October 10, 2023

Chair Charlotte A. Burrows
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507
Via Regulations.gov

Re: Regulations To Implement the Pregnant Workers Fairness Act, Proposed Rule, RIN 3046–AB30

Dear Chair Burrows,

The Pregnant Workers Fairness Act (PWFA) was enacted to support pregnant women, not to promote abortion. The proposed rule[1] jeopardizes supportive work cultures for pregnant women by forcing employers to facilitate and promote abortions.

Christian Employers Alliance (CEA) opposes this effort to hijack the PWFA. CEA is a nonprofit organization whose mission is to unite, equip, and represent Christian-owned businesses to protect religious freedom and provide the opportunity for employees, businesses, and communities to flourish. CEA's members include for-profit and nonprofit employers, all of whom believe human life, from the moment of conception to natural death, is sacred. We believe human life should be honored and protected at all stages of life, and abortion is contrary to Christian values. Therefore, our employers support providing accommodations for pregnant women and oppose any attempt to force businesses or organizations to facilitate abortion.[2]

I. The Rule Threatens Pro-Life Employers.

The proposed rule threatens to prevent employers from fully and unconditionally supporting pregnant women and new life, for several reasons.

First, the rule's inclusion of abortion threatens to chill the *free speech* of employers expressing pro-life messages, such as messages supporting *Dobbs* or encouraging adoption over abortion. The rule vaguely makes it a violation to "coerce," "intimidate," "harass," "interfere with," or "retaliate" against employees because of their "right" to an abortion accommodation.[3] Employer speech and conduct

[1] EEOC, Proposed Rule, Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54,714 (Aug. 11, 2023).

[2] CEA is grateful for the contributions of Alliance Defending Freedom towards the preparation of this comment.

[3] *Id*. at 54,743–44, 54,771–54,772, 54,792–93 (proposed 29 C.F.R. §1636.5(f)). In addition to prohibiting employer retaliation, the rule makes it "unlawful to coerce, intimidate, threaten, harass, or interfere with any individual in the exercise or enjoyment of . . .any right granted or protected by the PWFA." *Id*. The anti-retaliation provision "protects an individual from conduct, whether related to employment or not, that a reasonable person would have found 'materially adverse,' meaning that the action 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id*. at 54,743. But PWFA's "broader" coercion provision "reaches those instances 'when conduct does not meet the materially adverse standard required for retaliation.'" *Id*. "Coercion"

need not be severe, pervasive, adverse, or hostile to be deemed as "intimidation," "harassment," or "interference." So, even if an employer grants abortion accommodations and does not deter employees from having an abortion, an employer could be accused of "intimidation" and "harassment" for taking a public or intra-office pro-life stance—such as favoring adoption over abortion[4]—if the stance could make women *feel* unwelcome for seeking an abortion accommodation. This vague standard could be used to stifle pro-life workplaces and to pressure corporate America to support abortion. Pro-life speech should not be deemed harassment, either under this rule or EEOC's harassment guidelines.[5]

Second, the rule lacks any conscience and free-speech exemptions, and EEOC seems intent on forcing religious employers to go to court to be able to assert any religious liberty protections. The rule nebulously incorporates Title VII's religious exemption, but EEOC reads this exemption only to cover religious discrimination claims for hiring co-religionists rather than the entire employment relationship or PWFA claims, and EEOC also takes a narrow view of the ministerial exception.[6] EEOC even says that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, may be no defense at all in some cases and is no defense to private suits.[7]

EEOC thus should clarify how exactly the rule's intimidation, coercion, harassment, interference, and retaliation provisions apply. Can employers have pro-life work cultures? Can they explain that abortion harms women and takes a human life? Can employers counsel abortion-minded employees in favor of life, including by promoting adoption over abortion? Can they say they support *Dobbs*? And how will EEOC ensure that women do not feel unwelcome asking for pregnancy accommodations from employers forced to support abortion? Stifling pro-life speech is prohibited under the First Amendment. *See NIFLA v. Becerra*, 138 S. Ct. 2361 (2018). Moreover, because PWFA exempts all small employers, it is subject to (and fails) strict scrutiny for its coercion of religious companies. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Courts will not accept or defer to EEOC's extreme positions, so EEOC should provide categorical exemptions for the freedoms of speech, association, and religion now.

