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Chair Charlotte A. Burrows
U.S. Equal Employment Opportunity Commission
131 M Street N.E.
Washington, D.C. 20507

Via federal rulemaking portal:
https://www.regulations.gov

Re: Comment on
Equal Employment Opportunity Commission Regulations
to Implement the Pregnant Workers Fairness Act
RIN number 3046–AB30

Dear Chair Burrows:

Background

I am the immediate past General Counsel of the EEOC, as you know from our overlapping tenures. In my previous private practice of employment law, I had represented the plaintiff employee in the pregnancy discrimination case *Young v. UPS*, from its inception as a charge at the EEOC, through litigation in the District Court and the Court of Appeals, to its successful conclusion (with the help of a University of Michigan appellate clinic) at the U.S. Supreme Court.

I have experienced the EEOC's lack of enthusiasm about its mandate to protect pregnant women from discrimination in employment. The EEOC showed no interest in *Young v. UPS* at either the agency level or the Fourth Circuit Court of Appeals, even though pregnancy was at the time one of the EEOC's express priorities listed in its Strategic Enforcement Plan. After I petitioned the U.S. Supreme Court to hear the case, an EEOC staff person phoned me in an effort to dissuade me from going forward with the case.

After my time at the EEOC, I returned to private practice where I have worked on a variety of employment discrimination matters, chief among them matters pertaining to religious employees and employers. I am very familiar with the discrimination-related concerns of these constituents.

Concerns about the Proposed Regulations

1. The proposed regulations use ideologically stilted vocabulary to distort congressional intent.

    a. The regulations avoid natural terminology.

The PWFA's passage is an opportunity for the EEOC to champion womanhood, motherhood, and the right of women and mothers to maintain their livelihoods throughout pregnancy and childbirth. But the EEOC proposes regulations that ostensibly protect genderless "workers" who find themselves wishing they could procreate and lactate as women have always done. The babies these "pregnant workers" carry and wish to protect are not referred to in the regulations as babies or children or even as embryos or fetuses. Rather, the proposed regulations repeatedly say that pregnant workers should not be forced to choose between their jobs or financial security and "a healthy pregnancy." But of course what a pregnant woman wants is a healthy baby. She hopes to keep her job while pregnant so that she can give birth to a healthy baby.

It is odd and unhuman for regulations about pregnancy and childbirth to side-step normal discourse and to generally avoid mention of "women", "mothers", "females", and "babies" or "children" (except when quoting others) and to prefer instead "pregnant workers" and "healthy pregnancy". But there seems to be an actual purpose for this stilted vocabulary:

    b. The proposed regulations purport to regulate non-pregnancy matters.

The PWFA protects "limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions." But the proposed regulations reach much further than the statute warrants. Although early on, the regulations properly speak about "simple, common-sense accommodations" which employers have sometimes failed to provide, "such as a stool for a cashier or bathroom breaks for a preschool teacher," the regulations go well beyond common sense: They define "related medical conditions" in a "non-exhaustive list" that includes "termination of pregnancy ...; infertility; fertility treatment ...; menstruation changes in hormone levels ...; and use of birth control..."

Unlike the statute, the EEOC's proposed regulations would require employers to accommodate those who are not pregnant and never will be pregnant or give birth, including, presumably, a man who wishes to take time off work for hormone therapy in an effort to "chestfeed" a baby. The sex-neutrality of the regulations seems deliberately arranged to enable a male employee to sue an employer for not accommodating his desire to be the first employee to have a womb transplant.

Motherhood is a wonderful gift, and it is also a very costly calling. The PWFA regulations should, as Congress intended, help alleviate some of that cost to women. Laws that favor pregnant women do not result in unlawful discrimination against men, *see California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272 (1987), so there is no need to refrain from promulgating rules that apply to "pregnant women" and their "babies".

2. The proposed regulations' accommodation requirements are too broad.

a. Employers should be required to accommodate only those employees who are actually pregnant or who actually give birth.

Nondiscrimination on the basis of pregnancy -- which is a legal protection provided by Title VII -- protects from discrimination women who are pregnant *and* women whom the employer *assumes* to be pregnant or likely to soon be pregnant. By comparison, *accommodation* of pregnancy, childbirth, or related medical conditions -- which is a legal protection provided by the PWFA --logically requires that there be a medical condition related to an actual pregnancy or childbirth. An employer cannot "accommodate" something that does not exist.

