COMMITTEE ON
EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

October 10, 2023

The Honorable Charlotte A. Burrows
Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

RE: RIN 3046-AB30, Regulations to Implement the Pregnant Workers Fairness Act

Dear Chair Burrows:

We write to raise concerns with many provisions in the proposed rule titled "Regulations to Implement the Pregnant Workers Fairness Act."[1] Discrimination of any kind is abhorrent and should not be tolerated, which is why federal laws protect workers from discrimination in the workplace, including discrimination against pregnant workers.[2] While the *Pregnant Workers Fairness Act* (PWFA)[3] requires the Equal Employment Opportunity Commission (EEOC) to issue regulations implementing the law, Congress did not authorize EEOC to issue regulations contrary to the statute itself. The Committee on Education and the Workforce has primary jurisdiction over the PWFA and EEOC, and we urge EEOC to change the proposed rule to bring it in line with the PWFA and congressional intent.

The PWFA Does Not Apply to Abortions.

The PWFA requires employers to provide reasonable accommodations to "known limitations related to pregnancy, childbirth, or related medical conditions" of an employee unless the employer can "demonstrate that the accommodation would impose an undue hardship."[4] The proposed rule defines "pregnancy, childbirth, or related medical conditions" to include "having or choosing not to have an abortion."[5] However, EEOC must not include abortion in the final

[1] 88 Fed. Reg. 54,714 (Aug. 11, 2023) [hereinafter Proposed Rule].
[2] *See*, *e.g.*, Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (prohibiting employment discrimination because of an individual's sex); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (defining sex in Title VII to include discrimination because of pregnancy, childbirth, or related medical conditions).
[3] Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. II (Pregnant Workers Fairness Act), 136 Stat. 4459, 6084-6089 (2022).
[4] 42 U.S.C. § 2000gg-1(1).
[5] Proposed Rule, *supra* note 1, at 54,774.

rule for several reasons.

The Term "Abortion" is not in the PWFA.

Most importantly, Congress chose not to include the term "abortion" or "abortion services" in the law. EEOC cannot add such a controversial provision to the law that Congress omitted. The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* holding there is no constitutional right to an abortion was handed down a mere six months before the PWFA was enacted.[6] Congress was well aware of the ongoing national debate over abortion and could have included the term in the law if it so chose. Its absence speaks volumes. Indeed, Sen. Robert Casey (D-PA), the Senate sponsor of the PWFA, stated on the Senate floor: "I want to say for the record, however, that under the act, under the Pregnant Workers Fairness Act, the Equal Opportunity Employment Commission, the EEOC, could not—could not—issue any regulation that requires abortion leave…."[7] Sen. Bill Cassidy (R-LA), the lead Republican cosponsor in the Senate, agreed, stating, "I reject the characterization that the [PWFA] would do anything to promote abortion."[8]

Moreover, the phrase "pregnancy, childbirth, or related medical conditions" excludes abortions. Abortion is not a medical condition related to pregnancy; it is the opposite. It terminates the pregnancy, tragically ending the life of an unborn child. Similarly, abortion is not related to childbirth; it ends the possibility of childbirth. Indeed, Committee Democrats wrote that the PWFA was intended to ensure women could "protect the health of their babies."[9]

Differences Between Title VII and the PWFA

The proposed rule's justification for including abortion is that Title VII of the *Civil Rights Act of 1964* (Title VII) includes the phrase "pregnancy, childbirth, or related medical conditions,"[10] and EEOC in 2015 interpreted this phrase in Title VII to include the "decision to have or not to have an abortion."[11] However, although "pregnancy, childbirth, or related medical conditions" was added to Title VII via the *Pregnancy Discrimination Act* (PDA) in 1978,[12] EEOC's "Enforcement Guidance on Pregnancy Discrimination and Related Issues" interpreting this phrase to include abortion (which is cited by the proposed rule) was not issued until 2015.[13] The proposed rule's reliance on guidance issued 37 years after the PDA was enacted raises serious questions about whether the guidance reflects a well-settled interpretation by the agency.

