08-06-2019.pdf [<https://perma.cc/8V3K-GZMT>] (reporting that LA provided products in public camps and other places “where young women may find themselves in unexpected situations” and announcing a feasibility/cost study to provide them in all public facilities); Jennifer Weiss-Wolf, *U.S. Policymaking to Address Menstruation: Advancing an Equity Agenda*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 493, 510–11 (2019) (mentioning a 2016–2018 Columbus, Ohio pilot that provided products in recreational facilities).

²⁶⁹ See *Burton v. Hilltop Care Ctr.*, No. 5019412, 2007 WL 3264013, at *3 (Iowa Workers' Comp. Comm'n, Oct. 26, 2007) (claimant uncovered that bleeding and incontinence problems were related to work); *Am. Emp. Ins. Co. v. Kellum*, 185 S.W.2d 113, 114–15 (Tex. Civ. App. 1944) (exploring whether a total disability jury verdict was supported by conflicting medical evidence on if a workplace injury caused menstruation, pain, and potential early-onset menopause to justify the workers compensation judgment).

fliction of emotional distress (“NIED”) also may be available to some menstruators who have been harmed at work.

Intrusion upon seclusion holds liable someone “who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concern. . . to the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable person.”²⁷⁰ Thus, both a privacy interest and a “highly offensive” intrusion are needed.²⁷¹

There are two recognized privacy interests in attending to “personal hygienic needs arising out of [one’s] menstruation.”²⁷² First, there is a privacy interest in protecting one’s body against unwanted exposure to others. Second, the autonomy to prevent shame related to disclosing what a body does is a privacy interest. This interest includes protecting the sounds, sights, smells, and frequency of use in the restroom as well as what products one does (or does not) use while there.²⁷³

Garces v. R & K Spero Co. offers an example. Management required a fast food worker, who was menstruating heavily, to beg to use the restroom and explain the personal details of her menstruation to gain access to it.²⁷⁴ In response, her former manager “mocked and [ultimately] refused [her bathroom] access” multiple times, resulting in menstrual blood leaking onto her clothing.²⁷⁵ In denying the employer’s motion to dismiss, the court observed, “[o]ne strains to conjure up an activity more private than the changing of a sanitary napkin.”²⁷⁶ In so doing, it applied Constitutional principles that find searches can violate an individual’s expectation of privacy during menstruation to workplace torts. After recognizing this interest at work, the court allowed the invasion of privacy tort to proceed.²⁷⁷

IIED and NIED are the other relevant torts.²⁷⁸ To establish liability for IIED, the worker must demonstrate that a supervisor committed outrageous conduct that a reasonable person would expect to cause the employee severe emotional distress, and that the conduct did indeed cause emotional distress.²⁷⁹ For example, in 1995, an account specialist alleged that her supervi-

²⁷⁰ RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977).

²⁷¹ PROSSER AND KEETON ON TORTS § 117 (William Lloyd Prosser, W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen eds., 5th ed. 1984).

²⁷² *Garces v. R & K Spero Co.*, No. CV095025895S, 2009 WL 1814510, at *9 (Conn. Super. Ct. May 29, 2009). *But see* Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 YALE J.L. & FEMINISM 465, 518 (2018) (“Feminist theorists have long critiqued the privacy interest more generally, in part because they have recognized that privacy—and particularly its heightened association with women?has long been a means of perpetuating inequality.”).

²⁷³ Portuondo, *supra* note 272, at 519.

²⁷⁴ *Garces*, 2009 WL 1814510, at *1.

²⁷⁵ *Id.* at *1.

²⁷⁶ *Id.* at *9 (citing *Wilkes v. Clayton*, 696 F. Supp. 144, 147 (N.J. 1988)).

²⁷⁷ *Id.*

²⁷⁸ *See generally* Marcy L. Karin & Paula Shapiro, *Domestic Violence at Work: Legal and Business Perspectives*, *Sloan Work & Fam. Network* (2009), https://wfrn.org/wp-content/uploads/2018/09/Domestic_Violence_and_Work-encyclopedia.pdf [<https://perma.cc/QSY9-77XB>] (exploring the application of various torts to gender-based indignities at work).

²⁷⁹ *Id.*

sors and coworkers intentionally caused harm by engaging in sex-based harassment that led to emotional distress and required medical care.²⁸⁰ Among other acts, her supervisors and colleagues made comments about “menstruation [and] stereotyped emotional behavior due to [it.]”²⁸¹ Although recognizing that it may fail later, the IIED claim survived the employer’s motion to dismiss.²⁸²

In *Garces*,²⁸³ both IIED and NIED claims survived a motion to strike. With respect to IIED, the court noted that some of the complaint’s allegations were “indeed heinous and are seemingly more analogous to a form of cruel torture,” especially given the supervisor’s role in the conduct.²⁸⁴ For NIED, the court said that conduct need only be “unreasonable and create an unreasonable risk of foreseeable emotional harm” to survive.²⁸⁵ Collectively, in theory, these torts offer some privacy and dignity protections to current and former menstruators. Given the costs of litigation and relatively low likelihood of success absent significant harm, however, the protection is limited to all but the most egregious safety and privacy harms in practice.

B. Menstrual Discrimination

The corresponding shame, lack of menstrual education, and power dynamics in American workplaces collectively enhance the likelihood that some workers are susceptible to intimidation, harassment, and discrimination, because of menstruation or as menstruators—some of which violates existing statutory discrimination protections. This section explains how some menstrual discrimination is already covered under federal and state sex/gender/pregnancy, disability, and age discrimination laws as well as gaps in current coverage. It also reviews theories of discrimination that victims of menstrual discrimination could use to prove employer liability and some difficulty enforcing these protections in practice.

1. Menstrual Discrimination as Sex/Gender/Pregnancy Discrimination

Title VII of the Civil Rights Act of 1964 prevents employers from taking adverse employment actions at work “because of . . . sex.”²⁸⁶ While the words menstruation and menopause are not found in the law, as explained in Section A below, discrimination on these bases is *per se* sex discrimination. In addition, in 1972, the Pregnancy Discrimination Act (“PDA”) changed Title VII’s definition of “on the basis of sex” to include “pregnancy, child-

²⁸⁰ *Goodstein v. Bombardier Capital, Inc.*, 889 F. Supp. 760, 763 (D. Vt., 1995).

²⁸¹ *Id.* at 767.

²⁸² *Id.*

²⁸³ See *supra* notes 272–75 and accompanying text.

²⁸⁴ *Garces v. R & K Spero Co.*, No. CV095025895S, 2009 WL 1814510, at *2–4 (Conn. Super. Ct. May 29, 2009)

²⁸⁵ *Id.* at *4–6, 12.

²⁸⁶ 42 U.S.C. § 2000e-2.

birth, and related medical conditions.”²⁸⁷ As explained in Section B, “sex” includes other conditions related to women’s reproductive capacity, including menstruation.²⁸⁸ Further, after the PDA, people with these “related” medical conditions must “be treated the same for all employment-related purposes. . . as other persons not so affected but similar in their ability or inability to work.”²⁸⁹

a. Menstruation, Perimenopause, and Menopause are Sex-Linked Conditions

As Elizabeth Cooper, Margaret Johnson, and I make clear in *Menstrual Dignity and the Bar Exam*, “[d]iscrimination against [current or former] menstruators or because of menstruation is discrimination on the basis of sex. . . because it is based on the menstruator’s reproductive ‘female’ sex organs, such as the uterus, which is the situs of the menses that is discharged during the menstrual cycle.”²⁹⁰ Further, any “[s]uch discrimination may also be on the basis of sex, gender, gender identity, or any combination of these three based on the discriminator’s expectations for a person’s conformity with sex, gender, or gender identity.”²⁹¹ This reinforces the law’s goal to pro-

²⁸⁷ 42 U.S.C. § 2000e(k).

²⁸⁸ Initial Brief of Plaintiff-Appellant at *9–14, *Coleman v. Bobby Dodd Inst.*, No. 17-13023, 2017 WL 6762403 (11th Cir. Nov. 6, 2017), 2017 WL 3500308 (“it is well established that [sex] includes. . . regularity of the menstrual cycle. . . This inclusive language. . . constitute[s] a non-exhaustive list.”).

²⁸⁹ 42 U.S.C. § 2000e(k); see EEOC, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#LA4a> [<https://perma.cc/Y2EJ-GA57>]; Cahn, *supra* note 23 at 7 (noting that “menstruation” does not appear in the EEOC’s PDA guidance).

²⁹⁰ Karin, Johnson & Cooper, *supra* note 15, at 58 and Part I.C; Johnson, *supra* note 10, at 28–37 (menstrual discrimination is sex discrimination under Title VII); Crawford, Johnson, Karin, Strausfeld & Waldman, *supra* note 14, at 355–56 (2019) (menstruation is covered under existing employment discrimination laws); Johnson, Waldman & Crawford, *supra* note 19, at 226, 263 (menstrual discrimination is sex discrimination under Title IX, 20 U.S.C. 1681 *et seq.*); see also Deborah A. Widiss, *Menstruation Discrimination and the Problem of Shadow Precedents*, 41 COLUM. J. GENDER & L. 235, 242 (2021) (“[M]enstruation discrimination is sex discrimination, full-stop.”); Initial Brief of Plaintiff-Appellant, *supra* note 288, at 19 (“This condition, which by definition affects only those with female reproductive organs, is per se sex linked.”).

Menstrual discrimination is also protected under the Constitution. See Karin, Johnson & Cooper, *supra* note 15, at 54–62 (analyzing menstrual discrimination under the Equal Protection Clause and applying the analysis to product, bathroom, and accommodation policies of state boards of law examiners to conclude that there is a strong argument that the “differential treatment of menstruators cannot survive the heightened constitutional scrutiny provided to sex-based classifications”); Bridget J. Crawford & Emily Gold Waldman, *Tampons and Pads Should Be Allowed at the Bar Exam*, N.Y.L.J. (July 22, 2020, 2:29PM), <https://www.law.com/newyorklawjournal/2020/07/22/tampons-and-pads-should-be-allowed-at-the-bar-exam/> [<https://perma.cc/LE7M-4JDY>] (applying Constitutional analysis to bar exam policies that prevent examinees from bringing their own products into the exam).

²⁹¹ Karin, Cooper & Johnson, *supra* note 15, at 58; cf. Widiss, *supra* note 290, at 243 (“Menstruation, like pregnancy, is a condition linked to female biology and associated with stereotypical assumptions about women’s proper role in society.”).

vide “equal opportunities in employment by eradicating ‘stereotypical assumptions about women’s reproductive roles.’”²⁹²

Relatedly, transgender, genderqueer/nonconforming, and intersex individuals may menstruate. In *Bostock v. Clayton County*, the Supreme Court defined “on the basis of sex” to include discrimination against transgender individuals, finding it “impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.”²⁹³ Thus, harassment and other discrimination against someone for not meeting the stereotypes and expectations that society has about who is—or is not—a menstruator also is covered under Title VII.²⁹⁴ The same holds true for who is—or is not—experiencing perimenopause or in menopause.

Dozens of available cases have included allegations of menstrual or menopausal sex-discrimination in violation of Title VII, leading to mixed results.²⁹⁵ Some decisions follow our analysis, finding that discrimination on the basis of menstruation (or menopause) is actionable sex-based discrimination. For example, *Taylor* upheld a \$644,750 jury verdict for sex discrimination.²⁹⁶ Taylor was an African American tractor-trailer driver who had to obtain an independent medical examination to work with menorrhagia and fibroids that could cause unexpected hemorrhaging.²⁹⁷ None of the white, male comparators were required to get an exam.²⁹⁸ The employer also informed Taylor that she would need to see an employer-selected gynecologist and get a hysterectomy to be “rehired,” if that doctor recommended it.²⁹⁹

Coleman v. Bobby Dodd Institute has received the most notoriety.³⁰⁰ After a decade of work with a private call center, 911-operator Alicia Coleman

²⁹² See Brooks Land, *Battle of the Sexes: Title VII’s Failure to Protect Women from Discrimination Against Sex-Linked Conditions*, 53 GA. L. REV. 1185, 1188, 1198 (2019).

²⁹³ *Bostock v. Clayton County*, 590 U.S. 1, 8–10 (2020).

²⁹⁴ Karin, Johnson & Cooper, *supra* note 15, at 58.

²⁹⁵ Marcy L. Karin, Remarks on Periods and Workplace Policy, University of Nevada Las Vegas Boyd School of Law Colloquium on Scholarship in Employment and Labor Law (Oct. 11, 2019) (categorizing and describing this litigation). No plaintiff identified as being transgender, genderqueer/nonconforming or intersex in court filings.

