United States Senate

WASHINGTON, DC 20510

October 10, 2023

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

Re: Proposed Rule – Regulations to Implement the Pregnant Workers Fairness Act [EEOC-2023-0004; RIN 3046-AB30]

Dear Chair Burrows,

We write to provide comments on the U.S. Equal Employment Opportunity Commission's (EEOC) Proposed Rule – Regulations to Implement the Pregnant Workers Fairness Act [EEOC-2023-0004; RIN 3046-AB30]. Congress passed the Pregnant Workers Fairness Act (PWFA) last year to ensure qualified workers receive reasonable accommodations when these workers are affected by pregnancy, childbirth, or related medical conditions and providing those accommodations would not cause an undue hardship for their employers. In general, we strongly support the EEOC's proposed rule, particularly the EEOC's interpretation of pregnancy, childbirth, or related medical conditions and the rule of construction related to Section 702(a) of Title VII. We commend the EEOC for its thoughtful consideration of many aspects of this groundbreaking law, from the breadth of examples regarding reasonable accommodations to reinforcing that it is a violation for employers to unnecessarily delay providing accommodations. We propose edits to ensure employees' privacy is protected as it relates to their reproductive health and to more closely align the proposed rule with PWFA's text and purpose as it relates to an employer's provision of leave and health insurance benefits while on leave.

I. The EEOC Correctly Interprets Pregnancy, Childbirth, or Related Medical Conditions in the Proposed Rule

We strongly support the EEOC's proposed reading of "pregnancy, childbirth, and related medical conditions" consistent with the EEOC's interpretation of the same language in Title VII and the related case law.[1] Not only is this interpretation of the PWFA supported by a longstanding canon of construction,[2] but also in this case, Congress explicitly adopted the PWFA in response to gaps in the existing legal protections, including the Pregnancy Discrimination Act of 1978 (PDA) codified in Title VII, suggesting that Congress knew how these terms were being

[1] 88 Fed. Reg. 54721-22, 54767 (Aug. 11, 2023) https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act.
[2] *See* Antonin Scalia and Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 323 (2012), https://jm919846758.files.wordpress.com/2020/09/rlilt.pdf.

interpreted by the courts.[3] Specifically, Congress sought to remedy a gap in the PDA as interpreted by the Supreme Court in *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015).[4]

In *Young*, the Supreme Court found that workers were only entitled to reasonable accommodations if another employee or class of employees similarly situated in their ability or inability to work received accommodations.[5] However, workers affected by pregnancy, childbirth, or related medical conditions were not guaranteed the accommodations they needed independent of finding these comparators.[6] This court decision created two problems for workers: (1) eligible workers were limited in what accommodations they could receive by who happened to be in their workplace and what accommodations they had received; and (2) workers affected by pregnancy, childbirth, or related medical conditions may need accommodations that other workers do not need. Additionally, although other laws such as the Family and Medical Leave Act and the Americans with Disabilities Act provided some protections for workers affected by pregnancy, childbirth, or related medical conditions those protections are not comprehensive.[7] It is against this background of existing law that Congress passed the PWFA.

The phrase "pregnancy, childbirth, and related medical conditions" is drawn directly from the PDA and intentionally encompasses the full range of covered conditions. Congress included the term "related medical conditions" in the PWFA to provide comprehensive coverage and include conditions beyond the simple fact of pregnancy and childbirth; otherwise the term would not have been included in this list.[8] As the EEOC notes in its proposed rule, "related medical conditions" in the PDA has been interpreted both in EEOC guidance and by the federal courts to include a range of conditions.[9] Against this background of existing law, Congress did not explicitly carve out abortion from other "related medical conditions" in the PWFA, making clear Congress intended for "related medical conditions" in the PWFA to be interpreted in the same way as in the PDA.[10] The PWFA thus requires an employer to provide accommodations for

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[3] *See* 168 Cong. Rec. H. 10528 (2022) (statement of Rep. Nadler) ("The Pregnant Workers Fairness Act aligns with Title VII in providing protections and reasonable accommodations for ''pregnancy, childbirth, and related medical conditions'', like lactation.").

[4] *See* 168 Cong. Rec. S7048-49 (daily ed. Dec. 8, 2022) (Senator Casey discussing a "loophole" in the PDA and the facts of *Young v. United Parcel Service*, 575 U.S. 206 (2015)); H.R. Rep. No. 117-27, at 14-17 (2021) (discussing gaps under the PDA and *Young* and explaining the purpose of the PWFA to "remedy the shortcomings of the PDA").