Regardless, EEOC is not restricted to interpreting the phrase "pregnancy, childbirth, or related

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[6] 142 S. Ct. 2228 (2022).
[7] 168 Cong. Rec. S7050 (daily ed. Dec. 8, 2022) (statement of Sen. Casey).
[8] *Id.* (statement of Sen. Cassidy).
[9] H.R. REP. NO. 117-27, pt. 1, at 22 (117th Cong.).
[10] Pub. L. No. 95-555 (1978), 42 U.S.C. § 2000e(k).
[11] Proposed Rule, *supra* note 1, at 54,721 (citing EEOC, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015)).
[12] Pub. L. No. 95-555 (1978), 42 U.S.C. § 2000e(k).
[13] EEOC, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (June 25, 2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues.

medical conditions" in the PWFA the same way EEOC has interpreted the phrase in Title VII, even assuming EEOC has appropriately applied Title VII in this instance. While the PWFA and Title VII both include this phrase, the PWFA does not incorporate this phrase and its current meaning by reference to Title VII. The PWFA could also have stated that this phrase has the meaning that it has in Title VII, as the PWFA does with other terms,[14] but it did not so state. Moreover, Congress could have chosen to amend Title VII and incorporate the PWFA within it to pick up the meaning of this phrase, but Congress chose to make the PWFA a standalone law that is not a part of Title VII, unlike the PDA which amended, and is a provision within, Title VII. Congress' choice not to incorporate the phrase "pregnancy, childbirth, or related medical conditions" by reference to Title VII is especially stark here because elsewhere, the PWFA incorporates Title VII and Title I of the *Americans with Disabilities Act* (ADA) by reference in approximately 30 other provisions.

Substantively, the PWFA has key differences with Title VII and the PDA. Title VII prohibits employment discrimination because of an individual's sex, which, under the PDA, includes discriminating "on the basis of pregnancy, childbirth, or related medical conditions."[15] However, Title VII and the PDA do not discuss accommodations related to pregnancy, childbirth, or related medical conditions, although accommodations can be required to avoid discrimination.[16] In contrast, the PWFA makes it an unlawful employment practice not to "make reasonable accommodations to the known limitations related to pregnancy, childbirth, or related medical conditions of a qualified employee."[17]

The PWFA was Intended to Cover Practical Workplace Accommodations.

The PWFA is akin to the accommodations provisions in Title I of the *Americans with Disabilities Act* (ADA), in which it is unlawful for an employer not to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability."[18] Indeed, the proposed rule highlights this kinship, stating, "Like the ADA, the PWFA provides for reasonable accommodations in certain circumstances."[19] Moreover, the proposed rule observes that the "PWFA borrows the definition of 'reasonable accommodation' and 'undue hardship' from the ADA and uses the same interactive process as is commonly used under the ADA."[20] And as the proposed rule notes, the ADA can apply to limitations related to pregnancy that qualify as a disability.[21]

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[14] *See* 42 U.S.C. § 2000gg(2)(A) (the term covered entity "has the meaning of the term 'respondent' in" Title VII); *id.* § 2000gg(5) ("the term 'person' has the meaning given such term in" Title VII); *id.* § 2000gg(7) ("the terms 'reasonable accommodation' and 'undue hardship' have the meanings given such terms in" Title I of the ADA).
[15] 42 U.S.C. § 2000-e(2)(a); *id.* § 2000-e(k).
[16] *See*, *e.g.*, Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015).
[17] 42 U.S.C. § 2000gg-1(1).
[18] 42 U.S.C. § 12112(b)(5).
[19] Proposed Rule, *supra* note 1, at 54,716.
[20] *Id.* at 54,717.
[21] *Id.* at 54,751 ("Under the ADA, certain workers affected by pregnancy, childbirth, or related medical conditions may have the right to accommodations if they show that they have an ADA disability; this standard does not include pregnancy itself but instead requires the showing of a pregnancy-related disability.").

However, there is no indication in the ADA or in the PWFA that these laws require accommodations for abortions. As the proposed rule emphasizes, the PWFA was intended by its supporters to be a practical, common-sense, workplace law. The proposed rule states:

> Voluntary compliance should be the norm because, while the form of reasonable accommodation will vary depending on the job and the worker's needs, the accommodations that most workers will seek likely will be no cost to low cost and may be as simple as access to water during the workday, additional bathroom breaks, or sitting or standing.[22]

The proposed rule also notes that "some pregnant workers have not received simple, common-sense accommodations, such as a stool for a cashier or bathroom breaks for a preschool teacher."[23] The congressional record emphasizes that the PWFA was intended to ensure employers provide reasonable, practical, simple accommodations to pregnant employees.[24] Congress did not intend to make forays into controversial social policy by enacting the PWFA but instead intended to provide solutions to everyday workplace challenges.

Cases Cited in the Proposed Rule Argue Against Including Abortion.