²⁹⁶ *Taylor v. Giant of Md. LLC*, 33 A.3d 445 (Md. 2011); *Giant of Md., LLC v. Taylor*, 981 A.2d 1, 12 (Md. Ct. Spec. App. 2009). See *supra* note 168–69 and accompanying text; Lindy Korn, *Workplace Issues: Female Employee Subject to Disparate Treatment*, NY DAILY REC. (Dec. 28, 2011), <https://nydailyrecord.com/2011/12/28/workplace-issues-female-employee-subject-to-disparate-treatment/> (exporting this case’s requirements to analyze disparate treatment for “gender specific ailments”); Johnson, *supra* note 10, at 54–55 (explaining how this case shows a workplace injustice).

²⁹⁷ *Taylor*, 33 A.3d, at 447–48.

²⁹⁸ *Id.* at 459–63.

²⁹⁹ *Giant of Md.*, 981 A.2d at 9–10.

³⁰⁰ No. 4:17-CV-29, 2017 WL 2486080 (M.D. Ga. June 8, 2017). See Vagianos, *supra* note 1 (citing Andrea Young, executive director, Georgia’s ACLU, “Firing a woman for getting her period at work is offensive. . . A heavy period is something nearly all women will experience, especially as they approach menopause[.]”); Michael Alison Chandler, *This Woman Said She Was Fired for Leaking Menstrual Blood at Work. The ACLU is Suing for Discrimination*, WASH. POST (Sept. 11, 2017) (quoting Sean Young, legal director, Georgia’s ACLU, “No woman should have to go to work worrying about whether her boss is monitoring her” period), <https://www.washingtonpost.com/local/social-issues/ga-woman-said-she-was-fired-for-leaking-during-her-period-at-work-the-aclu-is-suing-for-discrimination/2017/09/08/50fab924->

was fired when menstrual blood from her “unpredictable” and “pre-menopausal” periods damaged company property twice.³⁰¹ After the first incident during which she “accidentally soiled an office chair,” she was disciplined and warned that she would be fired if it happened again.³⁰² Despite taking precautions (including having menstrual products with her), she “accidentally soiled the carpet.”³⁰³ Coleman was terminated her next day at work for “failing to maintain high standards of personal hygiene.”³⁰⁴

She sued, claiming that her termination for “a uniquely feminine condition” demonstrated direct evidence of impermissible sex discrimination.³⁰⁵ She argued that it was enough to show that her firing would not have occurred but for the menstruation.³⁰⁶ The court disagreed. Despite acknowledging that she was terminated for being “unable to control the heavy menstruation and soiling herself and company property,”³⁰⁷ the court found that this was not by itself sufficient; Title VII does not validate “such a broad interpretation.”³⁰⁸ Essentially, periods are not a covered sex-linked condition.³⁰⁹ Coleman appealed, after which the case settled.³¹⁰

Menopause also is sex-linked, but courts have waffled on whether it triggers Title VII protection. For example, in support of her sex-discrimination claim, a worker offered evidence that someone described a building she previously managed as “Menopause Manor” during her job interview.³¹¹ The court held that this was not direct evidence of discrimination nor “clearly indicative of discriminatory animus towards women” even if it “was made in poor taste.”³¹²

These cases demonstrate that, despite a strong argument and some precedent to do so, courts do not uniformly find that menstruation, perime-

8d97-11e7-8df5-c2e5cf46c1e2_story.html [https://perma.cc/2YZF-266G]; Areva Martin, *This Woman Was Fired for a Heavy Period Leak*, TIME (Oct. 26, 2017, 2:35PM), <https://time.com/4999185/woman-fired-for-period-leak/> [https://perma.cc/LY6E-7ZRZ].

³⁰¹ Coleman, 2017 WL 2486080, at *1 (noting that Coleman was experiencing “periods of uncontrollably heavy menstrual bleeding”); Initial Brief of Plaintiff-Appellant, *supra* note 288, at 9 (using the term “pre-menopausal” for perimenopause).

³⁰² Coleman, 2017 WL 2486080, at *1.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* at *2. This decision does not preclude future claims that menstruation or menopause were treated differently than other conditions that impact all or have a male comparator. *See id.* (“There is no allegation that male employees who soiled themselves and company property due to a medical condition, such as incontinence, would have been treated more favorably.”).

³⁰⁷ Coleman, 2017 WL 2486080, at *2.

³⁰⁸ *Id.* at *1; Initial Brief of Plaintiff-Appellant, *supra* note 288, at 5.

³⁰⁹ Coleman, 2017 WL 2486080, at *1-2; *see* Jay-Anne Casuga, *Firing Over a Sex-Linked Condition: Is it Discrimination*, 222 Daily Lab. Rep. (BL) 5, Nov. 20, 2017 (exploring whether firing someone for a sex-linked condition violates Title VII).

³¹⁰ Kathryn Hayes Tucker, *Woman Allegedly Fired Over Having a Period at Work Settles*, DAILY REPORT LAW.COM (Nov. 10, 2017, 2:00PM), <https://www.law.com/dailyreportonline/2017/11/10/woman-allegedly-fired-over-having-a-period-at-work-settles/?sreturn=20210707192943> [https://perma.cc/GJL2-8MZD] (reporting on Coleman’s settlement).

³¹¹ Carver v. Michigan, No. 11-CV-583, 2012 WL5397124, at *1 (W.D. Mich. Nov. 5, 2012) (unpublished).

³¹² *Id.* at *2, *4.

nopause, or menopause are sex-linked conditions for purposes of coverage under Title VII's "because of sex" language.

b. Menstruation and Menopause are Covered Reproductive Conditions

As noted, the PDA amended Title VII to define sex to include "other related conditions."³¹³ While neither the statutory text nor legislative history mentions menstruation or menopause,³¹⁴ application here is the logical next step for the Equal Employment Opportunity Commission ("EEOC") and case law. This is because interpreting this phrase to include menstrual discrimination builds directly on guidance and decisions that confirm Title VII coverage for lactation, termination of pregnancy, and conditions related to potential or intended pregnancy such as infertility treatment or use of contraception (both of which also may medically suppress or alter menstruation).³¹⁵ Specifically, menstruation "plays a key role in fertility" and menstrual irregularities "may be symptoms of infertility due to another cause."³¹⁶ Relatedly, menopause signals the time when a body is no longer able to get pregnant, e.g., the end of the "female" reproductive cycle.³¹⁷

Given this medical reality and keeping the law's purpose in mind, some courts have interpreted menstruation and menopause to be other conditions related to pregnancy and some have relied on the connection between lactation and menstrual harassment. For example, in *Powers v. Chase Bankcard Servs., Inc.*, the Southern District of Ohio allowed a hostile work environment claim to survive summary judgment based on multiple incidents of both menstrual and lactation-related harassment.³¹⁸

³¹³ See *supra* notes 287–288 and accompanying text.

³¹⁴ Land, *supra* note 292, at 1201, 1204 (describing that "Congress intended the PDA to cover . . . pregnancy-related physiological conditions that occur post-pregnancy").

³¹⁵ See EEOC, *supra* note 289; Initial Brief of Plaintiff-Appellant, *supra* note 288, at 9 (capturing a list of relevant cases); EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 428 (5th Cir. 2013) ("any physiological condition" is an "other medical condition"); Hicks v. Tuscaloosa, 870 F.3d 1253 (11th Cir. 2017) ("[B]reastfeeding is a sufficiently similar gender-specific condition [that] 'clearly imposes upon women a burden that male employees need not—indeed, could not—suffer.'"); Megan Boone, *Lactation Law*, 106 CALIF. L. REV. 101 (2018); Casuga, *supra* note 309 (observing the similarities to lactation discrimination including the link to pregnancy).

³¹⁶ *How Menstruation Relates to Fertility*, WOMEN & INFANTS, <https://fertility.womenandinfants.org/services/women/irregular-periods-fertility> [<https://perma.cc/WF3K-8FH5>]; *Trying to Conceive*, U.S. DEP'T HEALTH & HUM. SERVS., <https://www.womenshealth.gov/pregnancy/you-get-pregnant/trying-conceive> [<https://perma.cc/TAT5-F5ED>] (explaining the relationship between menstruation, fertility, age, and menopause).

³¹⁷ *Menopause Basics*, U.S. DEP'T HEALTH & HUM. SERVS., <https://www.womenshealth.gov/menopause/menopause-basics> [<https://perma.cc/ACY8-R9ZQ>]; Mullins, *supra* note 21, at 9 (criticizing the silence around the "last stage" of reproductive capabilities).

³¹⁸ No. 2:10-CV-332, 2012 WL 1021704 (S.D. Ohio Mar. 26, 2012) (unpublished). The hostile work environment allegations included one colleague "graphically" describing someone's menstrual cycle after calling the plaintiff and a coworker "bloody cunt" and "bloody whores." *Id.* at 3. When the employer claimed that the plaintiff opened the door for these comments by discussing menstruation at work, the court responded, "Whether a person discusses normal bodily functions with co-workers has no bearing on their rights. . . to be protected from a hostile work environment." *Id.* at 9.

Other courts, however, have not covered menstruation, finding instead that menses normally stops during pregnancy and Title VII's "protection ends when pregnancy ends."³¹⁹ For example, in 1992, in *Jirak v. Fed. Express Corp.*, the Southern District of New York dismissed a sex-discrimination claim from a part-time courier who was fired after missing or being late to work for back pain and menstrual cramps.³²⁰ The court declined to hold that this was sex-discrimination, observing that "menstrual cramps are not a medical condition related to pregnancy or childbirth [and any such claim otherwise] is supported neither by federal statute nor by pertinent case authority."³²¹ According to the court, an employer may enforce a policy that treats absences the same regardless of their reason, so long as any such policy is "applied equally to all employees."³²²

Coleman offers another example.³²³ The court held that the 911-operator's "excessive menstruation" was neither related to pregnancy, childbirth, nor "treated less favorably than similar conditions affecting both sexes."³²⁴ Specifically, the court acknowledged earlier cases that applied the PDA to "uniquely feminine conditions beyond pregnancy, such as pre-menopausal menstruation." The decision continued, "a non-frivolous argument" is possible if an employer "treat[s] a uniquely feminine condition, such as excessive menstruation, less favorably than similar conditions affecting both sexes, such as incontinence."³²⁵ But here, the court was troubled that *Coleman* did not allege a comparator, even though she was not required to do so for her direct evidence case.³²⁶ Regardless, the decision left a door open for future cases, which is helpful if an employer allows workers with other conditions to take breaks, but does not allow them for menstruation.³²⁷

Given the potential class of coverage under Title VII's because of sex and "other related conditions" language, the next section reviews available theories to potentially hold an employer liable for menstrual discrimination.

³¹⁹ See Land, *supra* note 292, at 1208 (citations omitted).

³²⁰ 805 F. Supp. 193, 194 (S.D.N.Y. 1992).

³²¹ *Id.* at 195. For purposes of the motion, the court presumed that *Jirak* met the prima facie case. The employer then articulated a legitimate non-discriminatory reason of a "poor attendance record." *Id.* at 195. *Jirak* unsuccessfully argued that this was pretextual. *Id.*

³²² *Id.*

³²³ See *supra* notes 300–310 and accompanying text.

³²⁴ *Coleman v. Bobby Dodd Inst.*, No. 4:17-CV-29, 2017 WL 2486080, at *1-2, *6 (M.D. Ga. June 8, 2017).

³²⁵ *Id.* at *1. But see Emily Gold Waldman, *Compared to What? Menstruation, Pregnancy, and the Complexities of Comparison*, 41 COLUM. J. GENDER L. 218, 219 (2021) (demonstrating difficulties with the comparator requirement for menopause discrimination); Mullins, *supra* note 21, at 17 (exploring why "similarly situated" male comparators are difficult for menopause).

³²⁶ See Karin, Johnson & Cooper, *supra* note 15, at 65 n.315.