[5] *See Young*, 575 U.S. at 229; *see also* 88 Fed. Reg. 54715 (discussing statutory protections for workers affected by pregnancy, childbirth, and related medical conditions under Title VII).

[6] *See* H.R. Rep. No. 117-27, at 14-17 (2021).

[7] *See id.* at 17-21; *see also* 88 Fed. Reg. 54715.

[8] *See* 168 Cong. Rec. H. 10528 (2022) (statement of Rep. Nadler) ("The Pregnant Workers Fairness Act aligns with Title VII in providing protections and reasonable accommodations for ''pregnancy, childbirth, and related medical conditions'', like lactation.").

[9] *See* 88 Fed. Reg 54721 n. 50.

[10] Congress also adopted identical language to the PDA, which encompasses a wide array of related medical conditions including abortion, against the background of floor statements by legislators opposing the PWFA because it would require accommodations related to abortion further demonstrating Congress understood this language would be interpreted to encompass abortion. *See, e.g.*, 168 Cong. Rec. S7049 (statement of Sen. Thom Tillis); 167 Cong. Rec. H2325, H2330, H2332 (statements of Rep. Letlow, Rep. Good, and Rep. Miller).

limitations arising out of these conditions, including abortion, miscarriage, and lactation to name a few, if the accommodations are reasonable and do not cause an employer an undue hardship.[11]

II. The EEOC Has Correctly Interpreted the Rule of Construction Related to Section 702(a) of Title VII of the Civil Rights Act

The EEOC has stated that it would be interpreting 42 USC 2000gg-5 on a case-by-case basis consistent with how it currently handles requests under Section 702(a) of Title VII of the Civil Rights Act.[12] This rule of construction states, "[t]his Act is subject to the applicability to religious employment set forth in Sec 702(a) of Title VII of the Civil Rights Act."[13] EEOC rightly relies on past precedent for determining what constitutes a "religious corporation, association, education institution, or society" under section 702(a) of the Civil Rights Act of 1964.[14] It recognizes that Section 702(a) of Title VII allows religious institutions to prefer coreligionists; this language does not allow discrimination based on other protected characteristics.[15] Because the language in Section 702(a) of Title VII and the PWFA is the same, the EEOC concludes, "[t]he Title VII language does not categorically exempt religious organizations from making reasonable accommodations to the known limitations of employees under the PWFA."[16] We agree and note that the Senate rejected an amendment that would have broadly exempted religious employers from complying with the PWFA, demonstrating Congress's intent to ensure that employers of all types provide needed accommodations to workers with known limitations related to their pregnancy, childbirth, or related medical conditions under the PWFA.[17]

III. The EEOC Rightly Determined Employers Should Only Require Reasonable Documentation for Medical Issues, But We Urge the EEOC to Consider Narrowing What It Considers "Reasonable Documentation"

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[11] *See* 88 Fed. Reg. 54721.

[12] 88 Fed. Reg. 54746, 54794.

[13] In relevant part, Section 702(a) of Title VII states, "[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.''

[14] 88 Fed. Reg. 54747.

[15] *See id.* at n. 196 (collecting circuit court cases).

[16] *Id.* at 54747.

[17] *See* S. Amdt. 6577, 117th Cong. (2022), https://www.congress.gov/amendment/117th-congress/senate-amendment/6577/text. (" Strike section __7(b) and insert the following: (b) Rule of Construction.--This division shall not be construed to require a religious entity described in section 702(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1(a)) to make an accommodation that would violate the entity's religion (as defined in section 701(j) of such Act (42 U.S.C. 2000e(j))."). This type of amendment was also rejected in the Education and Workforce Committee in the House. *See* Markup of H.R. 1065, Pregnant Workers Fairness Act, Before the H. Comm. on Educ. & Lab., 117th Cong. (Mar. 24, 2021) (substitute amendment offered by Rep. Russ Fulcher (R–ID)), https://docs.house.gov/meetings/ED/ED00/20210324/111413/BILLS-117-HR1065-A000370-Amdt-2.pdf. House Sponsor of the bill, Representative Nadler, made the correct interpretation of this language clear when he stated, "[p]roperly read, the rule of construction thus means that religious institutions can continue to prefer coreligionists in making pregnancy accommodations. For example, if a religious employer were choosing between making an available role related to 'religious employment' available to a pregnant worker as a light duty assignment or hiring a co-religionist for that role, it could do the latter without running afoul of the PWFA." 168 Cong. Rec. H. 10528 (2022) (statement of Rep. Nadler).

