October 10, 2023

Submitted via www.regulations.gov

Re: AACS Comments on Regulations to Implement the Pregnant Workers Fairness Act, Docket ID EEOC-2023-0004, RIN 3046 AB

The American Association of Christian Schools (AACS) provides these comments on the Regulations to Implement the Pregnant Workers Fairness Act. The AACS is a national organization comprised of over 700 member schools across the country, employing more than 13,000 teachers and staff who serve approximately 118,000 students nationwide. Like other faith-based and Christian institutions, our schools are committed to providing an environment that helps and supports their employees.

We appreciate the intent of the Pregnant Workers Fairness Act (PWFA) to ensure pregnant women do not experience workplace discrimination due to their pregnancy, childbirth, or medical conditions related to pregnancy. We believe children are a gift from God, and we applaud and support the efforts to ensure pregnant mothers are provided accommodations in the workplace.

However, we are gravely concerned that the proposed regulations for PWFA do not accurately reflect the intent of Congress when the PWFA law passed as these proposed regulations include abortion, an issue which was specifically and intentionally not included in the PWFA statutory language. Not only is the inclusion of abortion not in accordance with the law, but it also creates problems with the religious exemption of the PWFA, the principle of federalism, and the regulatory impact as described in the proposed regulations.

First, the inclusion of abortion in the regulations exceeds the intent of the PWFA to ensure accommodations are made in the workforce for "pregnancy, childbirth, or other related medical conditions." The PWFA passed with strong bipartisan support to ensure that reasonable accommodations are made for women in the workforce who are pregnant or have medical conditions related to pregnancy. Abortion was never included in the statutory language of the bill, nor was it intended to be part of the law. In fact, the sponsors of the bill made clear that their intent was to have PWFA focus solely on the needs of pregnant women, and abortion was not and should not be included in the considerations for accommodations under the PWFA.

This was emphasized by several key Senators who advocated for the PWFA:

> Senator Bill Cassidy, ranking member of the Senate Health, Education, Labor, and Pensions Committee and lead sponsor of the PWFA, emphatically stated on the Senate floor: "I reject the characterization that this [the PWFA] would do anything to promote abortion."[1]
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> Senator Bob Casey also made it clear on the Senate floor that the intent of the bill was to not include abortion, and related regulations should reflect that. He stated: "I want to say for the

[1] https://www.congress.gov/congressional-record/volume-168/issue-191/senate-section/article/S7049-2

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> record, however, that under the act, 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."[2]
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> Senator Steve Daines also emphatically reiterated this point: "The purpose of the Pregnant Workers Fairness Act is to help pregnant mothers in the workplace receive accommodations so that they can maintain a healthy pregnancy and childbirth. Therefore, 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." He then referenced Senator Casey's earlier statement and offered his agreement: "Senator's 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."[3]

Furthermore, when the current proposed regulations were released, Senator Bill Cassidy expressed his alarm that "these regulations completely disregard legislative intent and attempt to rewrite law by regulation. . . . The decision to disregard the legislative process to inject a political abortion agenda is illegal and deeply concerning."[4]

Congress clearly did not authorize the insertion of abortion as part of the coverage provided by the PWFA. Abortion is a brutal procedure which intentionally takes a human life, while pregnancy naturally brings new life into the world. As such, "related medical conditions" to pregnancy should encompass those conditions which are born out of the process in which life is developing. Therefore, abortion cannot be considered a "related medical condition" to pregnancy as it is intentionally ending a life. It is safe to say that the PWFA would not have enjoyed bipartisan support if the intent of the law was to include abortion. Thus, to insert abortion in the regulations as a "related medical condition" to pregnancy is to exceed the law.

Even EEOC legal counsel Carol Miaskoff recognized certain limits to the accommodations that are covered through the PWFA and related regulations. In a webinar on August 30, 2023, she explained that accommodations through the PWFA did not extend to adoption situations, in her words, "because although obviously adoption involves bringing a child into your family, it is not childbirth, it is not the process of pregnancy, childbirth and the medical consequences thereof, and those medical consequences are the specific focus of the PWFA."[5] If adoption, which "involves bringing a child into your family" as noted by Miaskoff, is not included in the accommodations under the PWFA, how can abortion, which involves taking a baby's life, be included in the accommodations under the PWFA?