³²⁷ Casuga, *supra* note 309 (exploring whether firing someone for a sex-linked condition violates Title VII); see Initial Brief of Plaintiff-Appellant, *supra* note 288, at *8 ("[S]ex-linked traits related to women's reproductive capacity are covered.").

c. Theories to Prove Menstrual Discrimination

Finding that menstrual and menopausal discrimination constitutes sex discrimination is not the end of the inquiry, workers still must prove and an adverse employment action was taken because of it. This section explores three theories of discrimination to hold employers liable for period-related discrimination: disparate treatment; disparate impact; and harassment.³²⁸

First, disparate treatment requires someone to demonstrate, with direct or circumstantial evidence, that adverse act(s) were taken against them, at least in part, with discriminatory animus. Sometimes disparate treatment analysis results in awards for menstruating workers such as in *EEOC v. H. S. Camp & Sons, Inc.*³²⁹ Here, the Middle District of Florida found that an employer's proffered non-discriminatory reason for firing a Black female worker who "experienced severe pain due to menstrual cramps" and left work to sleep was pretextual.³³⁰

And sometimes it does not. In *Ayala-Gonzalez v. Toledo-Davila*, the District Court for Puerto Rico reversed a jury award for a police officer who was fired for refusing to take a drug test because she was menstruating at the time and could not urinate when it was administered.³³¹ The employer proffered that it was a legitimate non-discriminatory reason to require drug tests to uncover illegal substances in this safety-sensitive position. When experts failed to connect plaintiff's menstruation with a medical reason not to urinate, the court found that the employer's reason for firing the plaintiff was justified.³³²

Similarly, the employer's desire to uphold an absence policy was considered a legitimate non-discriminatory reason in a sanitation worker's case. In *Pritchard v. Earthgrains Baking Co.*, the plaintiff asked her supervisor for permission to leave to get a menstrual product.³³³ The request was denied for three hours and she ultimately "soiled" her uniform. She then asked to leave to get clean clothes and was told that she could go as soon as a replacement arrived, which took another three hours.³³⁴ Pritchard was not able to counter the employer's need to enforce attendance and her case was dismissed.³³⁵ These cases demonstrate that even when courts include menstruation as part of Title VII's protected coverage, plaintiffs still need to prove causation, which is hard to do under the existing disparate treatment analysis. Conse-

³²⁸ Retaliation claims are also available and alleged in some of these cases.

³²⁹ 542 F. Supp. 411, 435, 449, 450 (M.D. Fla. 1982).

³³⁰ *Id.* Despite claiming that leave to address menstruation was prohibited, the employee followed company procedures. *Id.*

³³¹ 739 F. Supp. 2d 84 (D.P.R. 2010). The parties agreed that the plaintiff demonstrated a prima facie case of sex discrimination. *Id.*

³³² *Id.* at 87-89, n.4.

³³³ *Pritchard v. Earthgrains Baking Cos.*, Case No. 7:98CV0536, 1999 U.S. Dist. LEXIS 21069 (W.D. Va. Mar. 5, 1999).

³³⁴ *Id.* at *3.

³³⁵ *Id.* at *5.

quently, some menstrual discrimination persists without any likelihood that employers will be held liable for it.

Second, a disparate impact claim exists when an employer's facially neutral policy disproportionately impacts menstruators. To find liability, the employer cannot have a legitimate business reason for the policy, or if one is claimed, there cannot be an alternative policy that would be just as effective and have less of an impact on the protected group.³³⁶ Applying this theory in *Harper v. Thiokol Chem. Corp.*, the Fifth Circuit determined that an employer's return to work policy was illegal sex discrimination. There was no justification for requiring women to demonstrate their menses had restarted and was back to "normal" as a condition of returning to work after pregnancy; this imposed a burden on women that "clearly deprive[d them] of employment opportunities" and was not imposed on men.³³⁷

Third, the most common menstrual discrimination claim alleged is hostile work environment. Under this theory, an employer may be held responsible for sex-based harassment when a menstruating or menopausal worker is subject to unwelcome, severe or pervasive harassment that unreasonably impacts the work environment.³³⁸ For example, a factory worker proved a hostile work environment claim in *Conner v. Schrader-Bridgeport Int'l Inc.*³³⁹ Here, Conner produced a wide range of evidence of sex discrimination at trial, including that her supervisor asked her, between 10-20 times a month, in front of colleagues, if she was "on the rag today [and whether she got] any last night[.]"³⁴⁰ Also, after she was hospitalized for uterine hemorrhaging, Conner had multiple unexpected bleeding moments at work. Despite "visible bloodstains on her paints," she was only allowed to leave to change if she "show[ed her supervisor] that [she's] bleeding" in a room with a large glass window that faced the factory floor.³⁴¹ In finding that this conduct was "clearly of sufficient severity," the court observed that it was "unnecessary

³³⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (creating disparate impact); see e.g., *Berger v. Pennsylvania Dep't of Transp.*, No. 5:16-cv-06557, 2018 WL 1918733, at *1, *11 (E.D. Pa., Apr. 24, 2018) (granting summary judgment for an employer who changed a bathroom access policy that placed "a greater burden and hygienic demand on females during their menstrual cycle").

³³⁷ 619 F.2d 489, 491-92 (5th Cir. 1980). After a miscarriage, Harper tried to return to work, but was informed that she needed a "normal menstrual cycle" and medical clearance first. She did not have a "normal" period again until months after her doctor cleared her to return and she was fired. *Id.* at 490-92. This also was illegal disparate treatment under recent "sex plus" decisions because Harper was singled out for discriminatory treatment as a postpartum woman whose menstrual cycle had not resumed. *Id.* at 493.

³³⁸ See *LeBoy v. Brennan*, No. 14C3287, 2017 WL 2868952 (N.D. Ill. July 5, 2017) (overruling an ALJ decision to allow a former mail carrier's hostile work environment claim to proceed, based in part on her being subjected to frequent jokes and embarrassing comments about her menstrual cycle, and in part on the reality that every supervisor to whom she could have turned participated in the allegedly sexist comments).

³³⁹ 227 F.3d 179 (4th Cir. 2000).

³⁴⁰ *Id.* at 185, 188.

³⁴¹ *Id.* at 188.

and deeply invasive” to require her to show bloody pants in front of coworkers under any definition.³⁴²

In another case, Lisa Petrosino alleged that her general work culture, including “disparaging remarks” about her menstrual cycle, constituted a hostile work environment.³⁴³ Multiple supervisors commented that she must be “on the rag” if she disagreed with their opinion or asked her not to “give [them] a hard time just because [she’s] on the rag.”³⁴⁴ The Second Circuit observed that her male supervisors “routinely [connected] their perceptions of [her work] and her anatomy, especially [with] vulgar references to her breasts and menstrual cycle.”³⁴⁵ The decision concluded, “as a matter of law,” that this “gender-hostile environment was sufficiently severe and pervasive.”³⁴⁶

Finally, period discrimination also likely violates state and local antidiscrimination laws.³⁴⁷ Even though these laws do not explicitly include menstruation or menopause as protected categories, sex is included in every state law and gender identity or expression is protected in just under half of them.³⁴⁸ Pregnancy and related medical conditions also are explicitly covered under some state laws.³⁴⁹ Further, while it is not included in the ordinance’s text,³⁵⁰ the New York City Human Rights Commission has issued guidance unequivocally stating, “discrimination based on menstruation is a form of gender discrimination.”³⁵¹

³⁴² *Id.* at 197–98 (noting that “[a] senseless mandate from a supervisor that an employee expose symptoms of a deeply private reproductive system dysfunction is simply humiliating, especially when, as here, that mandated display must occur within eyesight of other employees”). Ultimately, the jury verdict of \$20,000 in compensatory and \$500,000 in punitive damages was reinstated. *Id.* at 184.

³⁴³ *Petrosino v. Bell Atl.*, 385 F.3d 210, 215 (2d Cir. 2004) (alleging this violated Title VII and New York law).

³⁴⁴ *Id.* at 215.

³⁴⁵ *Id.* at 224 (further observing that this “communicated that her gender would always stand as a bar to full acceptance within the workplace”).

³⁴⁶ *Id.* at 224. The Fourth Circuit also reversed summary judgment in a hostile work environment claim in *Smith v. First Union Nat’l Bank*, 202 F.3d 234 (4th Cir. 2000). One of many things that demonstrated a sufficiently severe or pervasive environment was the supervisor’s regular comments that an upset female employee was either “menstruating or . . . needed a ‘good banging.’” *Id.* at 238, 243 n. 5.

³⁴⁷ Karin, Johnson & Cooper, *supra* note 15, at 65–66 (providing examples of menstruation-discrimination under state human rights laws). *But see* D’Ambrogia v. Prudential Ins. Co., NASD No. 96-04768 (FINRA), at *3 (a “one-time offensive utterance” by a supervisor related to menstruation “may have temporarily embarrassed Claimant,” but it was not enough to “unreasonably interfere” with work).

³⁴⁸ Karin, Johnson & Cooper, *supra* note 15, at 64; Iris Hentze & Rebecca Tyus, *Sex and Gender Discrimination in the Workplace*, NCSL (Aug. 12, 2021), <https://www.ncsl.org/research/labor-and-employment/-gender-and-sex-discrimination.aspx> [<https://perma.cc/4LPE-PCNE>].

³⁴⁹ *See, e.g.*, NCLS, *supra* note 348 (capturing the states that cover discrimination on the basis of pregnancy and related medical conditions in their human rights laws).

³⁵⁰ 47 R.C.N.Y. § 2-01.

³⁵¹ NYC Comm’n on Hum. Rts., *NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions 3* (July 2021), https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_

Collectively, this analysis demonstrates some antidiscrimination coverage for menstruation. Explicit statutory coverage, or guidance from the EEOC and equivalent local agencies, would help expand its application in practice.

2. *Some Menstrual Discrimination is Disability Discrimination*

In addition to the accommodation requirement,³⁵² the ADA and related local laws generally protect qualified individuals with a disability from discrimination on the basis of disability, including from hostile work environments. This includes protection against adverse employment actions taken on the basis of any of the categories of disability described above, e.g., workers with an actual menstruation-related disability, a record-of having a menstruation-related disability, or someone who is regarded as having one.³⁵³ For example, the EEOC settled an actual disability discrimination claim for a worker who was fired after disclosing that she had menorrhagia, a bleeding disorder affiliated with the menstrual cycle, despite obtaining medical clearance that she could safely work with the condition.³⁵⁴

Given the cultural stereotypes, inaccuracies, and misperceptions about menstruation and menopause, the “regarded as” disabled prong plays a vital role in protecting against some menstrual and menopausal discrimination.³⁵⁵ Even though reasonable accommodations are not available if a worker is regarded as having a disability, the purpose of this category of disability coverage is to prevent employers from relying on stereotypes about actual or perceived limitations.³⁵⁶ For example, *Mullen v. New Balance* analyzed a “regarded as claim” in addition to the actual disability claim described above.³⁵⁷ In so doing, the court pointed out that an impairment that is both transitory (lasting less than six months) and minor may not serve as the basis of a perceived disability claim.³⁵⁸

This exception also was addressed in *Hart v. Malabar Pharm.*³⁵⁹ Here, the plaintiff was fired after returning from surgery for polycystic ovary syndrome (“PCOS”), which was diagnosed after she experienced a “prolonged,

2021.pdf [https://perma.cc/J4B6-8JU3]. Importantly, this proclamation comes immediately after a statement that pregnancy discrimination is sex discrimination and using the transition “Similarly.” *Id.* This guidance accurately and directly connects menstrual discrimination to pregnancy, reproductive, and other sex discrimination.

³⁵² See *supra* Section II.A.

³⁵³ *Id.*

³⁵⁴ See Press Release, *supra* note 12 (the case settled for \$20,000 and rehiring Adams).

³⁵⁵ 42 U.S.C. § 12102(3)(A).

³⁵⁶ THE ADA PROJECT, *Summary of ADAAA* <http://www.adalawproject.org/summary-of-the-adaaa#anchor-linkC> [https://perma.cc/6KKG-RWXM].

³⁵⁷ No. 17-CV-194-NT, 2019 WL 958370, at *4 (D. Me. Feb. 27, 2019).

³⁵⁸ *Id.* at *5 (quoting 42 U.S.C. § 12102(3)(B)). See also 29 C.F.R. §§ 1630.2(1)(iii), (j)(1)(ix); 1630.15(f). But see 42 U.S.C. § 12102(3)(b) (an impairment that lasts under six months may be substantially limiting).

