October 10, 2023

Mr. Raymond Windmiller
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: Equal Employment Opportunity Commission (EEOC) proposed "Regulations To Implement the Pregnant Workers Fairness Act" [RIN 3046-AB30]

Submitted via www.regulations.gov.

Dear Mr. Windmiller:

I appreciate this opportunity to provide comment on the "Regulations To Implement the Pregnant Workers Fairness Act."[1]

Proposed Rule Summary

The EEOC's proposed rule is on the implementation of the Pregnant Workers Fairness Act (PWFA), which requires employers to provide reasonable accommodations to employees for pregnancy, childbirth, and related medical conditions. The EEOC's rule expands the definition of related medical conditions to include factors unrelated to pregnancy and maintaining a healthy pregnancy, and includes abortion, in opposition to Congress's intent.

The EEOC's economic analysis is incomplete as it includes only a fraction of the workers its proposed definitions include, it fails to account for differences in economic impacts on employers across different states, and it fails to account for the value of lost lives induced by the EEOC's specification of an abortion accommodations mandate.

Proposed Rule Provides Incomplete Economic Analysis

Pursuant to Executive Orders 12866 and 13563, and as amended by Executive Order 14094, the EEOC performed a regulatory economic analysis of proposed regulations, including the one-time administrative costs ranging from $56.76 to $170.27 per establishment and annual, economy-wide costs of between $7.1 million and $21.2 million to provide reasonable accommodations under the proposed rule.

The EEOC's estimated annual costs violate the economic analysis requirement in at least three ways, including:

[1]U.S. Equal Employment Opportunity Commission, "Notice of Proposed Rulemaking; Request for Comments," *Federal Register*, Vol. 88, No. 154 (August 11, 2023), pp. 54714–54794, https://www.govinfo.gov/content/pkg/FR-2023-08-11/pdf/2023-17041.pdf (accessed October 10, 2023) (hereinafter "proposed rule").

1. Using the wrong base for the number of workers eligible for an accommodation, including only women who have given birth in a given year;
2. Failing to differentiate costs across states; and
3. Ignoring the costs of lost lives through increased likelihood of abortion.

1. The EEOC uses the wrong base for the number of workers eligible for an accommodation, including only women who have given birth in a given year.

The proposed rule estimates that "[t]he sum of the expected number of pregnant women eligible for PWFA accommodations…is 1,000,000."[2] This figure is based on the EEOC's estimate that 63.6 million employees work in states and for employers that will be newly subject to PWFA accommodations. Of those 63.6 million employees, the EEOC estimates that 33 percent are women of child-bearing age (16–50 years old), and that 4.7 percent of women between the ages of 16 to 50 "gave birth to at least one child the previous year."[3] This yields the EEOC's estimate that 1,000,000 "pregnant employees" will be newly eligible for accommodations under the PWFA.

The EEOC then estimates that 23 percent of these newly eligible "pregnant women" would have a need for an accommodation that they previously would not have received and concludes that "[a]pplying this percentage yields lower-bound estimates of approximately…240,000 [pregnant workers] who will need, and be newly entitled to, reasonable accommodations under the proposed rule and underlying statute in a given year."[4]

This is not a reasonable estimate for the number of workers who, by the EEOC's definition of "related medical conditions," are covered by and will seek reasonable accommodations under the EEOC's altered interpretation of the law.

The EEOC's expanded interpretation of medical conditions covered by the PWFA includes a significantly larger population than the subset of workers newly covered by the PWFA who are women ages 16 to 50 and who gave birth in that year. As detailed below, the EEOC's definitions of "pregnancy," "childbirth," and "related medical conditions" can apply to workers who did not give birth in the last year, who may not be between the ages of 16 and 50, and who may not even be women.

According to the EEOC:

> ''Pregnancy'' and "childbirth" include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy; labor; and childbirth (including vaginal and cesarean delivery). "Related medical conditions" are medical conditions which relate to, are affected by, or arise out of pregnancy or childbirth, as applied to the specific employee or applicant in question, including, but not limited to, termination of pregnancy, including via miscarriage, stillbirth, or abortion; infertility; fertility treatment;

[2]Ibid., p. 54758.
[3]Ibid., p. 54757.
[4]Ibid., p. 54758.

> ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstrual cycles; use of birth control; and lactation and conditions related to lactation, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. This list is non-exhaustive, and an employee or applicant does not have to specify a condition on this list or use medical terms to describe a condition in order to be eligible for a reasonable accommodation.[5]

The very first "related medical condition" that the EEOC lists is "termination of pregnancy, including via miscarriage, stillbirth, or abortion."

Yet, the EEOC's estimate is based on women who give birth. The EEOC's estimate of potentially affected workers excludes naturally occurring pregnancy losses that occur for roughly 20 percent of women with known pregnancies.

And more significantly, the EEOC's estimate excludes those who intentionally end their pregnancies through abortion. Using conservative estimates on the number of abortions in the U.S.: for every four pregnancies that end in birth, at least one pregnancy ends in abortion.[6]

Factoring in the EEOC's inclusion of "termination of pregnancy" to related medical conditions would increase the number of workers newly eligible for accommodations under the PWFA by approximately 57 percent.[7] Considering that accommodations include allowing leave from work, the increased factor could be even larger as a high percentage of workers seeking abortions are likely to have a need for leave, including both their own physical health as well as potentially substantial travel time that could be required to obtain an abortion out of state.

Finally, the EEOC's basis of women who give birth within a given year is too narrow to include all conditions the EEOC deems covered under the PWFA. The EEOC states that 4.7 percent of women ages 16 to 50 give birth in a given year, but the EEOC's interpretation covers "past

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[5]Ibid., p. 54767.

[6]Guttmacher estimated 930,160 documented abortions in clinical settings in 2020. The CDC reported 3,613,647 births in 2020. See Rachel K. Jones, Marielle Kirstein, and Jesse Philbin, "Abortion Incidence and Service Availability in the United States," Guttmacher Institute, *Perspectives on Sexual and Reproductive Health* (2022), pp. 128–141, https://onlinelibrary.wiley.com/doi/epdf/10.1363/psrh.12215 (accessed October 5, 2023); and Michelle J. K. Osterman et. al., "Births: Final Data for 2021," *National Vital Statistics Report*, Vol. 72, No. 1 (January 31, 2023), https://www.cdc.gov/nchs/data/nvsr/nvsr72/nvsr72-01.pdf (accessed October 5, 2023).

[7]Author's estimates based on the CDC's reported 3,613,647 births in 2020, and the Guttmacher Institute's report of 930,160 documented abortions in clinical settings in 2020. Combined, this equals 4,543,807 pregnancies that did not end in miscarriage. Assuming the approximation that 20 percent of known pregnancies ends in miscarriage, total known pregnancies would be 5,679,759, including 1,135,952 ending in miscarriage. Thus, the 3,613,647 births would need to be multiplied by a factor of 1.57 to account for all known pregnancies.

pregnancy," and "potential or intended pregnancy." Even assuming a narrow time frame for "related medical conditions" such as fertility, infertility, post-partum depression, and lactation, the number of workers seeking accommodations could easily double. Moreover, men could potentially qualify for "infertility" and "fertility treatment" accommodations as well as conditions such as carpal tunnel syndrome, depression, anxiety, and high blood pressure related to a spouse's pregnancy or the recent birth of a child.

Other comments have provided the case for why the EEOC has no authority to ignore Congress's intent and include abortion in the PWFA regulations and have explained the legal challenges such an abortion mandate will face.[8] Thus, the EEOC should narrow its definition of covered conditions to exclude abortion and include only pregnancy-related health issues.

If the EEOC maintains abortion and other non-pregnancy conditions in its list of related conditions, the EEOC should recalculate its base of workers who will be newly entitled to and potentially in need of accommodations under its proposed regulations to account for workers who have abortions and other non-pregnancy conditions specified by the EEOC. An accurate inclusion of all workers the EEOC's interpretation of the PWFA seeks to cover would be significantly higher than that specified in the EEOC's current analysis. Including only pregnant women who give birth in a given year in the EEOC's estimates while simultaneously specifying related medical conditions including many individuals who do not give birth could render the rule arbitrary and capricious.

