EO 12866 Meeting on the Proposed "Pregnant Workers Fairness Act Regulations," RIN 3046-AB30

July 14, 2023

Thank you for the opportunity to provide comments on the Office of Information and Regulatory Affairs' review of the Equal Employment Opportunity Commission's (EEOC) proposed regulations implementing the Pregnant Workers Fairness Act.

I. The USCCB supported the Pregnant Workers Fairness Act.

The U.S. Conference of Catholic Bishops (USCCB) supported the Pregnant Workers Fairness Act (PWFA) and was heavily involved in negotiations and advocacy leading up to its passage – our statement in support of the bill was even quoted on the Senate floor – so we are well positioned to speak on what it does and does not mean.

The Pregnant Workers Fairness Act has the goal, consistent with the bishops' stated priority of building a society that cares for expectant mothers and their preborn children, of removing the unique disadvantages that pregnant women and women giving childbirth have experienced under existing law when seeking accommodations in the workplace. The bishops have repeatedly called for circumstances of employment that better support family life, especially challenges associated with having children.[1] This is why we worked hard to support passage of this historic, bipartisan legislation to support the well-being of pregnant women workers and their preborn children.

Some advocacy groups are now making the strained claim that PWFA requires accommodations for abortion. During Congress's deliberations over PWFA, some pro-life advocates, in an abundance of caution, had expressed concern that the EEOC might construe it that way. But PWFA does not have the goal of expanding access to abortion, and the EEOC should not reinterpret it as if it did.

II. Reasonable accommodation for pregnancy, childbirth, and related medical conditions does not include any abortion-related benefit.

A. The text and legislative history of PWFA clearly foreclose an interpretation that it covers accommodations for abortion.

PWFA does not require the provision of any benefit for purposes of facilitating an abortion (e.g., leave). The intent of PWFA is to require accommodations for "pregnancy," "childbirth," and "related medical conditions"—in other words, to assist pregnant workers and workers giving birth to a child by providing them with accommodations that would permit them to continue to remain both gainfully employed and healthily pregnant. For that reason, PWFA uses the words "pregnancy," "childbirth," and "related" medical conditions. Abortion is plainly

[1] *See, e.g.*, Letter from USCCB Committee Chairmen to Congress, Oct. 26, 2022, available at https://www.usccb.org/resources/USCCB%20Letter%20and%20Policy%20Recommendations%20Supporting%20Women%20and%20Families%20-%20Oct%202022_0.pdf.

not pregnancy or childbirth. And it is not relevantly "related" to pregnancy or childbirth because it *ends* pregnancy and *prevents* childbirth, the very conditions that were *not* being accommodated under previous law and that Congress, by passage of PWFA, now intends employers to accommodate. Because it ends pregnancy and prevents childbirth, abortion is the conceptual opposite of pregnancy and childbirth and hence not a "related medical condition." (Strictly speaking, abortion is not a "condition" at all, it is a procedure that ends the life of a preborn child.) PWFA says nothing about abortion and that is because it has nothing to do with abortion.

Members of Congress recognized all of this. When the Senate HELP Committee reported the PWFA out of committee by a vote of 19-2, Senator Patty Murray stated "Too many pregnant workers still face pregnancy discrimination and are denied basic accommodations—like being able to sit or hold a water bottle—to ensure they can stay healthy and keep working to support themselves and their families. No one should be forced to decide between a healthy pregnancy and staying on the job—so we must pass the Pregnant Workers Fairness Act without delay."[2] These comments clearly do not contemplate an intent to cover abortion. Senator Bob Casey, lead sponsor of the bill in the Senate, stated on the Senate floor: "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."[3] This statement was later endorsed and described as the intent of Congress by Sen. Daines: "Senator Casey's statement reflects the intent of Congress in advancing the Pregnant Workers Fairness Act today. 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."[4] No Senator objected to that characterization.