Lower-court cases cited in the proposed rule regarding abortion and the PDA actually argue against including abortion in the PWFA proposed rule. The proposed rule notes that *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008), held that the "PDA prohibits an employer from discriminating against a female employee because she has exercised her right to have an abortion."[25] However, the PWFA has nothing to do with whether an employee has employment protections for "exercising the right" to have an abortion. Instead, the PWFA is about providing accommodations for *known physical or mental limitations* relating to pregnancy, childbirth, or related medical conditions.[26]

The proposed rule also says that *Turic v. Holland Hospital, Inc.*, 85 F.3d 1211 (6th Cir. 1996), found the "termination of a pregnant employee because she contemplated having an abortion violated the PDA."[27] Again, the situation in *Turic* has nothing to do with the PWFA. Contemplating having an abortion has no connection to *known physical or mental limitations* related to pregnancy, childbirth, or related medical conditions.

Moreover, following the U.S. Supreme Court's decision in *Dobbs*, there is no longer a Court-

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[22] *Id.* at 54,717.
[23] *Id.* at 54,751.
[24] H.R. Rep. No. 117-27, pt. 1, at 22 (117th Cong.) ("most common temporary pregnancy-related accommodation sought (71 percent of participants) was more frequent breaks (e.g., bathroom breaks)"); *id.* at 29 (potential accommodations include lifting restrictions, scheduling, additional restroom breaks, access to water, and modified seating).
[25] Proposed Rule, *supra* note 1, at 54,774 n.11.
[26] *Id.* at 54,718 ("'Limitation' means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions.").
[27] *Id.* at 54,774 n.11.

recognized constitutional right to an abortion, although there may be a state-recognized right.[28] It is, therefore, questionable whether *Doe v. C.A.R.S. Protection Plus, Inc.* and *Turic v. Holland Hospital, Inc.* are still good law post-*Dobbs*.

The Proposed Rule Unreasonably Defines "Temporary" as 20 Months.

To qualify for coverage under the PWFA, a worker must be able to "perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if … any inability to perform an essential function is for a temporary period" and "the essential function could be performed in the near future."[29] The proposed rule unreasonably decides that "temporary" and "in the near future" can be up to 80 weeks, or 20 months. The proposed rule defines "in the near future" to mean "generally forty weeks" based on the length of a full-term pregnancy.[30] In addition, when the worker returns from leave after childbirth, if she is still unable to perform an essential function, "the forty weeks would restart once the pregnancy is over and the worker returns to work after leave."[31]

EEOC's definition of "temporary" and "in the near future" to mean up to 20 months goes far beyond the statutory text and congressional intent. Congressional proponents of the PWFA claimed it was needed because the ADA, even as amended in 2008, has not been consistently interpreted to cover *temporary* impairments.[32] EEOC's expansion of "temporary" to 20 months contradicts this alleged important justification for passing the law—namely, to address temporary impairments. Moreover, the ADA itself defines a "transitory impairment" as having a duration of six months or less.[33] EEOC cannot define "temporary" under the PWFA, which is modeled on the ADA, to be more than three times longer than under the ADA.

Congress did not intend for the PWFA to mandate accommodations, including leave, lasting for nearly two years. Far from implementing a practical measure providing commonsense workplace accommodations as discussed above, EEOC's definition of "temporary" as 20 months would be unworkable for most employers.

The Proposed Rule is Additionally Overbroad.

The proposed rule defines "related medical conditions" to include "use of birth control, menstruation, infertility and fertility treatments, [and] endometriosis," among other treatments and conditions.[34] By including treatments and conditions such as these, the proposed rule stretches its interpretation of the PWFA past the breaking point. As explained above, Congress intended the PWFA to address commonplace workplace needs of pregnant workers, such as

[28] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
[29] 42 U.S.C. § 2000gg(6)
[30] Proposed Rule, *supra* note 1, at 54,724.
[31] *Id.* at 54,725.
[32] *See*, *e.g.*, H.R. Rep. No. 117-27, pt. 1, at 20 (117th Cong.) ("courts have sometimes pointed to the short duration of pregnancy complications as a reason to reject an ADAAA claim").
[33] 42 U.S.C. § 12102(3)(B).
[34] Proposed Rule, *supra* note 1, at 54,721.

access to water, additional bathroom breaks, or provision of a stool or chair. Moreover, treatments and conditions rightfully falling outside the PWFA's scope are not without remedy and may be covered by other federal workplace laws such as Title VII and the ADA.

The PWFA Fully Incorporates Title VII's Religious-Organization Exemption.