Both the Americans with Disabilities Act and Title VII -- two statutes enforced by the EEOC -- demonstrate how this difference between nondiscrimination and accommodation works. Both of these statutes have a nondiscrimination mandate. In addition, the ADA requires employers to provide accommodations for disabilities, and Title VII requires employers to provide accommodations for religious belief and practice. The nondiscrimination requirement protects employees from nonhiring or termination if the employer merely regards the applicant or employee as disabled or religious. But the duty to accommodate a disability or a religious belief or practice applies only if the applicant or employee actually suffers a disability or actually has a religious belief or practice that requires accommodation.

Pregnancy and childbirth should be no different. The *nondiscrimination* mandate for pregnancy is covered by Title VII, which prohibits employers from discriminating against employees whom they merely suspect may be or may become pregnant. The *accommodation* mandate for pregnancy is covered by the PWFA, which is purely an accommodation statute. The PWFA requires employers to accommodate pregnancy, childbirth, and related medical conditions--but only where such conditions actually exist. The PWFA regulations should not oblige an employer to accommodate a pregnancy that does not yet, and indeed may never, exist.

b. Employers should not be required to accommodate abortion.

Worse than the EEOC's attempt to use the PWFA regulations to advance one of its primary goals -- the advancement of a sex neutral society -- is its attempt to use the

PWFA regulations to advance a second goal: that all employers be required to accommodate and facilitate abortion. Abortion is, of course, anti-pregnancy and anti-childbirth; it is not mentioned in the PWFA; and the PWFA's sponsors insisted that abortion would not result from the PWFA. (Women who suffer an injury due to abortion are already appropriately protected by the Americans with Disabilities Act.)

Abortion is not a "medical condition related to pregnancy and childbirth." Abortion is a purposeful act that ends pregnancy and has the aim of resulting in no live birth. No employer should be required by regulations under the PWFA to accommodate and facilitate abortion.

The EEOC professes an interest in comments regarding how the proposed regulations "enhance human dignity"--meaning, presumably, the dignity of the mother. In fact, abortion undermines the human dignity of a potential mother by suggesting that her offspring are not worthy of protection. This agency attempt to facilitate abortion is based either on the false assumption that an unborn child is without human dignity, or on the false assumption that an unborn child may or may not have dignity depending solely on the mother's intention or lack of intention to give birth to the child. Either assumption is based on a degraded notion of human dignity, is highly controversial, and should not be forced on American employers by unelected bureaucrats.

3. The proposed regulations insufficiently protect religious employers.

a. The regulations require accommodations that violate religious beliefs.

The EEOC's proposed regulations would require employers to make accommodations that are not "conditions" or "limitations" related to pregnancy and childbirth and that are not mentioned in the PWFA, many of which are matters of grave religious and moral concern for various religious employers and organizations. Included in this list would be not only those mentioned above (i.e., abortion, fertility treatment, and birth control) but also such things as-- (1) accommodations for those seeking to change their sexual functions in an attempt to procreate or lactate in a manner inconsistent with their biological sex, and (2) accommodations for *in vitro* fertilization in all or specific circumstances. Some religions teach that all *in vitro* fertilization is wrong. Others teach that an *in vitro* fertilization procedure that uses "donated" eggs, sperm, or uterus, or that fertilizes more eggs than can be safely implanted at once is wrong; or that rely on selective termination of less desirable embryos is wrong.

The EEOC's proposed rulemaking on this point will have the effect--perhaps an intended third goal of the EEOC -- of forcing religious employers into the untenable position of having to compromise their religious beliefs (by facilitating acts they believe to be morally wrong) or having to accommodate workers who are engaging in behaviors forbidden by the employer's religious faith.

b. The regulations fail to adequately exempt religious employers.

i. The definition of "religious organization" and the assumed category of religious activity are too narrow in the proposed regulation.

The PWFA incorporates Title VII's religious organization exemption; but the EEOC's proposed regulations would provide that the religious organization exemption "only applies to those organizations whose purpose and character are primarily religious." This "primarily religious" language does not appear in Title VII's religious exemption, and it is problematic because so much of what religious people do to practice their religious beliefs takes place outside of church, synagogue, or other house of worship, and may appear secular to those outside the faith, but is inextricably tied up with religious belief.