Even if the EEOC is inclined to view the text of the PWFA as ambiguous on whether it includes abortion – which it unambiguously does not – the legislative history plainly forecloses an interpretation that it does.

It is true that two courts of appeal have found – wrongly, in our view – that Title VII, as amended by the Pregnancy Discrimination Act, can prohibit discrimination on the basis that a woman has had or is contemplating having an abortion. But those cases do not bear on the meaning of PWFA.

First, one of those cases, *Turic v. Holland Hospitality*, 85 F.3d 1211, 1214 (6th Cir. 1996), was about firing only, and did not involve questions of accommodations at all. The other case, *Doe v. C.A.R.S. Protection Plus*, 527 F.3d 358 (3d Cir. 2008), while involving some factual discussions of leave, focused on whether the employee has been terminated for having an abortion (per se).

[2] https://www.help.senate.gov/chair/newsroom/press/senate-help-committee-advances-bipartisan-bills-to-improve-suicide-prevention-protect-pregnant-workers-and-support-people-with-disabilities
[3] https://www.congress.gov/117/crec/2022/12/08/168/191/CREC-2022-12-08-senate.pdf
[4] https://www.congress.gov/congressional-record/volume-168/issue-200/senate-section/article/S10081-2

Second, in drafting PWFA, Congress chose not to amend Title VII but to write PWFA as a freestanding law. This suggests a desire not to import any abortion-related requirements that have been read into Title VII by the courts, and explains why members of Congress confidently disclaimed any intent for PWFA to include abortion accommodations.

B. The principle of constitutional avoidance counsels against interpreting PWFA to cover abortion.

Misinterpreting PWFA to cover accommodations for abortion would create significant constitutional problems. Even if its incorporation of Title VII's exemption for religious employers is appropriately construed (as we discuss further below), many employers that oppose abortion are not necessarily "religious organizations" within the meaning of that exemption. For instance, the March for Life, whose principal purpose is to advocate on behalf of preborn children, would likely not qualify as a religious organization under the multifactor test typically used by courts. And as *Hobby Lobby* recognized, some for-profit businesses can exercise religion. Thus, even an appropriately broad reading of PWFA's incorporation of Title VII's religious exemption would not fully alleviate the conflicts between PWFA and employers' rights to free speech, expressive association, and free exercise of religion. The simplest application of the principle of constitutional avoidance – a canon of statutory construction that directs statutes to be construed in a way that avoids conflicts with the Constitution – would be to exclude abortion from the scope of PWFA.

If the EEOC rule does interpret PWFA to require accommodations for facilitating an abortion, then issues of constitutional avoidance will arise in the interpretation of the law's prohibitions on retaliation. Those provisions prohibit employers from discriminating against employees who oppose acts or practices made unlawful by PWFA, and from "interfering with" rights protected under PWFA.

It is common for religious and mission-driven employers to maintain policies about employee conduct that are designed to protect the integrity of the organization's religious or mission-oriented identity. Those policies often impose discipline on employees who contradict the organization's religious beliefs or mission, and are constitutionally protected exercises of free speech, expressive association, and/or the free exercise of religion. Maintenance or enforcement of those policies in relation to employees asserting rights under PWFA – that is, claims to a right to an accommodation for abortion – could be regarded as violations of PWFA's anti-retaliation provisions. In this way, unless PWFA's anti-retaliation provisions are narrowly construed, they would create constitutional conflicts.[5]

[5] Given that the Religious Freedom Restoration Act (RFRA, discussed in more detail below) is "quasi-constitutional," the EEOC arguably bears a similar obligation to interpret PWFA in a manner that avoids conflicts with RFRA. However, given that PWFA omits many employers from its reach, it would likely not be regarded as a law of "general applicability" and thus would be subject to the same strict scrutiny analysis under the First Amendment that would apply under RFRA. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (holding that a law was not generally applicable because it allowed for discretionary exemptions).