The PWFA states that it is "subject to the applicability to religious employment set forth in section 2000e-1(a) of [Title VII]."[35] This provision originated in the then-Committee on Education and Labor in an amendment offered by Republicans. When the Committee marked up the *Pregnant Workers Fairness Act* (H.R. 1065, 117th Congress) on March 24, 2021, Rep. Russ Fulcher (R-ID) offered an amendment adding a nearly identical provision to the bill, although the amendment was not adopted.[36] The Committee is pleased this important provision to protect religious liberty is included in the PWFA as enacted.

The PWFA fully incorporates the religious-organization exemption from Title VII, Section 2000e-1(a), which states in relevant part:

> [Title VII] shall not apply to … a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[37]

This provision in Title VII allows religious organizations to make religiously based employment decisions so that they do not have to violate their faith. This includes making employment decisions based on the worker's religion conforming to the organization's religion and religious tenets,[38] but the provision does not allow employment discrimination on other grounds.[39] The Title VII provision applies to "the entire realm of the employment arena," not just to hiring.[40] Title I of the ADA includes a similar provision.[41]

The proposed rule is correct to state that the PWFA incorporates the religious-organization provision from Title VII in full and that EEOC will administer the PWFA provision as it administers the same provision in Title VII.[42] This confirmation is in keeping with Congress'

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[35] 42 U.S.C. § 2000gg-5(b).
[36] H.R. REP. NO. 117-27, pt. 1, at 61-62 (117th Cong.).
[37] 42 U.S.C. § 2000e-1(a).
[38] *See*, *e.g.*, Gosche v. Calvert High Sch., 997 F. Supp. 867, 872 (N.D. Ohio 1998) (religious school could make adherence to moral standards of the church a requirement for continued employment), affirmed by 181 F.3d 101 (6th Cir. 1999).
[39] *See*, *e.g.*, Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985) (while "religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin").
[40] Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries, 238 F. Supp.2d 174, 180 (D.D.C. 2002).
[41] 42 U.S.C. § 12113(d).
[42] Proposed Rule, *supra* note 1, at 54,746 ("As with assertions of section702(a) in Title VII matters, when 42 U.S.C. 2000gg-5(b) is asserted by a respondent employer, the Commission will consider the application of the provision on a case-by-case basis.").

view that the PWFA provision fully incorporates the Title VII provision.[43]

The proposed rule asks whether the final rule should adopt "a rule that construes the PWFA as not requiring a religious entity to make any accommodation that would conflict with the entity's religion" or instead adopt a much narrower rule.[44] Because the PWFA fully incorporates the Title VII provision, the final rule must state that religious entities are not required to make any employment decision that conflicts with their religion. Under the religious-organization exemption, religiously based employment decisions are protected against scrutiny under the PWFA as they are under Title VII.[45] Moreover, construing the PWFA religious-organization provision more narrowly or differently than EEOC construes Title VII would needlessly create confusion among religious employers and their employees regarding the scope of the exemption. There is extensive, well-developed case law interpreting Title VII's exemption that will inform the application of the PWFA religious-organization exemption.

Conclusion

Along with the PDA and the ADA, the PWFA can help ensure pregnant workers receive reasonable, practical accommodations in the workplace. As such, EEOC's final rule on the PWFA must conform with the statutory text and congressional intent. This would include removing abortion from the rule. The rule must also be workable for employers who will have to implement it. We look forward to EEOC making substantial changes to the proposed rule so that the final rule does not go beyond the text of the PWFA and can be reasonably implemented by employers.

Sincerely,

Virginia Foxx
Chairwoman

Mary E. Miller
Vice Chair

[43] H.R. REP. NO. 117-27, pt. 1, at 11 (117th Cong.) (Rep. Fulcher's amendment "included a provision to exempt religious organizations from coverage under the bill"); *id.* at 61 (Rep. Fulcher's amendment "simply added language incorporating the religious-organization protection from" Title VII).
[44] Proposed Rule, *supra* note 1, at 54,746.
[45] *See*, *e.g.*, Corp. of Presiding Biship of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 332 n.8 (1987) (Supreme Court "considered and rejected the possibility that § 702 could be construed to exempt a religious organization only with respect to employment involving religious activities."); EEOC v. Miss. College, 626 F.2d 477, (5th Cir. 1980) ("[I]f a religious institution … presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, s 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination."); Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 348-49 (E.D.N.Y. 1998) ("In a case of alleged gender discrimination, if a religious organization offers a legitimate religious reason for an employee's termination, applied equally to both sexes, the court cannot examine the rationality of the proffered belief.").