³⁵⁹ No. 19-cv-2347-Orl-31LRH, 2020 WL 1665869 (M.D. Fla. Apr. 3, 2020).

five-month period of menstruation.”³⁶⁰ The employer argued that Hart failed to prove she had an actual or perceived disability because menstruation is “transitory and minor.” The court disagreed, finding that “regardless of whether the period of menstruation itself was minor and transitory, it appears the PCOS is not.”³⁶¹ Further, medical documentation showed that she had to avoid strenuous activity, which supports the claim that PCOS substantially limits a major life activity and constitutes a disability.³⁶² Ultimately, it may be harder to demonstrate that a menstruator is regarded as having a disability due to the transitory and minor exception; however, it does not preclude perceived disability claims based on stereotypes of menstruation or menopause, nor does it prevent menstruators from meeting their burden on actual or record of disability for menstrual-related impairments.³⁶³ Thus, some menstrual discrimination is disability discrimination; in practice, more guidance is needed to facilitate enforcement and fully address menstruation-related disability discrimination.

3. *Some Menstrual Discrimination is Age Discrimination*

The intersection of age and menstruation offers some menstruators another potential avenue of existing antidiscrimination protection. Under the Age Discrimination in Employment Act (“ADEA”), employers may not treat workers aged forty and older differently at work because of their age.³⁶⁴ Leslie Mullins argues that menopause discrimination is *per se* age discrimination, “[b]ecause naturally occurring menopause (i.e., where there is no surgical or medical intervention that causes early onset) occurs later in life.”³⁶⁵ Unfortunately, no cases have addressed this question squarely yet.

Nonetheless, a number of peri-menopausal or menopausal workers have alleged intersecting age, disability, and sex discrimination claims to mixed results.³⁶⁶ In *Ward v. Nicholson*, for example, the EEOC’s Office of Federal Operations reversed an agency decision against a worker whose supervisor referred to her and a coworker as “post-menopausal bitches,” among other things.³⁶⁷ The EEOC found this sufficient to state a harassment claim under the ADEA and Title VII.³⁶⁸ By contrast, in *Mesias v. Cravath*, a 59-year-old woman alleged age (and other) discrimination after her supervisor told a colleague that “he was tired of working with menopausal women” and that “this

³⁶⁰ *Id.* at 1. PCOS is a common hormonal disorder that causes prolonged or infrequent periods. *Polycystic Ovary Syndrome (PCOS)*, Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/pcos/symptoms-causes/syc-20353439> [https://perma.cc/L559-9YYJ].

³⁶¹ 2020 WL 1665869, at *2.

³⁶² *Id.*

³⁶³ *Id.* (citing *Sine v. Rockhill Mennonite Home*, 275 F. Supp. 3d 538, 545 (E.D. Pa. 2017)) (“The temporal nexus between [a] request for leave [for a hysterectomy] and her termination is sufficient to support the inference that she was regarded as disabled.”).

³⁶⁴ 29 U.S.C. § 621(a).

³⁶⁵ Mullins, *supra* note 21, at 20.

³⁶⁶ *Id.* at 20–21; see Cahn, *supra* note 23, at 8–9.

³⁶⁷ No. 0120070147, 2007 WL 556805 (E.E.O.C. 2007).

³⁶⁸ *Id.*

is the last time I'm working with menopausal women!"³⁶⁹ The employer was not held liable, despite the supervisor's negative remarks.³⁷⁰

These types of "stray remarks" have been analyzed in other cases too. Without additional evidence of discriminatory animus, courts generally dismiss cases involving supervisors' references to "older" workers and menopause-status.³⁷¹ Essentially, courts have deemed that these remarks are not close enough in time or specificity to constitute actionable discrimination. Thus, a 52-year-old woman could not hold her employer liable for a pattern of age-based hostility, despite repeatedly being called derogatory names such as "la bruja" (the witch) and "la menopausica" (the menopausal one).³⁷² A sexual harassment claim did proceed in *Bailey v. Henderson*,³⁷³ however. Vanessa Bailey alleged that her second-line supervisor told her direct supervisor not to step in when she was being harassed by coworkers, "because the problems were attributable to 'just some black women going through menopause.'"³⁷⁴ The court held that the supervisor's conduct, including the menopause comment, could collectively demonstrate harassment.³⁷⁵

Even though there are only a few age discrimination cases involving menstruation, claims at the intersection of the ADEA, ADA, Title VII, and state human rights acts remain important. This area is also ripe for litigation—especially if the EEOC clarifies existing intersectional protection and includes examples of it in relevant guidance. Until then, as the next section explores, there is significant international activity to provide guidance.

C. International Standards and Models

A robust, ongoing international menstrual movement has resulted in laws and proposals to address some menstrual needs at work. This section outlines the push for international standards and provides an overview of the laws, proposals, and lessons learned from them.

As a preliminary matter, no international treatise or convention imposes specific workplace requirements about periods. Over the last decade, however, the United Nations ("UN") has incrementally recognized the importance of menstrual management in particular and embedded menstruation into public health, gender equity, economic security, and other human rights.³⁷⁶ Importantly, this UN work has focused on dignity and equity with

³⁶⁹ 106 F. Supp. 3d 431, 435, 438 (S.D.N.Y. 2015).

³⁷⁰ *Id.*

³⁷¹ See Mullins, *supra* note 21, at 21.

³⁷² *Acedo Martinez v. Coatings Inc.*, 251 F. Supp. 2d 1058 (D.P.R. 2003) (also dismissing a Title VII claim for the same reasons).

³⁷³ 94 F. Supp. 2d 68, 71 (D.D.C. 2000).

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 75–76 (denying disparate treatment sex and disability discrimination claims).

³⁷⁶ See *e.g.*, Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (Dec. 13, 2006). See generally Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, & Human Rights*, WISC. L. REV. 491 (2017) (explaining how the tampon tax is gender discrimination and violates human rights).

respect to sanitation, menstrual education, obtaining physical and mental health, and the right to make a living.³⁷⁷ Menstruation and menopause also are relevant to multiple millennium and sustainable development goals designed to reduce poverty and promote gender equality.³⁷⁸ Relatedly, the International Labour Organization (“ILO”) addresses sanitation in its occupational safety and health standards.³⁷⁹ While these UN and ILO instruments have little direct impact on American workers, they influence the way menstruation is addressed globally, including at work. They also encourage member states to support menstrual management and related dignity and safety needs. Further, menstrual accommodations and antidiscrimination protection are required by some countries’ laws. Others are currently debating them. This section provides an overview of the development and substance of these laws and pending period policy campaigns.

1. Early Labor Standards Related to Menstruation

Formal menstrual leave began in the former Soviet Union, over a hundred years ago, when women were experiencing high unemployment levels after World War I.³⁸⁰ In 1921, a Bolshevik reformer claimed that industrial work negatively impacted women’s health and reproduction.³⁸¹ In 1922, Ts. Pik wrote an article suggesting menstrual leave, which formed the basis of industry specific protective legislation.³⁸² For five years, beginning with a 1922 decree, garment industry workers were provided two days of paid leave at the start of each menstrual cycle, provided they obtain a medical certificate

³⁷⁷ Human Rights to Safe Drinking Water and Sanitation, G.A. Res. 70/169 (Dec. 17, 2015); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 14(2)(h) (Dec. 18, 1979); Convention on the Rights of the Child, G.A. Res. 44/25, art. 24(2)(e) (Nov. 20, 1989); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 11 (Dec. 16, 1966).

³⁷⁸ See e.g., Lyla Mehta, Interactive Expert Panel, U.N. COMM’N ON THE STATUS OF WOMEN, *Challenges and Achievements in the Implementation of the Millennium Development Goals for Women and Girls* (Mar. 2013), <https://www.un.org/womenwatch/daw/csw/csw57/panels/otherpanels-paper-lyla-mehta.pdf> [<https://perma.cc/E6QP-H3HT>]; see also House, Mahon & Cavill, *supra* note 5, at 18 tbl. 9.1 (observing that six of the millennial goals cannot be met without understanding menstrual health management); Keith, *supra* note 70, at 3 (containing a chart showing how menstruation and menstrual management are linked to sustainable development goals and targets).

³⁷⁹ See ILO Conv. No. 161, Occupational Health Services Convention (1985); ILO, *WASH@Work: A Self-Training Handbook*, at III (2016), https://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—sector/documents/publication/wcms_535058.pdf [<https://perma.cc/A56W-UQZA>] (illustrating that menstrual management must be addressed at work to advance two sustainable development goals); see also Sommer, Chandraratna, Cavill, Mahon & Phillips-Howard, *supra* note 61, at 4 (describing the ILO’s leadership opportunity to guide member states to adopt relevant standards). The United States is not a signatory to all of these, and thus, not subject to their obligations. Further, these instruments have notoriously weak enforcement mechanisms on the individual level.

³⁸⁰ Melanie Ilic, *Soviet Women Workers and Menstruation: A Research Note on Labour Protection in the 1920s and 1930s*, 46 EUR-ASIA STUDS. 1409 (1994).

³⁸¹ Izumi Nakayama, *Periodic Struggles: Menstruation Leave in Modern Japan* 160 (2007) (Ph.D. dissertation, Harvard University) (Proquest).

³⁸² Ilic, *supra* note 380, at 1411–12.

and at least 21 days had passed since their last menstrual leave.³⁸³ In 1924, three days of leave were provided to certain classes of female artistic workers “[i]n view of the intensely physical and highly emotional nature of their work.”³⁸⁴ In 1926, the regulations restricted leave to workers with confirmed menstrual pain and folded menstrual leave into sick leave.³⁸⁵ Moving beyond leave, in 1931, 57,000 “[w]omen tractor-drivers [were provided] temporary disability during menstruation or—if they submit[ted] a medical certificate—transfer to light duty work without a reduction in pay.”³⁸⁶

Around the same time, classes of primarily younger Japanese workers—especially those with harsh work conditions and without regular access to safe facilities—were calling for paid menstrual leave.³⁸⁷ In 1927, with knowledge of the Soviet Union’s provisions, the “Establish Five Laws” fight was launched to obtain: (1) minimum wage; (2) an eight-hour workday; (3) health insurance; (4) unemployment benefits; and (5) a “youth and women protection law” that consisted of a prohibition against night work, maternity leave, “*menstruation leave of three days and benefits*,” and break time for breastfeeding.³⁸⁸

Soon thereafter, in response to a 1928 strike of Tokyo Municipale Bus Company conductors who hoped to gain access to toilets during long shifts, women began organizing and the movement for menstrual accommodations began.³⁸⁹ In 1931, the National Labor Federation favored requiring men-

³⁸³ *Id.* at 1411–12 (citing the Decree of the Labour Protection Department of the Trade Union Organisation, or VTsSPS); *MM, Menstrual Leave; What Lies Beneath. . . Part 1—Origins*, MENSTRUAL MATTERS (2021), <https://www.menstrual-matters.com/blog/ml-origins-1> [<https://perma.cc/G53U-U595>]; Choulamany, *supra* note 70, at 19; Marian Baird, Elizabeth Hill & Sydney Colussi, *Mapping Menstrual Leave Legislation and Policy Historically and Globally: A Labour Entitlement to Reinforce, Remedy or Revolutionize Gender Equality at Work?*, 42.1 COMPAR. LAB. & POL’Y J. 1, 6 (forthcoming 2021) (“The Bolshevik menstrual policy was directed at women working in factory jobs[.]”).

³⁸⁴ Ilic, *supra* note 380, at 1412 (describing how the regulations stated that “acrobats, tight-rope walkers, women horse riders, dancers and gymnasts” should get leave, but not “jugglers, impersonators and impressionists”).

³⁸⁵ *Id.* at 1411–12; Choulamany, *supra* note 70, at 19. Another study found that 87% of women working in “textiles, leather, print, and medical-sanitary industries” claimed “menstrual irregularities.” Nakayama, *supra* note 381, at 150–51.

³⁸⁶ Ilic, *supra* note 380, at 1414 (reporting on the People’s Commissariat of Labour decision to offer menstrual accommodations).

³⁸⁷ Choulamany, *supra* note 70, at 18; Emily Matchar, *Should Paid “Menstrual Leave” be a Thing?*, ATLANTIC (May 16, 2014), <https://www.theatlantic.com/health/archive/2014/05/should-women-get-paid-menstrual-leave-days/370789/> [<https://perma.cc/QV7D-RB33>] (“[W]omen were entering the workforce in record numbers, and . . . factories, mines and bus stations had little . . . sanitary facilities.”); Nakayama, *supra* note 381, at 253 (noting that unions also used menstrual leave to court young women workers). The menstrual leave push started in Japan with an 1872 geisha strike, which sought excused leave for “monthly visits.” *Id.* at 144–45.

³⁸⁸ Nakayama, *supra* note 381, at 144–45 (emphasis in original) (offering a detailed account of this fight and other early calls for menstrual leave in Japan).

