EEOC-2023-0004

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October 10, 2023

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Attention: Regulations to Implement the Pregnant Workers Fairness Act NPRM
(RIN 3046–AB30, Docket No. EEOC-2023-0004)

Submitted via www.regulations.gov.

Dear Mr. Windmiller:

I write to comment on the Notice of Proposed Rule Making (NPRM) for "Regulations to Implement the Pregnant Workers Fairness Act" (RIN 3046–AB30, Docket No. EEOC-2023-0004), pursuant to the notice and comment process outlined in and protected by 5 U.S.C. § 553(c).

The Commission's Initial Regulatory Impact Analysis contained in the NPRM for this proposed rule greatly understates its costs and erroneously argues that "the agency has selected the approach that maximizes net benefits."[1] I have identified five key shortcomings:

1. The Commission ignores costs related to workers other than those who give birth in a given year.

The Commission attempts to estimate the potential cost of accommodations only for women who gave birth during the past year. The plain language of the statute encompasses "any physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions," which obviously also includes at least some conditions (such as miscarriage) that affect populations other than women who gave birth during the past year.[2] Furthermore, the Commission proposes that "whether a worker has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions shall be construed broadly to the maximum extent permitted by the PWFA," effectively including all conditions (and decisions) associated with human reproduction (or lack thereof).[3] This broad interpretation not only violates Congressional intent with

[1] NPRM, page 54764
[2] 42 U.S.C. § 2000gg(4)
[3] NPRM, page 54773

respect to matters such as accommodation of abortion,[4] but the Commission fails to consider the possibility that a narrower interpretation of the statute could maximize net benefits.[5]

2. The Commission does not estimate the number of pregnant workers who potentially gain a right to accommodation at the most relevant level of granularity.

The Commission begins by estimating the number of employees in three major sectors of employment (private sector establishments with 15 or more employees, state and local government, and the federal government), then further divides each category in two based on the preexisting legal regime (whether the workers in the state or locality were already covered by a law similar to the PWFA).

The Commission then calculates two national percentages: the share of all workers who are women of reproductive age (33 percent) and the share of these women who gave birth in the previous year (4.7 percent). It applies these percentages to the numbers of employees calculated above to estimate the number of workers who potentially require an accommodation under the PWFA during a given year.[6]

This calculation implicitly and unnecessarily assumes that working women who recently gave birth represent the same share of employees across all major sectors and preexisting legal regimes, even though it is well known that women are more likely to work in some types of jobs than in others and that fertility rates vary by state.[7] Fortunately, the dataset with which the Commission calculated these percentages contains sufficient detail to perform the same calculations at a more granular level. The Commission should do so, in order to obtain a better estimate of the number of pregnant workers potentially gaining a right to accommodation.

3. The Commission misapplies survey results in a way that underestimates the share of pregnant workers who will require an accommodation.

The Commission claims, "Survey research has shown that 71 percent of pregnant workers experience some type of pregnancy-related limitation that might require an accommodation. The Commission thus adopts 71 percent as its upper-bound estimate of the percentage of pregnant workers needing accommodation."[8]

In fact, the survey in question shows that 71 percent of women who recently gave birth faced, during pregnancy, a need to "take more frequent breaks, such as extra bathroom breaks." For the other three

[4] Comment by Senator Bill Cassidy, M.D., Ranking Member, U.S. Senate Committee on Health, Education, Labor, and Pensions, September 29, 2023, https://www.help.senate.gov/imo/media/doc/pwfa_comment_letter.pdf (accessed October 10, 2023)

[5] Most obviously, net benefits could be improved by not requiring an employer to accommodate an employee who desires to obtain an elective abortion, which would result in the unnecessary destruction of valuable human life. Beyond this, the statute may not require accommodations for matters related to potential pregnancy, and these accommodations may not pass a benefit-cost test.

[6] NPRM, pages 54717 and 54757

[7] Footnote 35 of the NPRM even mentions the overrepresentation of women among elementary and middle school teachers.

[8] NPRM, page 54757

situations that were surveyed, the share of affirmative responses ranged from 40 percent to 61 percent. Because those who needed other accommodations did not necessarily also need to take more frequent breaks, 71 percent represents the *minimum* (not the maximum, as the Commission claims) share of pregnant workers that might require an accommodation.

The Commission further argues, "Based on this research, the Commission has calculated that approximately 23 percent of pregnant workers have faced a pregnancy-related limitation but did not receive a workplace accommodation, either because they did not ask for one or because the employer did not address the need when the issue was raised. … The Commission thus adopts 23 percent as its lower-bound estimate of the percentage of pregnant workers who will need, and be newly entitled to, a reasonable accommodation under the proposed rule and underlying statute."