We support the portion of the proposed regulation clarifying that employers need not seek supporting documentation to grant an accommodation and providing limitations on employers who do decide to seek documentation, including that an employer is "only permitted to do so under the proposed rule if it is reasonable to require documentation under the circumstances" and may only require "reasonable documentation."[18] Many known limitations that may require accommodations under the PWFA are extremely time sensitive in nature; therefore, it is critical that the documentation process not be onerous to ensure that workers receive their accommodations in a timely manner. Additionally, given the highly personal nature of workers' pregnancy, childbirth, and related medical conditions, we strongly encourage EEOC to amend its definition of reasonable documentation (1636.3(1)(2)).[19] Employers do not need a detailed description of an employee's medical condition, if a healthcare provider has supplied: (1) a description of an employee's limitation that requires an accommodation, (2) verified that the limitation requires an accommodation that is related to pregnancy, childbirth, or a related medical condition, and (3) made clear that this limitation requires an accommodation. These modifications will balance employees' need to keep their sensitive medical information private with employers' need to verify an employee's request for an accommodation under the PWFA.

IV. Leave May Be an Appropriate Accommodation, and Whether the PWFA Requires an Employer to Provide Leave and Health Insurance Benefits While on Leave Should Be Evaluated Based on Criteria Internal to the PWFA

In general, we support the EEOC's recognition that leave is a possible and appropriate accommodation under the PWFA—although it cannot be mandated by an employer. However, we propose two modifications to the proposed rule in 1636.3(i)(3). Specifically, the Commission states that a covered entity has "[t]he ability to choose whether to use paid leave … or unpaid leave *to the extent that the covered entity allows employees using leave not related to pregnancy… to choose*…" 1636.3(i)(3)(iii). Similarly, the EEOC's proposed rule includes the following: "an employer must continue an employee's health insurance benefits during their leave period *to the extent that it does so for other employees in a similar leave status*."[20]. Given the history of the PWFA—that it was enacted against the background of *Young v. UPS*—the decision whether: (1) leave is an appropriate accommodation, and (2) to continue health insurance benefits while an employee is on PWFA leave, should be examined independently of other "similarly-situated employees" and on the basis of criteria internal to the PWFA.[21] As a result, we suggest that these comparison criteria not be included in the final regulation.

V. Conclusion

We support the EEOC's proposed rule which reflects the PWFA's careful balancing of the interests of employers and the needs of employees, so employees are not forced to choose between their jobs and their reproductive health.

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[18] 88 Fed. Reg. 54736-37, 54789.
[19] *Id*. at 54789.
[20] *Id.* at 54780-81.
[21] Of course, if an employer provides leave to other similarly-situated employees then that may indicate that providing these accommodations would not cause an undue hardship to the employer.

Sincerely,

Patty Murray
United States Senator

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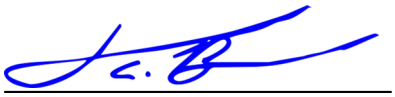

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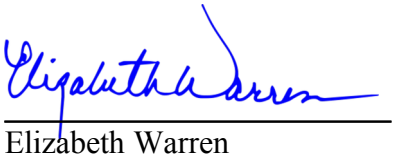

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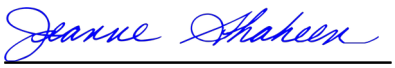

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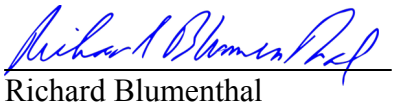

Richard Blumenthal
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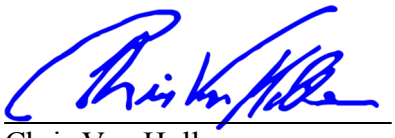
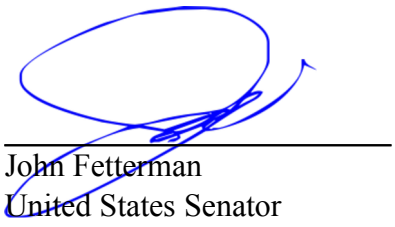


Chris Van Hollen
United States Senator



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