³⁸⁹ *Id.* at 153–54, 171, 178 (over 500 women participated in the strike; noting that the conductor’s “uniform was the[ir] first western-styled clothing” and most did not own underwear for it); *MM, Menstrual Leave; What Lies Beneath. . . Part 3—Sweatshop Labour*, MENSTRUAL MATTERS (Aug. 25, 2019), <https://www.menstrual-matters.com/blog/ml-sweatshop-3> [<https://perma.cc/KW6J-ZECU>]; Baird, Hill & Colussi, *supra* note 383, at 7.

strual leave as a “symbol for women’s emancipation[, a representation of their] ability to speak openly about their bodies, and to gain recognition for their role as workers.”³⁹⁰ The unions saw menstrual leave as a gateway to organizing broader women’s issues like paid leave.³⁹¹ CBAs started including menstrual leave provisions, and there were 70 documented menstrual leave provisions in 1946.³⁹²

In the 1930s, Tamino Setsu, the only female Japanese work inspector, surveyed over 1100 women workers in 19 factories after she received complaints about “menstrual irregularities.”³⁹³ The overwhelming majority of respondents reported complications from menstruation at work.³⁹⁴ In response, Setsu recommended “changing facilities, work content, and work schedules to accommodate the female body” as well as “installing a resting room for breaks, equipped with a toilet[, sink, and] an additional room where workers suffering from menstrual pains could rest.”³⁹⁵

Then, after World War II, American forces relied on Setsu’s work, joined the unions’ efforts, and “encouraged” Japan to provide menstrual leave.³⁹⁶ Enacted in 1947, Japan’s Labor Standards Act ultimately created *seirikyuuka* leave (translated as “physiological leave”). Under this still valid law, any worker suffering from painful periods or whose job might exacer-

³⁹⁰ Alice Dan, *The Law and Women’s Bodies: The Case of Menstruation Leave in Japan*, 7 HEALTH CARE FOR WOMEN INT’L 1, 8 (1986) (unions pushed for leave to advance women’s role as worker and to “dramatize [] the need for better working conditions”).

³⁹¹ *Id.* at 8 (“menstruation [was seen] a ‘barometer’ for reproductive ability, and that even women without symptoms ought to take leave to protect their future motherhood”).

³⁹² Nakayama, *supra* note 381, at 243 n.77, 254 (observing that this was less than 10% of executed CBAs at the time). By 1954, 122 out of 162 CBAs negotiated menstrual leave, which was 11 more than had negotiated maternity leave. *Id.* at 249–50.

³⁹³ *Id.* Captured in MENSTRUATION AND WORK ABILITY (1943), Kirihara Shigemi also researched menstruation’s impact on work in Japan. Shigemi found that efficiency was worse at the start of menstrual cycles and that pain and other factors varied depending on the “type and structure” of work. *Id.* at 144–45. From 1946–1947, Tsuchiya Hitoshi and Sugi Midori surveyed menstrual experiences at work, resulting in recommendations to offer a “changing room, bathroom, and rest area[,] have ample supply of aspirin, codeine, and other pain killers that alleviate menstrual cramps[, and] provide medical knowledge concerning menstruation.” *Id.* at 236.

³⁹⁴ *Id.* at 227.

³⁹⁵ *Id.* at 227, 231.

³⁹⁶ The US Advisory Committee on Labor in Japan made the recommendation. *Id.* at 237–42; Dan, *supra* note 390, at 8; Levitt & Barnack-Tavlaris, *supra* note 65, at 532; see also Sherry Yajima Keller, *Sex Discrimination in Employment: The Legal Status of the Working Woman in Japan*, 3 LOY. L.A. INT’L & COMP. L. REV. 83, 93 (1980) (some believe that the Japanese Constitution “was forced” and does not represent “Japanese social norms”); Baird, Hill & Colussi, *supra* note 383, at 7 (noting that the “collective demands for menstrual leave” were not formalized until after WW-II “when inadequate workplace sanitation emerged as a national labour concern”). A debate ensued that included allegations that women “would manipulate” this leave to travel to “rural areas to purchase food,” an expressed “fear that female workers would all take leave together,” and business arguments that it was too much. *Id.* at 237–42, 240. The UN suggested removing menstrual leave, but unions and local women’s groups fought to keep it. Dan, *supra* note 390, at 8. There also was a failed amendment to cover only dysmenorrhea—as opposed to any “difficulty.” Nakayama, *supra* note 381, at 237–42, 240, 272–73.

bate period pain may take leave.³⁹⁷ *Seirikyuu* need not be paid; nor is there a prescribed ceiling of how much leave may be taken.³⁹⁸

2. *Additional Menstrual Accommodation Models*

Building on these early efforts, new variations of international menstrual accommodation laws—primarily in the form of job-protected leave—were enacted. In 1953, South Korea began requiring employers to provide one day of unpaid “physiologic” leave to workers.³⁹⁹ After a series of changes and litigation from 5,100 menstruating workers who sought pay for leave taken,⁴⁰⁰ the Korea Labor Standards Law reverted to its original form in 2014.⁴⁰¹ Around then, the former head of a South Korean airline denied “136 [leave] requests from 15 flight attendants,” claiming that they did not demonstrate that they were on their cycles, and thus, eligible for leave.⁴⁰² In 2017, a South Korean appeals court found that it “infringe[s] upon privacy and human rights” for an employer to ask workers to “prove” menstruation to take leave.⁴⁰³

In 2003, Indonesia revised its 1948 paid menstrual leave law to excuse workers “who feel pain during their menstruation period” from work during the first two days of their cycle if they “notify the entrepreneur.”⁴⁰⁴ The 2003 amendment made pay optional and required a workplace agreement or CBA to implement menstrual leave.⁴⁰⁵ In effect, workers now must negotiate for menstrual leave with individual employers and unions, which created an ac-

³⁹⁷ Labor Standards Act, 1947, Chapter VI, Art. 68, (Act No. 49/1947) (Japan). According to the Japanese Ministry of Labor Women’s Division, the law reflects three changes from the original proposal to: (1) clarify that pain was required for menstrual leave; (2) recognize that one size does not fit all by giving the worker discretion about the amount of unpaid time needed; and (3) allow flexibility for shorter blocks of time to be taken if an entire day’s absence is not needed. Nakayama, *supra* note 381, at 283.

³⁹⁸ Labor Standards Act, Art. 68. In 1971, three menstruators had their attendance bonuses reduced after taking two days of leave from NBC Industry. The women sued, seeking the bonus they would have received but for menstrual leave. The Hachioji Regional Court dismissed the case, finding that *paid* menstrual leave is not required. Both the Tokyo Higher and Supreme Courts affirmed. Nakayama, *supra* note 381, at 277–80.

³⁹⁹ Labor Standards Act, 2012, Art. 73 Monthly Physiologic Leave (Act No. 11270/2012) (S. Kor.); Baird, Hill & Colussi, *supra* note 383, at 11 (noting there is no “discretion to deny menstrual leave”).

⁴⁰⁰ In 1989, the law changed to automatically entitle workers to this leave. Choulamany, *supra* note 70, at 7, 18. In 2004, the provision was eliminated but later reinstated in 2006 due to litigation. Katy Waldman, *Thanks, But We Will Pass on Paid Menstrual Leave*, SLATE (May 16, 2014), <https://slate.com/human-interest/2014/05/paid-menstrual-leave-not-a-good-idea-period.html> [<https://perma.cc/53QT-MVN9>].

⁴⁰¹ Choulamany, *supra* note 70, at 7, 18.

⁴⁰² *Menstrual Leave: South Korea Airline Ex-CEO Fined for Refusing Time Off*, BRIT. BROAD. CORP. (April 25, 2021), <https://www.bbc.com/news/world-asia-56877634> [<https://perma.cc/XC3E-CNQA>].

⁴⁰³ *Id.*

⁴⁰⁴ Art. 81(1), Act of the Republic of Indonesia Concerning Manpower, 2003 (Act No. 13/2003).

⁴⁰⁵ *Id.* at Art. 81(2).

cess class divide given the power dynamics involved with negotiations.⁴⁰⁶ Some employers also require workers to prove eligibility by displaying their underwear or undergoing a medical exam.⁴⁰⁷

Established in 2002 and amended in 2013, Taiwan provided a “[f]emale employee having difficulties in performing her work during [a] menstruation period” the right to ask for one day leave monthly.⁴⁰⁸ Under the original law, menstrual leave counted as sick leave.⁴⁰⁹ But a group of legislators deemed this “inconsiderate and unfair toward women in the workplace.”⁴¹⁰ Under the revised law, up to three additional days of menstrual leave could be taken on top of the standard 30 days of sick leave (at half-pay) that is provided to all workers annually.⁴¹¹ Due to litigation, “probes into privacy,” such as requiring a worker to come in to demonstrate the need for menstrual leave, are not allowed.⁴¹²

Other relatively recent menstrual leave laws include Zambia’s “Mother’s Day” law, which formally took effect in 2015, but for which some employers provided informally since the 1990s.⁴¹³ Under this law, all women (even if they are not mothers) are provided one leave day monthly to take at their discretion, neither proof nor advanced notice are required.⁴¹⁴ In 2017, Mex-

⁴⁰⁶ *Id.*; Kuntala Lahiri-Dutt & Kathryn Robinson, ‘Period Problems’ at the Coalface, 89 FEMINIST REV. 102, 108 (2008); Baird, Hill & Colussi, *supra* note 383, at 8 (the 2003 changes “weakened” the right and decreased its ability to create “worker solidarity”).

⁴⁰⁷ Matchar, *supra* note 387 (some employers “have even been accused of forcing women to drop trough and ‘prove’ their need for time off”); Baird, Hill & Colussi, *supra* note 383, at 9 (“supervisory ‘health staff’ in Indonesian factories may require workers to remove their underwear and ‘prove’ they are menstruating”). Nike factories have gained “notoriety for workplace exploitation,” including claims of denying menstrual leave. *Id.*

⁴⁰⁸ Act of Gender Equality in Employment, Chapter IV, Art. 14 (2013) (Taiwan).

⁴⁰⁹ CHINA POST, *Gender Equality in Employment Act Revised* (Nov. 27, 2013), <https://www.proquest.com/newspapers/gender-equality-employment-actrevised/docview/1461974543/se-2?accountid=2890> [<https://perma.cc/R2SM-CYCV>].

⁴¹⁰ *Id.*; Matchar, *supra* note 387 (discussing how the inclusion of menstrual leave in the pre-existing right to take 30 days of sick leave “prompt[ed] a gender-diverse coalition of politicians to claim a violation of women’s basic rights”).

⁴¹¹ Act of Gender Equality in Employment, Chapter IV, Art. 14 (2013) (Taiwan); *see* CHINA POST, *supra* note 409 (explaining the regulation and why it was revised); Baird, Hill & Colussi, *supra* note 383, at 11 (pointing out that any leave taken over the 30 days of either menstrual or sick leave is unpaid).

⁴¹² While the Taiwanese Supreme Administrative Court dismissed the case on other grounds, it ruled that employers may not engage in this eligibility certification. *See* Alex Liao, Lee Tsai & Partners, *If an Employer Makes the Leave Application for Menstrual Leave Extremely Difficult, it is Still Deemed an Unfavorable Measure Under the Taiwan Law*, LEXOLOGY (2020), <https://www.lexology.com/library/detail.aspx?g=b9417686-e89a-49de-897b-6fac39b47a5e> [<https://perma.cc/9N6F-X9HP>].

⁴¹³ Employment Act, Cap. 269 (1997) § 54(2) (Zam) (the law provides women a day off when menstrual symptoms become painful); Kennedy Gondwe, *Zambia Women’s Day Off For Periods’ Sparks Debate*, BBC News (Jan. 4, 2017), <https://www.bbc.co.uk/news/world-africa-38490513> [<https://perma.cc/F5J6-RCV8>] (mentioning that the country’s main workers’ rights union supports the law and encourages women “to rest and not even go shopping or do other jobs [when on menstrual leave] because that is wrong”).

⁴¹⁴ Employment Act, Cap. 269 (1997) § 54(2) (Zam); Gondwe, *supra* note 413 (the law recognizes that “women are the primary care-givers. . . regardless of whether they are married”); Levitt & Barnack-Tavlaris, *supra* note 65, at 562 (observing the name “stresses [its] relationship to becoming mother”).

ico provided court personnel one rest day per month for physiological complications.⁴¹⁵ And, while China has considered national menstrual leave requirements, three Chinese provinces (Anhui, Hubei, and Shanxi) currently require it and Hainan recommends it.⁴¹⁶ Packaged with other protections related to childbirth, these laws generally require workers be provided one or two days per cycle, with menstrual certification.⁴¹⁷

Proposals also have been introduced in Chile (paid leave for “disabling period paid,” especially workers with endometriosis and dysmenorrhea),⁴¹⁸ India (two days of paid menstrual leave monthly),⁴¹⁹ Italy (three days of paid leave monthly for painful periods with medical note),⁴²⁰ the Philippines (one day per month at half pay for “premenstrual or menstrual tension”),⁴²¹ and Russia (two days in addition to sick and vacation leave).⁴²² These accommodation laws and pending proposals vary in terms of menstrual needs covered, length of time provided, certification requirements, and pay.