Third, the rule could make *pro-life and religious organizations* keep on staff employees who unapologetically have abortions, even if their behavior violates the organizations' pro-life or religious beliefs and tenets and even if a primary reason the organization exists is to protect life. The rule prohibits an employer from considering an accommodation request when making employment decisions, which suggests that employers who learn of an employee's abortion through an

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includes for example requesting medical documentation when it is not reasonable, *id*. at 54,738, or telling a worker that requesting an accommodation would be a "black mark," *id*. at 57,744.

[4] *E.g.*, Peter Rex, *Companies Should Support Adoption, Not Abortion*, Newsweek (July 13, 2022), https://www.newsweek.com/companies-should-support-adoption-not-abortion-opinion-1723563.

[5] *See* EEOC, "Proposed Enforcement Guidance on Harassment in the Workplace," Federal Register (Oct. 2, 2023), https://www.federalregister.gov/documents/2023/10/02/2023-21644/proposed-enforcement-guidance-on-harassment-in-the-workplace.

[6] *Id*. at 54,746–47, 54,749, 54,794.

[7] *Id*. at,747.

accommodation request cannot discipline that employee for violating the organization's beliefs.[8] The rule also considers it "intimidation" for an employer to say that requesting an accommodation will result in the applicant not being employed.[9] EEOC requires employers to change their employment policies to add PWFA exceptions.[10] And EEOC says directly that under the Pregnancy Discrimination Act (PDA) in Title VII, 42 U.S.C. § 2000e-2(k) employers cannot consider an employee's abortion in hiring, firing, and promotion decisions.[11]

EEOC thus should clarify whether under its rule pro-life and religious organizations must keep on staff employees who unapologetically have abortions, even if doing so violates the organizations' pro-life or religious beliefs. What pro-life employment decisions can employers make? For instance, if a pro-life pregnancy care center's director requests special privileges to take time off to obtain an elective abortion, may the center remove the director? How do the First Amendment, RFRA, and Title VII's religious exemption provide any defenses to a PWFA or PDA claim?

Fourth, the rule's inclusion of abortion could force employers to give employees *special privileges for the act of seeking elective abortions*, such as extra leave, remote work, or working from other states.[12] Virtually all employers already allow employees to use available time off, especially earned time off, for whatever they choose, subject to the scheduling needs of the business. This rule seems to do more than allow use of standard leave time, and instead seems to be designed to give special privileges for the act of seeking an elective abortion to enable employees to travel from pro-life states to pro-abortion states. The rule requires indefinite unpaid leave beyond FMLA requirements, and it sweeps in employees and employers that the FMLA does not cover.[13] The rule also allows employees to bypass the normal processes to be eligible to take paid or unpaid leave, like needing prior approval or giving advance notice.[14]

EEOC thus should state to what extent this rule requires employers to give special privileges to facilitate the act of obtaining an elective abortion beyond any other employee's request for leave for other medical procedures. Will this rule supersede or preempt state laws prohibiting the facilitation of an elective abortion? Does it require all employers, even employers in pro-life states and state employers, to accommodate the act of obtaining an elective abortion? On what basis does the federal government have the authority to force anyone to deny or ignore the personhood of unborn children? How does Congress have the power to preempt state pro-life laws? And why does EEOC never mention or protect unborn life anywhere in the rule?

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[8] *Id*. at 54,766 (proposed 29 C.F.R. §1636.1); (proposed *id*. at 54,770 (proposed 29 C.F.R. §1636.4); *id*. at 54,771–54,772 (proposed 29 C.F.R. §1636.5(f)); *id*. at 54,791 (proposed 29 C.F.R. 1636.4(c)).