2. **The EEOC's analysis fails to differentiate costs across states.**

The EEOC's definition of covered conditions under the PWFA includes the termination of pregnancy through abortion. The Guttmacher Institute provides a notably conservative estimate of 930,160 documented abortions in 2020. Now that 21 states restrict or prohibit access to abortions, women seeking abortions in those states will have a much higher propensity to seek accommodations—namely leave from work to travel out of state—related to those abortions.

In addition to incorporating the number of women newly entitled to and seeking accommodations for an abortion under the EEOC's interpretation of the PWFA, the EEOC should also amend its state-based estimates to account for the additional accommodations needed and requested by women seeking abortions who reside in states that restrict abortions.

3. **The EEOC's analysis ignores the costs of lost lives through increased likelihood of abortion.**

The EEOC's analysis of the costs of its proposed rule ignores the cost of human lives lost through the increased likelihood of abortions due to the EEOC's interpretation of the PWFA to include accommodations for abortions.

While it is unknown how much required accommodations for pregnant workers seeking an abortion will increase the number of abortions, the accommodations—particularly the provision

[8]See, for example, Comment ID EEOC-2023-0004-49357 and Comment ID EEOC-2023-0004-17260.

of leave that would include women traveling out of state to obtain abortions—will increase abortions by a non-zero amount.

Standard government analysis uses a "value of a statistical life" (VSL) to estimate the economic value that society places reducing mortality risks, which is to say, preserving life or prevent death. [9] The VSL serves a function in regulatory decision-making as a method of assessing the cost-effectiveness of a regulation. In 2023 dollars, the conventionally-used VSL is $10.08 million.[10]

The provisions in the rule raise the risk of death from abortion. Data from the Guttmacher Institute and the Centers for Disease Control (CDC) indicate that there were 930,160 documented abortions in a clinical setting in 2020 and 3,613,647 births, for a total of 4,543,807 potentially viable pregnancies. These figures indicate that 20.47 percent of potentially viable pregnancies end in abortion.

The EEOC has failed to consider what could be substantial costs from the increased prevalence of abortion. If mandated accommodations for abortions under the PWFA increase the likelihood of abortion by even 0.00002 percentage points (1 in 50,000), from 20.47094 percent to 20.47096 percent, this would equal the loss of a human life, valued for economic analysis purposes at $10.08 million.

If the EEOC's interpretation of the PWFA to include abortion accommodations increases women's likelihood of abortion by a range of 0.001 to 0.01 percentage points, the additional lost lives would be between 45 and 454 and the statistical value of those lost lives would be between $458 million and $4.58 billion.

If the EEOC maintains that abortion is a related medical condition covered under the PWFA, it must include estimates of the value of lives lost through abortion.

Conclusion

The EEOC should redefine "related medical conditions" in its proposed rule to remain consistent with Congress's intent to protect pregnant workers who desire to maintain healthy pregnancies. Absent redefining "related medical conditions," the EEOC must account for all of the workers likely to be affected by and need accommodations for the "related medical conditions" that the EEOC specifies. The EEOC must re-analyze its cost estimate based on a full accounting of the number of affected workers, based on differences in costs for abortion accommodations across various states, and it must include an estimate of the statistical value of lost lives as a result of abortion accommodations. Its failure to do so would risk rendering its rule arbitrary and capricious.

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[9] For a review of the VSL methodology, see: Viscusi, W.K. (2018). Pricing Lives: Guideposts for a Safer Society. Princeton: Princeton University Press.

[10] This VSL is based on the EPA's estimate of a VSL of $7.4 million in 2006 dollars, which was updated to 2023 dollars using on the Federal Reserve's Personal Consumption Expenditures Chained-type Price Index through July 2023. See: Environmental Protection Agency, "Mortality Risk Valuation," last updated March 14, 2023, https://www.epa.gov/environmental-economics/mortality-risk-valuation (accessed October 5, 2023); and Federal Reserve Bank of St. Louis, "Personal Consumption Expenditures: Chain-type Price Index," last updated September 29, 2023, https://fred.stlouisfed.org/series/PCEPI (accessed October 5, 2023).

Respectfully submitted,

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[11]This comment is submitted in my personal capacity, with my title provided for informational purposes only.