3. *Other International Period Provisions and Pending Campaigns*

Menstrual leave is not the only workplace policy intervention present in international models. Some countries have promulgated specific safety, education, or other workplace flexibility provisions. For example, in 1992, China

⁴¹⁵ Tribunal de lo Contencioso Administrativo del Estado de Mexico, *Cuerdo Por El Que Se Concede a Las y Los Servidores Públicos Adscritos a Este Tribunal “Licencia De Ausencia” De Un Día De Descanso al Mes, a Causa De Complicaciones De Tipo Fisiológico*, 119 GACETA DEL GOBIERNO [GG] 2–5 (Jun. 29, 2017).

⁴¹⁶ Baird, Hill & Colussi, *supra* note 383, at 14 (sharing that menstrual leave was considered in 2011 as a safety and health measure); Chen Xia, *Paid Menstrual Leave Provokes Controversy in China*, CHINA.ORG.CN. (Feb. 16, 2016), http://www.china.org.cn/china/2016-02/16/content_37800348.htm [<https://perma.cc/RR7G-6MUU>] (describing the local laws and their variances).

⁴¹⁷ Xia, *supra* note 416 (reporting on the Anhui regulations); Shen Lu & Elaine Yu, *Chinese Province Grants Women Leave for Menstrual Pain*, CNN (Feb. 16, 2016, 1:06AM EST), <https://www.cnn.com/2016/02/16/asia/china-menstruation-leave/index.html> [<https://perma.cc/6A9T-YMDQ>] (sharing that Guangdong also was considering a proposal).

⁴¹⁸ El Mastrador Braga, *Proponen “Ley Menstrual” en Chile: Qué dice la experiencia en el mundo?*, ELMOSTRADOR (Aug. 31, 2017), <https://www.elmostrador.cl/braga/2017/08/31/proponen-ley-menstrual-en-chile-que-dice-la-experiencia-en-el-mundo/> [<https://perma.cc/LDY5-4DH4>] (further mentioning that Argentina and Columbia are considering menstrual leave).

⁴¹⁹ The Menstruation Benefits Bill, Bill No. 249 (Nov. 27, 2017) (India); *see Two Days Leave During Periods?*, FIN. EXPR. ONLINE (Jan. 2, 2018), <http://www.financialexpress.com/india-news/two-days-leave-during-periodsparliament-may-discuss-menstruationbenefit-bill-for-the-1st-time-know-what-it-is/999091> [<https://perma.cc/UYM9-HRNX>]; Belliappa, *supra* note 27, at 604 (sharing that Parliament tabled the bill).

⁴²⁰ Proposta di Legge 27 aprile 2016, Camera Dei Deputati n.3781 (It.); Anna Momigliano, *Italy Set to Offer ‘Menstrual Leave’ for Female Workers*, INDEP. (March 25, 2017), <https://www.independent.co.uk/news/world/europe/italy-menstrual-leave-reproductive-health-women-employment-a7649636.html> [<https://perma.cc/4CKQ-V3PP>] (reporting that Italy may be “the first Western country with an official ‘menstrual leave’ policy for working women”).

⁴²¹ Menstruation Leave Act, Rep. Act No. 1687 (Aug. 10, 2004) (Phil.), <http://legacy.senate.gov.ph/lisdata/293124711.pdf> [<https://perma.cc/TCM6-AAQU>]; Baird, Hill & Colussi, *supra* note 373, at 12.

⁴²² Baird, Hill & Colussi, *supra* note 383, at 6; Astrup, *supra* note 146, at 15.

enacted the Protection of Rights and Interests of Women law to ensure that employers are educated about “women’s characteristics. . .during men-
strua[tion,] pregnancy, obstetrical[,] and nursing period[s]” that may require
“safety and health” protections.⁴²³ During menstruation, the law dictates that
workers “shall not [be] assign[ed] any work. . .that is not suitable to wom-
men.”⁴²⁴ Although the substance and cultural context are very different, the
United Kingdom also has long regulated related workplace safety, including
related to menstruation.⁴²⁵

Beyond safety, the UK’s Equality Act covers menstrual discrimina-
tion.⁴²⁶ Over the last decade, cases have illustrated coverage and defined the
scope of this protection. In *Jackson v. Network Rail Infrastructure Ltd.*, for
example, an employer was held liable for sex discrimination for a range of
bad acts, references to sex or sex characteristics, and unwanted conduct re-
lated to menstruation.⁴²⁷ In awarding over £20,000, the tribunal specifically
concluded that being told, “you’re grumpy, is it your time of the month?”
was “related to sex. . .highly personal and embarrassing, and it either violated
[the worker’s] dignity or created an offensive humiliating demeaning envi-
ronment for [her] in front of her [mostly male] peers.”⁴²⁸

In *Merchant v. BT*, a manager ignored a medical report about how
menopause impacted work and relied on his spouse’s experience with meno-
pause.⁴²⁹ In addition to not following proper procedures for medical evi-
dence, the tribunal held this was sex discrimination, because the manager
would not have treated a male comparator with failed concentration in the
same way.⁴³⁰ Menopausal workers also have brought successful, interrelated
claims of sex and age discrimination under this United Kingdom law.⁴³¹

⁴²³ Law on the Protection of Women’s Rights and Interests (promulgated by Nat’l Peo-
ple’s Cong., Apr. 3, 1992, rev’d Aug. 28, 2005, effective Dec. 1, 2005), art. 26, P.R.C. Laws
(China).

⁴²⁴ *Id.*; see Baird, Hill & Colussi, *supra* note 383, at 10 (positing that the law situates
menstruation in a larger “pre and post-natal health policy platform;” further reporting that
available media implies that the law has not been enforced and “rollout was unsuccessful”).

⁴²⁵ Health and Safety at Work Act of 1974 (UK), UK Pub. Gen. Acts 1974 c. 37; see
Gov’t. Equals. Off. & Equal. & Hum. Rts. Comm., Equality Act 2010: Guidance (Feb. 27, 2013)
(UK), <https://www.gov.uk/guidance/equality-act-2010-guidance> [[https://perma.cc/59AZ-
EVUZ](https://perma.cc/59AZ-EVUZ)].

⁴²⁶ Equality Act 2010 (U.K.), U.K. Pub. Gen. Acts. 2010, c.15; See Jog Hundle, *Employ-
ment Law and Menopause*, HENPICKED (June 21, 2020), [https://menopauseinthework-
place.co.uk/employment-law/menopause-and-employment-law/](https://menopauseinthework-
place.co.uk/employment-law/menopause-and-employment-law/) [[https://perma.cc/Y8H6-
BBKX](https://perma.cc/Y8H6-
BBKX)] (reviewing UK laws that govern menopause at work).

⁴²⁷ *Jackson v. Network Rail Infrastructure Ltd.*, Emp. Trib. Case No. 2301702/2017,
¶ 3(b) (Eng.).

⁴²⁸ *Id.* at ¶ 105.

⁴²⁹ *Merchant v. British Telecomms.* Emp. Trib. Case No: 1401305/11 (Feb. 27, 2012)
(Eng.).

⁴³⁰ *Id.*

⁴³¹ See Hundle, *supra* note 426 (describing *A v. Bonmarche Ltd.*, a 2019 case where a senior
supervisor was awarded £28k for successful age and sex discrimination claims against a com-
pany that allowed a manager to engage in a bullying campaign that focused on A’s status as “a
dinosaur” who “was going through menopause”).

In *Davies v. Scottish Courts & Tribs. Serv.*, a perimenopausal court officer was reinstated and awarded £19,000 for disability discrimination. Davies was fired after she mistakenly alleged that two men drank her water, which she thought was diluted with her prescription medicine to treat cystitis.⁴³² As part of a disciplinary investigation, Davies admitted that she was confused and must have made a mistake. She also disclosed that she had been having memory and concentration problems connected to being perimenopausal. The liability for workplace discrimination stemmed from the employer's failure to consider the impact menopause had on her actions.⁴³³

The Equality Act also offers “reasonable workplace adjustments. . .to ensure workplace equality.”⁴³⁴ For example, before the illegal termination, Davies obtained menstrual accommodations to work in the courtroom closest to the restroom and to take additional bathroom breaks.⁴³⁵

Even with this existing statutory protection and robust litigation practice, the Labour Party's equity platform includes proposals to further respond to menopausal needs. The goal is to “end the stigma and ensure that no woman is put at a disadvantage, from menstruation to menopause.”⁴³⁶ Announced on World Menopause Day in 2019, the proposed interventions include requiring large employers to provide menstrual accommodations like flexible scheduling and improved ventilation; safety assessments to ensure that work does not aggravate symptoms; and mandating education and training for supervisors on how menopause impacts work.⁴³⁷ It also proposes flexible leave and a recognition that “menopause is not an illness” and should not be the reason for penalizing workers.⁴³⁸

Across the pond, Canada also has workplace policy proposals related to periods. In 2000, Liberal MP Peter Fragiskatos sponsored an e-petition asking the Canadian government to provide menstrual products in washrooms at all federally regulated workplaces.⁴³⁹ The effort failed, but it was reintroduced almost two decades later. In 2019, Canada's Labor Minister kick-started a regulatory process to consider whether the government should require federally regulated employers—with a combined workforce of over

⁴³² *Davies v. Scottish Courts & Tribs. Serv.*, Emp. Trib. Case No. S/4104575/2017 (May 9, 2018) ¶¶ 14–15 (Scot.).

⁴³³ *Id.*; see Hundle, *supra* note 426 (sharing that £14,000 of damages was back pay and £5,000 due to injury of feelings).

⁴³⁴ Equality Act 2010, c.15 § 20 (UK).

⁴³⁵ *Davies*, Emp. Trib. Case No. S/4104575/2017, at ¶¶ 11–12.

⁴³⁶ Dawn Butler, *Labour Announces Plans to Break the Stigma of the Menopause at Work*, LABOUR (Sept. 20, 2019), <https://labour.org.uk/press/labour-announces-plans-break-stigma-menopause-work/> [<https://perma.cc/RH4C-DJ23>].

⁴³⁷ *Id.* (employers should engage in worker specific assessments that consider environment, temperature, ventilation and “welfare issues such as toilet facilities”).

⁴³⁸ *Id.*

⁴³⁹ Zi-Ann Lum, *No Consensus' on Free Menstrual Products in Federal Workplaces, Says Labour Minister*, HUFF. POST (Nov. 17, 2000, 02:46PM EST), https://www.huffpost.com/archive/ca/entry/canada-free-menstrual-products_ca_5fb41defc5b6d878180b9e14 [<https://perma.cc/PJ5Z-SKBE>]; see *Paid Menstrual Leave Debate Resurfaces*, CBC NEWS (Dec. 4, 2014), <https://www.cbc.ca/news/health/paid-menstrual-leave-debate-resurfaces-1.2860589> [<https://perma.cc/E5Y6-PKU9>].

1,207,000 employees in public industries like transportation, banks, telecom, national defense, police—to provide free menstrual products.⁴⁴⁰ Canada’s existing Labour Code requires employers to provide other occupational safety and health tools such as toilet paper, soap, and a way to dry hands. To “blow open the door on this conversation,” the government sought comments about whether to add menstrual products to that list.⁴⁴¹

Finally, in 2015, Vietnam decreed that employers must provide some workers paid breaks of at least 30 minutes per day for three days a month to address menstruation.⁴⁴² The length of break time is subject to an interactive negotiation consistent with employer and employee needs.⁴⁴³

Each of these laws has strengths and weaknesses to explore in future scholarship; collectively, however, they represent a broad range of countries and cultures that have recognized that there is a need for policy to address periods at work. They also demonstrate multiple options for potential American legislation to clarify and expand existing menstrual accommodation and discrimination protections to afford real menstrual justice at work.