[9] The rule prohibits "intimidating an applicant from requesting an accommodation for the application process by indicating that such a request will result in the applicant not being hired," and saying that requesting an accommodation would be a "black mark." *Id*. at 54,744.

[10] *Id*. at 54,744, 54,793 ("coercion" includes a policy limiting an employee's "rights to invoke PWFA protections (e.g., a fixed leave policy that states 'no exceptions will be made for any reason')").

[11] *Id*. at 54,714–15, 54,721, 54,774.

[12] *Id*. at 54,715–16, 54,727–29.

[13] *Id*. at 54,728–29.

[14] *Id*. at 54,728.

Fifth, the rule introduces confusion by not requiring a worker to have a present or recent pregnancy to get PWFA protections. Moreover, the rule seemingly includes non-female employees, such as males who identify as female, since the rule uses plural "they/their" pronouns to refer to a singular pregnant worker.[15] Does EEOC take the position that male employees—with male anatomy—have limitations arising from pregnancy, childbirth, and related medical conditions? Does EEOC's inclusion of low milk supply as a "related medical condition" include "chest-feeding" by men taking estrogen? Does the rule cover males with prosthetic pregnancies or seeking womb transplants? Or does the rule mean that a female employee's family member can have a known limitation that the family member's employer must accommodate? If no pregnancy is necessary, does EEOC's inclusion of "changes in hormone levels" mean that the rule protects the act of seeking gender interventions, such as cross-sex hormone treatments, puberty blockers, and sterilizing surgeries? Does EEOC's inclusion of infertility require employers to provide IVF leave for men who want time off for a surrogacy? Does EEOC's inclusion of birth control mean that employers must accommodate all employee efforts to avoid pregnancy? Must employers accommodate natural or artificial efforts to achieve pregnancy? Does EEOC's inclusion of menstrual cycles require on-demand menstrual leave? Is menopause included? Does the rule support adoptive parents, within or outside of the context of infertility or surrogacy?

EEOC should state that only women can get pregnant, give birth, and have related medical conditions. EEOC should use she/her pronouns for women and should not force employers to do otherwise.

II. The PWFA contains no abortion mandate.

The PWFA ensures that employers support pregnant women and their unborn children. EEOC lacks the authority to use it to protect the act of obtaining an elective abortion.

The PWFA requires employers to make "reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee," absent undue hardship to the employer. 42 U.S.C. §2000gg–1. Congress defined the term "known limitation" to mean a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," "whether or not such condition meets the definition of disability" in the Americans with Disabilities Act (ADA). 42 U.S.C. § 2000gg(4). But EEOC defines "pregnancy" to mean current, past, *potential or intended* pregnancy; EEOC defines "related medical conditions" more broadly than the statute to mean "medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth"; and EEOC provides that "related medical conditions" include "*termination of pregnancy*, *including via* miscarriage, stillbirth, or *abortion*" as well as infertility, fertility treatment, antenatal depression or anxiety, changes in hormone levels, menstrual cycles, use of birth control, lactation, and much more.[16]

EEOC's interpretation conflicts with the PWFA's text for several reasons. First, an employee's limitation to be accommodated must be a physical or mental condition that relates to, is affected by, or arises out of pregnancy, childbirth, or related medical conditions—meaning a medical condition *related to a present or recent pregnancy and childbirth*, *not any aspect of sexual or reproductive*

[15] *E.g.*, *id*. at 54,731, 54,735, 54,774–75.
[16] *Id*. at 54,721, 54,767, 54,774 (proposed 29 C.F.R. §1636.3(b)).

health. 42 U.S.C. § 2000gg(4). The choice to have an abortion concerning a healthy pregnancy does not satisfy this test. The PWFA's physical, mental, and medical conditions, as in the PDA, refer to "involuntary, detrimental impacts of pregnancy, childbirth, and related medical conditions on female workers."[17] Acts to obtain products or services are not medical conditions, let alone physical or mental conditions. By defining abortion as being encompassed by the PWFA, EEOC incorrectly defines actions or other non-conditions as medical conditions.