C. The EEOC's authority to interpret PWFA to cover abortion is further limited by the major questions doctrine.

The Supreme Court has recently struck down a number of agency actions under the major questions doctrine, a principle of administrative law that holds that a federal agency may not exercise powers of vast economic and political significance unless Congress has clearly assigned the agency with the authority to do so. *See, e.g., Biden v. Nebraska*, No. 22-506 (U.S. June 30, 2023), slip op. at 20; *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021); *Nat'l Fed. of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022); *W. Va. v. EPA*, 142 S. Ct. 2587, 2610 (2022).

The inclusion of abortion accommodations within PWFA would surely fall under the doctrine. The issue of abortion is preeminent in American politics, and PWFA's reach captures a broad swath of the economy. As discussed above, the EEOC cannot possibly claim that Congress has spoken clearly *in favor* of including abortion accommodations within PWFA's scope; if anything, Congress has clearly excluded them. Even assuming for the sake of argument that PWFA's text is ambiguous on the matter, the major questions doctrine prevents the EEOC from exploiting that ambiguity to impose an obligation to facilitate abortions on a vast number of employers.

III. Interactive process

Under the prevailing understanding of the process for identifying a reasonable accommodation, employers are required to engage in an interactive process with the employee in order to enable the employer to obtain relevant information. For instance, the EEOC's guidance on the ADA suggests that employers may, with employees' permission, request medical records regarding a disability giving rise to a request for an accommodation. But, as applied to abortion, it seems this interactive process would encourage employers to seek sensitive information about an employee's anticipated or actual abortion. This is another reason that PWFA should not be construed to relate to abortion. Indeed, in other quarters the administration has proposed rules that, under the Health Insurance Portability and Accountability Act (HIPAA), would heighten the confidentiality of information about abortion. An interpretation of PWFA that now requires or permits such disclosure would tack in the opposite direction. We note this not because we agree with the proposed HIPAA rules (we have filed comments opposing them), but to underscore the internal inconsistency.

IV. Religious exemption

PWFA states that "This chapter is subject to the applicability to religious employment set forth in section 2000e-1(a) of this title [section 702(a) of the Civil Rights Act of 1964]." Section 702(a) of the Civil Rights Act says "This subchapter 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." 42 U.S.C. 2000e-1(a).

Senator Bill Cassidy stated in Senate debate: "Is it possible that this law would permit someone to impose their will upon a pastor, upon a church, upon a synagogue, if they have religious exemptions? The answer is, absolutely no…The Title VII exemption, which is in federal law, remains in place. It allows employers to make employment decisions based on firmly held religious beliefs. This bill does not change this."[6]

This legislative history suggests that Congress passed PWFA with a correct understanding of the Title VII religious exemption in mind – that is, it does not merely exempt religious employers from claims of discrimination on the basis of an employee's faith, or simply protect the right to hire co-religionists. It also protects religious employers from claims arising out of employment decisions motivated by the employer's religious beliefs, even if such claims are cast as discrimination on the basis of sex.[7]

V. Undue hardship/substantial burden

If the EEOC regulations require accommodations for abortion, they should acknowledge that it would be a per se undue hardship for any employer opposed to abortion (whether or not the employer is a religious organization under Title VII 702(a)). Just last Term, the Supreme Court construed the phrase "undue hardship" as used in Title VII to mean a "substantial" burden on the employer, *Groff v. DeJoy*, No. 22-174 (U.S. June 29, 2023), and that would necessarily include any workplace requirement that substantially burdens an employer's religious beliefs and practices.