III. PROPOSAL FOR MENSTRUAL JUSTICE AT WORK

In recognition that the laws explained in Section II fail to explicitly address or comprehensively support the menstrual needs categorized in Section I, this section contains a policy proposal for menstrual justice at work. Building on the analysis of existing international, federal, and local laws, legislative and regulatory proposals, cases, and currently available data, the proposal contains three components to create or affirm existing rights to menstrual accommodations and antidiscrimination protection. Specifically, it requires (1) accommodations such as reasonable, paid and job-protected

⁴⁴⁰ LAB. PROGRAM OF THE DEPT. OF EMP. & SOC. DEV., NOTICE OF INTENT, *Proposed Amendments to Certain Regulations Made Under Part II of the Canada Labour Code to Require the Provision of Free Menstrual Products in the Workplace*, (May 4, 2019), <https://canada-gazette.gc.ca/rp-pr/p1/2019/2019-05-04/html/notice-avis-eng.html#ne1> [<https://perma.cc/E5Y6-PKU9>]; see Marie-Danielle Smith, *Liberals to Make Menstrual Products Free in Federally Regulated Workplaces*, NAT’L POST (May 3, 2019), <https://nationalpost.com/news/politics/liberals-to-make-menstrual-products-free-in-federally-regulated-workplaces> [<https://perma.cc/KTJ8-PFCG>] (noting this triggered the 60 day rulemaking period, but the process will take 18-24 months).

⁴⁴¹ LAB. PROGRAM OF THE DEPT. OF EMP. & SOC. DEV., *supra* note 440; Smith, *supra* note 440; *Menstrual Leave*; *supra* note 383 (researcher Yara Doleh also proposed that Canada create an optional menstrual leave law to help remove menstrual stigma).

⁴⁴² The Labour Code of the Socialist Republic of Vietnam and Implementation Documents (1994), art. 115–18; Decree Detailing a Number of Articles The Labor Code in Terms of Policies for Female Employees, 2015, Ch. II, Art. 7.2, Female Employee’s Healthcare Services (Act. No: 85/2015/ND-CP /2015) (Vietnam); Wendy N. Duong, *Gender Equality and Women’s Issues In Vietnam: The Vietnamese Woman—Warrior And Poet*, 10 PAC. RIM L. & POL’Y J. 191, 191, 245 (2001) (analyzing this protection in the context of Vietnamese feminism more broadly).

⁴⁴³ Contained in the Vietnamese Labor Code, it only applies to contractual workers that are at least fifteen and implies that the employer provides sex-specific “inspectors.” Duong, *supra* note 442, at 245 (noting that menstrual breaks may lead to age and disability discrimination or privacy concerns by “unnecessarily call[ing] attention to . . . gender”).

menstrual management breaks and access to other tools that facilitate workers' ability to menstruate however they so choose, like menstrual products and safe and dignified spaces to use them; (2) without being harassed or discriminated against on the basis of menstruation (or being a current or former menstruator); and (3) without fear of retaliation or retribution for doing so.

Four changes are needed to implement these components. First, federal labor standards must be amended to provide current and former menstruators the ability to alter work schedules to address menstruation, as needed. This could be accomplished in any number of ways. For example, the words "manage menstruation or menopause" could be added to the FLSA's 2010 breastfeeding amendment, which would then provide job-protected "reasonable break time" and "reasonable access" to a sanitary, safe menstrual-friendly space.⁴⁴⁴ Until federal legislation is enacted, the Department of Labor could publish guidance demonstrating that menstrual and menopausal conditions may be serious health conditions under the FMLA, which would immediately help more people take (unpaid) job-protected time off to address biology.⁴⁴⁵

Second, OSHA should revise its regulations to clearly require menstrual products, access to menstrual-friendly bathrooms that properly address blood exposure and disposal, and proper ventilation at worksites.⁴⁴⁶ Until new regulations are promulgated, OSHA should acknowledge that protections already exist under the existing statutory and regulatory language by immediately rescinding the conflicting informal interpretations of the OSH Act's general duty and blood at work standards. OSHA also should start enforcing these protections by citing non-compliant employers and engaging in a public education campaign to facilitate knowledge of safe menstrual management at work and compliance with related safety standards.

Third, antidiscrimination laws should be amended to explicitly cover menstruation and eliminate any confusion to the contrary. In the meantime, the EEOC should issue guidance that confirms that menstrual and menopausal discrimination are covered under Title VII as sex/gender-linked conditions and as "other related conditions" to pregnancy. Relatedly, guidance should clarify that some menstrual and menopausal impairments constitute a protected disability under the ADA and Rehabilitation Act, including when menstruators are perceived to be disabled. The EEOC also should affirmatively acknowledge the application of the ADEA to menopause discrimination, and the intersecting nature of these claims for menstruators and

⁴⁴⁴ *E.g.*, 29 U.S.C. §207 could be amended with the following italicized text: "An employer shall provide—a reasonable break time for an employee to *manage menstruation or menopause or express breast milk* . . ."

⁴⁴⁵ *See supra* section II.A.1.

⁴⁴⁶ *E.g.*, "Menstrual products shall be provided" could be promulgated as a new 29 C.F.R. § 1910.141(d)(2)(v); menstrual products alternatively could be recognized as the PPE that they are in § 1910.141(d)(3)(i).

workers in menopause that may demonstrate violations of multiple laws with the same bad acts.

Finally, the government should enact a coordinated, two-track public education campaign about addressing periods at work. One track should educate employers and menstruators about the patchwork of existing employment laws that address one or more menstrual needs. The other track should fund research and study: (1) these needs—including capturing the experiences of a diverse range of menstruators working in a cross-section of industries and occupations; (2) understanding and enforcement of existing protections; and (3) the impact of these policy interventions.

If implemented, this proposal would support current and former menstruators and normalize menstruation, menstrual management, and menopause at work. The rest of this section explains how and situates the recommendations in larger workplace and menstrual movements.

A. Addressing Multiple Menstrual and Menopausal Needs

This proposal addresses multiple needs to keep current and former menstruators at work in a way that also works for employers. It strategically uses menstrual accommodations to counteract bargaining inequality and level the playing field for workers who are not able to individually negotiate for them, are not subject to CBA provisions, and do not work for an employer that has voluntarily created period policies. Along those lines, it responds to the failure of the free market and other public policies to alter workplace structures to keep menstruators connected to work. Moreover, it promotes social justice by eliminating economic barriers to accessing products and creating a minimum requirement of paid break time to address biology and support public health.

Similar underlying goals have been used to justify other workplace policies, including accommodations for pregnant, breastfeeding, or disabled workers. This is the next application of employment law as a public health measure that supports bodily autonomy, dignity, and economic security. It acknowledges that all current and former menstruators might have menstrual needs at work, but not all needs are the same—and those needs may change over one's lifespan or in response to intervening events like stress, diet, or impairment.⁴⁴⁷ It also provides adaptable access to needed spaces and items to address menstrual injustices in both traditional and non-traditional occupations in ways that also protect employers.

In that regard, the proposal imports the interactive process found in the FLSA's breastfeeding requirements, state pregnant worker fairness acts, and the ADA. It also utilizes the "reasonableness" language from the breastfeeding accommodations, which provides a flexible floor under which employers may not fall, while simultaneously allowing menstruators to manage their

⁴⁴⁷ See Belliappa, *supra* note 27, at 607.

own bodies. By not requiring specific times and frequency, workers can limit their time away from work to only what is needed at that moment, and employers will have present, engaged workers for longer.

This proposal also provides a return on investment for employers by decreasing presenteeism and absenteeism, increasing productivity and engagement, and minimizing worker distractions from menstrual needs and harassment.⁴⁴⁸ At the same time, it provides better bathroom access, improved sanitation and menstrual products to some who need them, which is an important action to combat health disparities, period poverty, and menstruated-related class issues.⁴⁴⁹

Further, the suggested study evaluates which policy interventions are working, and which—due to implementation, enforcement, or other challenges—need to be revisited. This data will be instrumental; for years, workplaces have been mentioned generally as a site of menstrual inequity, but the intricacies of workers experiences, best practices, and existing policies have largely been absent. Relatedly, the narrative has been that research about menstruation at work does not exist. Data has been collected; however, it is under-researched, piecemeal and focused on identifying problems broadly. Comprehensive study is needed to capture the range of menstrual-experiences at work and the effectiveness of specific policy interventions to address these experiences—or how they may impact groups of workers differently. Research also could support critical innovation on potential interventions moving forward. For example, it could help stakeholders understand whether state unemployment insurance programs should be amended to define the lack of access to menstrual accommodations as a compelling personal reason that proves someone is unemployed through no fault of their own. Or whether period-related workplace training requirements or other employer education effort should be created. Or the potential impact of shareholder activism. Or an executive order or regulations for public sector experimentation or government contractor requirements. Or whether unions should bargain for more menstrual-friendly CBA provisions or support members by creating a fund to replace soiled uniforms or purchase needed menstrual products. Or something else.

Collectively, the components of the proposal acknowledge that menstruation happens at work and some policy experimentation is needed to fully address the evolving nature of work and the mismatch between menstruators' needs and different workplace structures.

⁴⁴⁸ See *e.g.*, *id.* at 614 (explaining that FOP leave offers the chance to have more connected workers).

⁴⁴⁹ Johnson, *supra* note 59; Baird, Hill & Colussi, *supra* note 383, at 14 (citation omitted) (“[I]n this emerging economy context, menstrual leave is instrumental in addressing inadequate sanitation and the economic cost of workplace absenteeism.”).

B. Normalizing Menstruation and Addressing Dignitary Harms

Consistent with the purpose underlying existing antidiscrimination laws, this proposal helps workers overcome systemic barriers with stigma and subordination because of menstruation and menopause.⁴⁵⁰ As the above stories demonstrate, menstrual discrimination at work is not about just one bad actor. It is much broader and existing structures foster discrimination and inadequate and unsafe menstrual management. This proposal counters that by acknowledging that menstruation matters—both to individuals and to society. Yet, menstruation is currently viewed as an individual experience for which the menstruator is solely responsible.⁴⁵¹ While menstrual experiences are individualized, society can no longer ignore menstruation or barriers that existing structures impose on menstruators—including at work.

Thus, this proposal enables current and former menstruators to remove themselves from the catch-22 situation of having to choose between engaging in safe menstrual management and a paycheck. A choice that remains harder for low-income workers without access to menstrual accommodations or the bargaining power to obtain them. The proposal changes that reality, acknowledging and addressing both dignitary and tangible harms to menstruators. It directly tackles menstrual/menopausal taboos and historic discrimination, sending the counter-narrative that current and former menstruators are welcome at work.⁴⁵² Plus, it may empower transgender, genderqueer/non-binary and intersex workers to neutralize uneducated and outdated stereotypes about who is and is not a menstruator or in menopause.

Like other employment laws, this proposal addresses discrimination experienced by a group of workers or about specific acts. Here, the group and acts intersects “with multiple other attributes of self-identity.”⁴⁵³ Having a law that mentions menstruation and menopause is important—but that law also needs to acknowledge the various intersecting ways in which periods build on or hamper sex, gender, gender identity, reproduction, health, disability, race, age, and socio-economic class.⁴⁵⁴ Recognizing (and destigmatizing) this intersection—at the location where menstruators spend the majority of their waking hours—is critical.⁴⁵⁵

Further, improving accommodations for menstruators—including those experiences that are also characteristic of related impairments—might help

⁴⁵⁰ Karin & Runge, *supra* note 159, at 352 (citing Stephen F. Befort, *Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 369 (2002)).

⁴⁵¹ Johnson, *supra* note 10, at 2.

⁴⁵² See Karin, Johnson & Cooper, *supra* note 15, at 29 n.144 (citing CLAUDE STEELE, WHISTLING VIVALDI 22 (2011) (explaining stereotype threat in the context of the bar exam, including “the ways in which negative stereotypes about one’s capacities, especially when based on race, gender, or other aspects of identity, can lead one to underperform”).

⁴⁵³ *Id.* at 79.

⁴⁵⁴ *Id.*; Johnson, *supra* note 59, at 3 (citing Crenshaw, *supra* note 58, at 1265).

⁴⁵⁵ Karin, Johnson & Cooper, *supra* note 15, at 79.

improve communication, transparency, and destigmatize the provision of accommodations more broadly.