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

[3] https://www.congress.gov/congressional-record/volume-%0A168/issue-200/senate-section/article/S10081-2

[4] https://www.cassidy.senate.gov/newsroom/press-releases/ranking-member-cassidy-blasts-biden-administration-for-illegally-injecting-abortion-politics-into-enforcement-of-bipartisan-pwfa-law

[5] https://www.law360.com/employment-authority/articles/1726558/eeoc-atty-tackles-thorny-questions-on-new-pregnancy-law

The EEOC is essentially creating a mandate for employers to make provisions for abortion where no such mandate has been issued by Congress. An abortion mandate for employers made through the regulatory process opens up a plethora of issues which will likely result in multiple lawsuits.

Second, the inclusion of abortion violates principles of federalism. Many states have laws which prohibit or limit abortion. Forcing employers in those states to consider abortion as a "medically related condition" to pregnancy essentially forces them to violate state law. Furthermore, the Supreme Court held in *Dobbs v. Jackson's Women's Health Organization* that the issue of abortion is a state issue and that there is no federal right to abortion. Again, the statutory language of the PWFA purposefully did not include abortion, and thus, does not contradict these state laws or Supreme Court ruling. However, by including abortion in the PWFA regulations, the commission is creating confusion between state and federal requirements, which will result in lawsuits as the regulations will be in conflict with state laws and the PWFA language.

Third, the inclusion of abortion would require clarification with the religious exemption. The proposed regulations recognize that the religious exemption provided in PWFA mirror section 702(a) of the Civil Rights Act which states that "This title 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."

We recognize that the proposed regulations further reiterate this PWFA language and state that "nothing in the text of the proposed rule limits the rights of covered entities under the U.S. Constitution, and that nothing in the proposed rule or 42 U.S.C. 2000gg-5(b) limits the rights of an employee, applicant, or former employee under other civil rights statutes."

However, the inclusion of abortion as an accommodation which must be covered presents a myriad of issues for religious employers and complicates the religious exemption. This would require explicit clarification in the regulations to ensure that religious employers are free to maintain standards and practices for their employees which are based on their religious convictions.

The proposed regulations seek comments on how this could affect religious employers, so we offer the following issues which will arise if abortion is kept in the final regulations:

- Does a religious employer maintain the freedom to make employment decisions based on religious tenets regarding abortion without fear of retaliation from an employer or the government?
- Will a religious employer be forced to cover abortion in health care plans?
- Will a religious employer be able to make employment decisions based on religious beliefs regarding other practices such as IVF, surrogacy procedures, or sterilization?
- Will pro-life organizations be able to continue keeping a pro-life culture in their organizations?

Even with the stated reference to section 702(a) of Title VII, as well as the reference to the ministerial exception, the Religious Freedom Restoration Act, and the First Amendment, the insertion of abortion into the proposed regulations creates confusion as to the burden on employers. The regulations must clearly state that the PWFA law is intended to provide religious institutions the freedom to make employment decisions that are not just limited to the employee's religion, but that also extend to the

actions related to the religious tenets of the religious institution. Simply put, the final regulations must clearly state that a religious employer is not required to make an accommodation that would conflict with its religious beliefs.

Finally, the inclusion of abortion will affect the regulatory impact analysis. The EEOC claims that the proposed regulations will provide benefits to society and the economy, but it does not address how the inclusion of abortion adds to these benefits, nor does it address the harm that will be caused to society and the economy through abortion. For example, the proposed rule does not take into account the harms that abortion has on women's health, not to mention the loss of life for future generations.

Conclusion: In order to stay true to the stated intent of PWFA and to avoid unnecessary and burdensome challenges to religious liberty, federalism, and the good of the society and economy, we urge the commission to remove abortion as part of the accommodations required under the regulations. This would be in keeping with the PWFA law and ensure the freedom enshrined in our Constitution remains protected.

We appreciate the careful consideration of our comments and urge the necessary revisions and changes be made in order to ensure that the regulations not only accurately reflect the intent of the law but also recognize the constitutionally protected liberty which allows faith-based institutions to offer life-serving health care services for their employees.

Sincerely,

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