Again, this is a misapplication of the survey. For each of the four possible accommodations that were included in the survey, at least 18 percent and as many as 32 percent of respondents either needed but did not request the accommodation or needed and requested the accommodation but were denied. The Commission simply averaged these four numbers to arrive at 23 percent when, in fact, the survey shows that at least 32 percent of pregnant women report needing but not receiving an accommodation to which they now have right under PWFA. As earlier, unless all the women who reported needing but not receiving other accommodations also reported needing but not receiving more frequent breaks (again, the highest-ranking category), then the true share of pregnant women who will need, and be newly entitled to, a reasonable accommodation exceeds 32 percent.

Furthermore, by applying these percentages (32 percent and 71 percent) from a national survey—which includes respondents who already had a right to accommodation under preexisting state or local law—only to the estimated number of pregnant workers who gained a right to accommodation under the PWFA, the Commission has implicitly assumed that these state and local laws had no effect whatsoever on the likelihood that a pregnant worker would seek an accommodation from her employer or that her employer would provide an accommodation in response to her request. If that were the case, then the applicable percentage of pregnant workers who need an accommodation (adjusted for the errors noted above) should be applied not only to those who gained a right to accommodation under the PWFA but to all pregnant workers. That, of course, would place the Commission in the untenable position of arguing that state and local PWFA-like laws have no effect, but the federal PWFA does.

Instead, it is almost certainly the case that state and local PWFA-like laws increase the likelihood that a pregnant worker will request an accommodation from her employer, as well as the likelihood that her employer will grant her request, making those who sought and received accommodations overrepresented among this group. Similarly, those who did not seek accommodations or whose request was denied should be relatively overrepresented among those who gain new rights under the PWFA. The Commission's analysis ignores this possibility. As a result, it almost certainly underestimates the share of pregnant women who will request and receive an accommodation under the PWFA.

4. The Commission's estimate of the marginal cost per accommodation is too low.

The Commission unreasonably assumes there is no cost associated with processing each request for an accommodation, even though it obviously requires some management time and likely human resources department time as well to document and ensure compliance with the PWFA.

The Commission simply focuses on the purchase of durable goods needed for certain accommodations and suggests, "The Commission seeks comment on whether the annual cost of providing non-zero cost accommodations should be calculated based on durable goods with a useful life of five years."[9] This does not consider the fact that an employer—particularly a small employer—is unlikely to have much use for the durable good beyond the period in which it is being used to provide an accommodation for the particular employee for whose benefit it is purchased. Even if the depreciation schedule says the good should last five years, it is unlikely to be worthwhile to attempt to resell it. Therefore, in most cases, the cost of the accommodation should include the full cost of any durable goods purchased.

5. The Commission's estimate of fixed administrative costs is far too low.

The Commission assumes a small amount of what it calls "One-Time Administrative Costs for Covered Entities" and "The Commission seeks comment on whether 90 minutes accurately captures the amount of time compliance activities will take for a covered entity in States that do not already have laws substantially similar to the PWFA and for the Federal Government, and whether 30 minutes accurately captures the amount of time compliance activities will take for a covered entity in States that have existing laws similar to the PWFA."[10]

The Commission has reasonably advised, "Because the statute and the regulations emphasize employee notice that is simple and straightforward, and need not be in writing, covered entities should train first-line supervisors to recognize such requests as requests for accommodations and to act on them accordingly."[11] Even in the first year, it is inconceivable that every person who needs to be made aware of the new law and instructed in how to handle requests for accommodation can be properly trained at a cost as low as 30 or even 90 minutes of total employee time per establishment; it will take longer than that for even one person to read and understand the proposed rule.

Furthermore, as new businesses are formed and as new individuals move into supervisory roles at new or existing businesses, these individuals will have to be made aware of the requirements of the PWFA, so administrative costs will continue (albeit to a lesser extent) beyond the first year of implementation.

For these five key reasons, the NPRM, with the included Initial Regulatory Impact Analysis, fails to provide a reasonable estimate of the cost of the proposed rule as required by Executive Order 12866. The result is a proposed rule that may be found to be "arbitrary and capricious" under the relevant legal standards.[12] I urge you to reject the proposed rule as written and pursue further analysis.

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[9] NPRM, page 54759
[10] NPRM, page 54749
[11] NPRM, page 54717
[12] Motor Vehicle Manufacturers Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

EEOC-2023-0004

Respectfully submitted,

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[13] Affiliation and title provided for identification purposes only. I submit this comment in my personal capacity only and not as an employee of The Heritage Foundation.