Some may criticize the proposal for seeking a “special” protection. Indeed, critiques of existing international laws argue that they “[u]ndermine gender equality,”⁴⁵⁶ invite discrimination by creating another reason not to hire, promote, or create opportunities for menstruators,⁴⁵⁷ and contradict earlier feminist theory that argued against highlighting differences.⁴⁵⁸ For these (and other) reasons, not all workers feel comfortable taking menstrual leave, even if their national law allows it. Some are concerned about being viewed as “weak” or advancing negative perceptions about menstruators needing to rest.⁴⁵⁹ Others know some international unions and “management attitudes” do not support it.⁴⁶⁰

This is a valid critique, which also applies to existing legal rights to breastfeeding breaks, family leave, disability accommodations, and other group-specific labor standards. Realistically, the law must sometimes acknowledge difference, however, to address specific needs. This also demonstrates why accommodations—by themselves—are not enough to address periods at work. Providing break time does not solve product or toilet access problems.⁴⁶¹ Nor do breaks or bathroom access necessarily remove stigma.⁴⁶² Over time, they may help normalize talking about periods, but it cannot immediately eliminate existing biases. It could out someone as having a menstrual need to managers or coworkers that creates space for discrimination if the menstruator does not conform with the “ideal worker” stereotype.⁴⁶³ The combination of provisions, however, should minimize these potential harms; collectively, it also should help take menstruation and menopause out of the shadows and menstrual products out of workers’ sleeves.⁴⁶⁴

Relatedly, lost from some retellings of the international menstrual movement is the broader campaign for which the push for leave was only one part. For example, the original Japanese strategy was for leave and other protections related to menstruation and gender justice. The 1917 National

⁴⁵⁶ Belliappa, *supra* note 27, at 604.

⁴⁵⁷ Dan, *supra* note 390, at 3; Astrup, *supra* note 146, at 15 (citations omitted); Duong, *supra* note 433, at 245.

⁴⁵⁸ See Lahiri-Dutt & Robinson, *supra* note 406, at 102 (Menstrual leave “brings into focus the presumed tensions between gender equity and gender difference. . .”).

⁴⁵⁹ Matchar, *supra* note 387; Choulamany, *supra* note 70, at 22; see Pattani, *supra* note 117 (quoting Purdue Professor Sharra L. Vostral) (“societal pressures frown upon its use”).

⁴⁶⁰ Dan, *supra* note 390, at 9; see also Choulamany, *supra* note 70, at 22 (noting the effectiveness of “workplace pressure to not take the leave” in Korea and Japan).

⁴⁶¹ See Belliappa, *supra* note 27, at 607, 611 (noting that FOP leave alone is not enough; it does not address differences in menstrual management access between unskilled, semiskilled, and skilled workers or for different occupations).

⁴⁶² *Id.* at 610 (explaining that the Indonesia experience shows that stigma and secrecy surrounding periods at work remains, which is one reason people do not take FOP leave).

⁴⁶³ See *The Takeaway*, *supra* note 20, at 08:48 (noting menstrual leave may be regressive because we still view the ideal worker as male); Hollingsworth, *supra* note 153 (“If you tell people you’re taking [period] leave. . . you’re not as good as men[.]”).

⁴⁶⁴ Belliappa, *supra* note 27, at 607 (recognizing that international conversations have shown that menstruation is “not a cause of embarrassment”).

Primary School Female Teacher's Assembly strike sought better treatment of menstruation, maternity leave, access to part-time work, and other items.⁴⁶⁵ The 1928 Tokyo Municipal Bus Company conductors sought menstrual leave and antidiscrimination protection.⁴⁶⁶ Consistent with what feminist scholars have long argued, more than one policy is needed to address societal inequalities, recognize that sex-based workplace discrimination begins with pregnancy and continues through parenthood, and integrate and keep women at work.⁴⁶⁷ Just as pregnancy accommodations and anti-discrimination are needed to obtain meaningful workforce attachment⁴⁶⁸—both are needed here for menstruators.

C. *Advancing Worker and Menstrual Justice Movements*

This proposal also complements ongoing, broader workplace and menstrual justice movements. Menstrual needs are not the only problems for menstruators may have at work. Rather, they are a component of larger systemic discrimination and bias for workers who are also women, transgender, genderqueer/nonbinary, or intersex, disabled, people of color, and/or older.⁴⁶⁹ Accordingly, the proposal is consistent with calls for broader labor standards, accommodations, and discrimination protections. If existing campaigns for paid breaks, sick or medical leave, scheduling flexibility, pregnancy/lactation accommodations, and expanded discrimination protections succeed, additional menstrual needs will be addressed, at least in part, by those new laws.

Some may posit that campaigns for period protections could undermine these broader efforts. This proposal is designed to strategically complement—and not supplant—them, however. It is the next logical application of recent advances supporting public health at work and moves the pendulum toward universal workplace design that responds to a variety of workers' needs without requiring employers to ask highly medical and technical questions about workers cycles. It allows current and former menstruators to have some type of accommodation, even those with “normal” cycles, but also is flexible to provide more supports to those that need more than break time. Additionally, menstruation already is viewed as an “entry point” and “gateway” for other reproductive and public health conversations.⁴⁷⁰ Until univer-

⁴⁶⁵ Nakayama, *supra* note 381, at 156.

⁴⁶⁶ *Id.* at 171.

⁴⁶⁷ Karin & Runge, *supra* note 156, at 338; *see e.g.*, Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994).

⁴⁶⁸ Issacharoff & Rosenblum, *supra* note 467, at 2154.

⁴⁶⁹ *See e.g. supra* notes 20 and 64 and accompanying text; *see also* WEISS-WOLF, *supra* note 14, at 198.

⁴⁷⁰ Weiss-Wolf, *supra* note 226, at 539, 542 (menstruation may kick-start the conversation about “wider implications”); Geertz, Iyer, Kasen, Mazzola & Peterson, *supra* note 36, at 3, 5, 37 (lamenting the lost opportunity to use menstrual management to impact other positive public and sexual health outcomes).

sal design is normalized, this proposal acknowledges that menstruation and menopause need not be equated with sickness, disability, or age to be supported.⁴⁷¹

It also moves the menstrual movement to the next level. The “year of the period” in 2015 represented the rebirth of public menstrual consciousness and launched a movement seeking public policy that recognizes that menstruation matters and systemic barriers must be removed.⁴⁷² Around this time, Jennifer Weiss-Wolf and others led efforts to integrate menstrual reform into societal zeitgeist with campaigns to eliminate the “tampon tax” (the application of sales tax to menstrual products).⁴⁷³ Designed to be an “entry point” issue leading to broader reforms, the tampon tax provided a clear message about eliminating a discriminatory policy that disparately impacted menstruators and which, if removed, would “inch toward a model of economic parity and gender equality.”⁴⁷⁴ A second wave of menstrual policy reform involves calls to improve access and affordability of menstrual products in schools,⁴⁷⁵ in carceral spaces,⁴⁷⁶ and for people experiencing homelessness.⁴⁷⁷ Today, these calls continue and are joined by efforts to require medically-accurate menstrual education,⁴⁷⁸ address periods during the pandemic,⁴⁷⁹ improve menstrual dignity around bar exams and standardized tests,⁴⁸⁰ and re-classify menstrual products as eligible for tax-exempt reimbursements.⁴⁸¹ It is past time to correct the failure of existing law to comprehensively address menstruation and to center policy interventions related to work in the menstrual movement.

⁴⁷¹ See *supra* notes 410–11 and accompanying text for an international comparison.

⁴⁷² See e.g., Johnson, *supra* note 10, at 15–22; BRAWS, *supra* note 9; see generally Crawford, Johnson, Karin, Strausfeld & Waldman, *supra* note 14, at 5–6 (describing advocacy campaigns and new menstrual equity laws); PALGRAVE HANDBOOK, *supra* note 19 (comprehensive exploration of menstruation, menopause, and the experiences of menstruators and people in menopause in multiple aspects of society around the world).

⁴⁷³ Jennifer Weiss-Wolf, *Raising the Bar for Menstrual Equity. Period.*, Ms. MAG., (July 23, 2020), <https://msmagazine.com/2020/07/23/raising-the-bar-for-menstrual-equity-period/> [<https://perma.cc/V9SM-H4ZV>]; Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 439–40, 474–82 (2019); Holly Seibold, *D.C. Moves One Step Closer to Menstrual Equity*, WASH. POST (April 28, 2018).

⁴⁷⁴ Weiss-Wolf, *supra* note 226, at 539, 542; Maria Carmen Punzi & Mirjam Werner, *Challenging the Menstruation Taboo One Sale at a Time: The Role of Social Entrepreneurs in the Period Revolution*, in PALGRAVE HANDBOOK *supra* note 19, at 833, 834 (noting that “[s]treet marches and protests against the ‘tampon tax’ [led to] campaigners calling for free menstrual products for girls in need”).

⁴⁷⁵ Johnson, Waldman, & Crawford, *supra* note 19, at 255–57.

⁴⁷⁶ See Johnson, *supra* note 10, at 47–49, 62–64; Valeria Gomez & Marcy L. Karin, *Menstrual Justice in Immigration Detention*, 41 COLUM. J. OF GENDER & LAW 123, 131–32 (2021).

⁴⁷⁷ See Crawford, Johnson, Karin, Strausfeld & Waldman, *supra* note 14, at 1, 39, 41; BRAWS, *supra* note 9.

⁴⁷⁸ See e.g., *The “Expanding Student Access to Period Products Act of 2020”: Hearing on D.C. B23-0887, Before the Comm. of the Whole and the Comm. on Educ.*, D.C. Council (Nov. 23, 2020) (statement of Marcy L. Karin and Galina M. Abdel Aziz).

⁴⁷⁹ See Bridget J. Crawford & Emily Gold Waldman, *Period Poverty in a Pandemic: Harnessing Law to Achieve Menstrual Equity*, 98 WASH. U. L. REV. 1569, 1569 (2021).

⁴⁸⁰ See Karin, Johnson & Cooper, *supra* note 15.

⁴⁸¹ 26 U.S.C. § 223; see Jennifer Weiss-Wolf, *The ERA Campaign and Menstrual Equity*, 43 HARBINGER 168, 171–73 (2019).

Congresswoman Grace Meng is leading the federal movement with a “whole of government” approach and her Menstrual Equity for All Act, which does include two workplace-related product access provisions.⁴⁸² Led by Congresswoman Meng, Members of Congress also urged President Biden to address period poverty and affirm the human and health care right to access menstrual products.⁴⁸³ These efforts are important, elevate space for menstruation in national discourse, and advance specific workplace (and other) menstruation-related rights. This article’s proposal supplements the existing legislative one by also addressing other categories of menstrual needs at work, integrating menopause into the conversation, and building on lessons learned from union and international experiences.

Finally, although there have been some exceptions during the pandemic, new workplace laws are usually subject to extreme partisanship. The same is generally true for reproductive and health care measures. There are early signs that the menstrual movement might not be subject to the same pre-existing, long-entrenched positions, however. Consequently, it may offer a bipartisan opportunity, bolstered by Republicans and Democrats having sponsored and signed state measures and Trump-era legislation and twice-issued guidance that included product access provisions in carceral facilities.⁴⁸⁴

CONCLUSION

This paper explored the landscape of menstruation, menopause, and work. After naming and categorizing menstrual and menopausal needs, it systematically reviewed how a series of laws and systems, which were created to deal with other workplace problems, provide some relief to menstruators. It also analyzed how these laws fail to address a multitude of menstrual injustices and the resulting problems ranging from absenteeism to privacy violations, health implications from poor menstrual management, harassment, and dignitary harms. Building on experiences with these laws and international models, the article recommends policy interventions to minimize menstrual injustice and acknowledge that menstruation matters at work.

⁴⁸² Menstrual Equity for All Act of 2021, H.R.3614 (117th Cong. 2021). *Id.* at § 7 (amend the OSH Act to require some employers to provide products); *id.* at § 8 (agencies must provide products in public restrooms); *see also* Menstrual Products in Federal Buildings Act, H.R.2478, § 2(a) (117th Cong. 2021).

⁴⁸³ Letter from Grace Meng (and 27 other MOCs) to Joe Biden, Jr. (Mar. 5, 2021), <https://meng.house.gov/sites/meng.house.gov/files/Letter%20to%20Biden.pdf> [<https://perma.cc/B2QM-YETF>].

⁴⁸⁴ *See e.g.*, FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, OPERATIONS MEMORANDUM 003-2018, PROVISION OF FEMININE HYGIENE PRODUCTS (Aug. 1, 2018); 35 ILL. COMP. STAT. ANN. 105/3-5(37) (2016); *see also* Weiss-Wolf, *supra* note 226, at 539, 542 (explaining how the tampon tax campaign involves “persuasive perspectives from all sides—left, right, libertarian—variously focused on social justice, gender equity, tax relief, and/or limiting the scope of government reach”).