A similar framing is required under the federal Religious Freedom Restoration Act (RFRA). The Supreme Court has acknowledged that RFRA can operate as a defense to a federal workplace requirement that substantially burdens the employer's religious belief, whether the employer is for-profit or nonprofit. *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014) (for-profit); *Zubik v. Burwell*, 578 U.S. 403 (2016) (nonprofit); *see also Braidwood Mgmt. v. EEOC*, No. 4:18-CV-824, 2023 WL 4073826 (5th Cir. June 20, 2023) (upholding lower court order that enjoins EEOC from enforcing its workplace guidance against business owner with religious objection).[8]

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[6] https://www.congress.gov/117/crec/2022/12/08/168/191/CREC-2022-12-08-senate.pdf

[7] For a detailed discussion of this issue, see our December 2020 comments to the EEOC, available here: https://www.usccb.org/sites/default/files/about/general-counsel/rulemaking/upload/12.10.2020.EEOC_.comments-on-TitleVII-manual.pdf, and Part I of our March 2023 comments on the joint rulemaking on partnerships with faith-based organizations, available here: https://www.usccb.org/sites/default/files/about/general-counsel/rulemaking/upload/2023.3.1.final_.NPRM_.FBPs_.pdf. *See also Fitzgerald v. Roncalli High School, Inc. et al.*, No. 22-2954 (7th Cir. July 13, 2023) (J. Brennan, concurring) ("[W]hen a covered employer demonstrates that an adverse employment decision was made because the relevant individual's beliefs, observances, or practices did not conform with the employer's religious expectations, the exemption would apply and bar a Title VII claim on that employment decision.").

[8] Proceeding with the RFRA analysis, once the employer made its prima facie case that accommodating abortion would substantially burden its religious exercise, the government would be required to show it has a compelling government interest in forcing that particular employer to make those particular accommodations, and that doing so is the means of furthering that interest that is the least restrictive of the employer's religious exercise. 42 U.S.C. 2000bb-1(b). The EEOC would lose on the compelling interest prong. There is no cognizable legal or policy interest in facilitating the killing of preborn children. It cannot be found in the Constitution. *Dobbs v. Jackson Women's*

VI. Relevance of *303 Creative*

If the EEOC interprets PWFA to require abortion accommodations, employers would necessarily have to engage in some form of speech in connection with compliance with that requirement. This suggests that the EEOC would also need to re-review the rule in light of *303 Creative v. Elenis*, No. 21-476 (U.S. June 30, 2023), which raises new constitutional concerns about compelled speech in the commercial setting.

VII. Regulatory impact analysis

The PWFA regulations will require the estimation of numerous costs and benefits, both quantitative and qualitative. We will mention only two such issues here.

First, if the rule includes abortion accommodations, and especially if it includes abortion leave, calculating the cost that such a requirement would impose on employers and the economy would be extraordinarily complex. In the post-*Dobbs* landscape, for any particular woman the closest abortionist may be in another state. Time of travel will vary based on geography. Time of recovery will vary based on the method of abortion, the stage of pregnancy at the time of the abortion, and the incidence of complications from the abortion. A functional estimate of the impact of an abortion leave requirement would need to account for each of these factors.

Second, providing accommodations for abortion could constitute pregnancy discrimination against pregnant employees who do not get abortions and are not offered equivalent benefits. For instance, consider an employer that offers leave for travel to see an out-of-state abortionist, but declines to offer leave for travel to see an out-of-state obstetrician on the grounds that there are local obstetricians, so leave for travel to an out-of-state obstetrician is not reasonable. Such a decision would expose the employer to a claim that it is discriminating against women who do not get abortions. So the rule's cost estimate would need to calculate the cost of additional benefits that employers would have to provide to avoid such discrimination charges, and the costs incurred by employers who do not provide such benefits and are sued for discrimination, and include those costs in the RIA. This incoherence – construing a law meant to prevent sex discrimination in a way that results in sex discrimination – would also likely render the EEOC rule arbitrary and capricious and contrary to law.

VIII. Conclusion

In conclusion, the passage of PWFA was a rare bipartisan win made possible by the willingness of members of Congress on both sides of the aisle to keep the bill focused on the wellbeing of pregnant women and their preborn children, rather than treading into the divisive area of abortion. We respectfully urge the EEOC to honor Congress's intent in that regard.

Health Organization, 142 S. Ct. 2228 (2022). Nor could the EEOC point to a single act of Congress that expressly promotes abortion as the basis for asserting such an interest.