Second, employers must *accommodate* pregnant working women by enabling them to keep their jobs and their babies, but accommodating the act of seeking an elective abortion seeks *to avoid, rather than to accommodate*, pregnant women and unborn children. U.S.C. §§ 2000gg(4), 2000gg–1. Accommodating the act of seeking an elective abortion does not accommodate a pregnancy or childbirth, or pregnancy-related medical conditions. Abortion is not healthcare, and it does nothing to make a workplace accessible for women with pregnancies. Forcing employers to facilitate elective abortions against their pro-life views is *never* reasonable—it is instead *per se* an undue hardship.

Third, the EEOC must calculate the negative economic effects of the perverse incentives that this rule would create by ramming abortion into the PWFA. The statute's intimidation, coercion, harassment, interference, and retaliation provisions seek to protect pregnant and post-partum women from being made to feel that their accommodation requests are or would be unwelcome.[18] But making employers offer special privileges for the act of seeking an elective abortion could make many pregnant women feel unwelcome for seeking accommodations to continue their pregnancies. An abortion accommodation regime could create a chilling effect on employees who choose to nurture the unborn lives within them instead of accepting extended leave to get an abortion. Promotion of abortion options by employers complying with this rule could intimidate pregnant employees who do not want abortions. Accommodations for continuing pregnancy could be seen as requiring more time and expense than an abortion, so an employer could try to claim they are not a reasonable accommodation, and that abortion is the only reasonable accommodation they need to offer. Deriving this anti-pregnancy consequence from the pro-pregnancy PWFA is just one absurd consequence of the proposed rule's flawed incorporation of abortion into the statute.

Fourth, the proposed rule violates the PWFA's explicit statement that it shall not be construed "to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000gg–5(a)(1). State pro-life laws shield pregnant women and unborn children from the harms of elective abortion. Women and unborn children are "individuals" protected under these state and local laws, and Congress did not exclude either women or unborn children from the PWFA term "individuals." This rule seems to suggest that if an employer accommodates an abortion that act displaces state pro-life laws.

[17] Zachary G. Garrett, The Ghost of *Gilbert*: Title VII Abortion Discrimination Actions After *Dobbs* at 22–23 (May 1, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4432358.

[18] 88 Fed. Reg. at 54,743–44, 54,771–54,772, 54,792–93 (proposed 29 C.F.R. §1636.5(f)).

III. Legislators disavowed a pro-abortion interpretation of the PWFA.

The PWFA's lead sponsor, Democrat Senator Bob Casey of Pennsylvania, said: "I want to say for the record [that] under the Pregnant Workers Fairness Act, the Equal Opportunity Employment Commission, the EEOC, could not—could not—issue any regulation that requires abortion leave, nor does the act permit the EEOC to require employers to provide abortions in violation of State law." 168 Cong. Rec. S7050 (Dec. 8, 2022).

The lead Republican cosponsor, Senator Bill Cassidy, likewise said: "I reject the characterization that this would do anything to promote abortion." *Id*. Senator Steve Daines concurred: "I want to make clear for the record that the terms 'pregnancy' and 'related medical conditions,' for which accommodations to their known limitations are required under the legislation, do not include abortion. ... This legislation should not be misconstrued by the EEOC or Federal courts to impose abortion-related mandates on employers, or otherwise to promote abortions, contrary to the intent of Congress." 168 Cong. Rec. S10081 (Dec. 22, 2022).

No Democrat member of Congress contradicted them.

EEOC cannot impose abortion mandates through the PWFA in the absence of clear text from Congress. *Biden v. Nebraska*, 143 S. Ct. 2355, 2374 (2023). A decision of this magnitude—to mandate abortion as a protected class in employment—is not committed to EEOC's discretion. EEOC should withdraw the proposed rule and issue one that protects pregnant women and their unborn children.

Respectfully Submitted,

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