By way of example, perhaps the only actions that Christians take that appear completely religious to outsiders involve baptism, communion, and prayer, the first two of which do not happen in the workplace. But Christians (like adherents of some other religions) also practice religion in ways such as feeding the hungry, tending widows, supporting pregnant women and new mothers, adopting orphans, assisting immigrants, teaching the illiterate, mentoring school children, giving and lending to the financially disadvantaged, nursing the sick, including operating hospitals. Of course, non-religious people may also undertake such activities; and from their perspective these activities may all appear entirely secular. But religious organizations may have genuine and deep-seated religious reasons for undertaking these activities. And, on the other hand, religious organizations may need to hire employees who undertake functions with little or no overt devotional content--say, bookkeepers and groundskeepers--but the organization may prefer to hire as employees only those who agree with and live in accordance with their organization's religious beliefs and practices. Employers who do these apparently secular activities for religious reasons are no less religious than those whose purpose and character the EEOC would agree is primarily religious.

ii. The rights of the religious employer are too vaguely and narrowly described in the proposed regulation.

The EEOC's proposed regulations, however, would provide that "Religious organizations are subject to the Title VII prohibitions against discrimination on the basis of ... sex ..., and they may not engage in related retaliation." The proposed regulations also say "Title VII language does not categorically exempt religious organizations from making reasonable accommodations to the known limitations of employees under the PWFA" and later weakly states that "the Commission has previously stated that a qualified religious organization may argue as a defense that it made the challenged decision on the basis of religion." This "may argue" provision is much weaker than the clear statements in Title VII's religious organization exemption -- Section 702(a) of the Civil Rights Act of 1964 -- and this wobbly "exemption" is not enough.

Title VII's religious organization exemption makes absolutely clear two things that the proposed rule falls short of doing justice to:

(1) Title VII in its entirety does not apply to religious entities with respect to employment of people of a particular religion; and

(2) The definition of religion in Title VII includes religious belief, observance, and practice.

The PWFA regulations should unambiguously state the full strength and breadth of the religious organization exemption.

iii. The definition of "religious organization" should be broader.

Perhaps the best articulation of what a religious organization is can be found in an October 6, 2017, Memorandum of the Office of the Attorney General, which defined religious institutions as "entities that are organized for religious purposes and that engage in activity consistent with, and in furtherance of such purposes." That is a good definition that accomplishes the purposes of Title VII's § 702(a) exemption and should be incorporated into the PWFA regulations.

If instead the regulation retains the "primarily religious" language, it should include *LeBoon* v. Lancaster Jewish Community Center, 503 F.3d 217, 226-29 (3d Cir. 2007) as an example of a religious organization that is exempt from its coverage. Although the Third Circuit employed a "primarily religious" test in *LeBoon*, a case involving the Title VII religious organization exemption, the court decided the case correctly. In *LeBoon* a Christian bookkeeper sued a Jewish Community Center for religious discrimination because she believed her Christian faith played a role in her termination. Leboon argued that because the Community Center lacked ties with a synagogue and had primarily cultural purposes, it was not exempt under Title VII. The Third Circuit unanimously held that the Jewish Community Center was a religious organization, noting that the center identified as Jewish and that its stated mission was to "promote Jewish life, identity, and continuity"; and that it relied on coreligionists for financial support, offered instructional programs with Jewish content, began its board meetings with biblical readings, and involved rabbis from local synagogues in its management.

iv. The application of the religious exemption should be broader.

The religious exemption should apply, at a minimum, any time the religious organization is making an employment decision based on religious faith. Human sexuality is a very important topic to many if not most religions. In Christianity, sex is woven into Scripture from the Genesis creation story, through the Ten Commandments, through dominical and apostolic teaching, and through many other pronouncements against sexual immorality and requirements for the flourishing of the human person. Therefore, religious organizations that make employment decisions based on religion may also be

making employment decisions based on sex. Under Title VII, the fact that an employment decision relates to sex does not remove that decision from the religious organization exemption of section 702(a). Rather, religious organizations are protected when they make these decisions because they are decisions made with respect to employment of people of a particular religion, or when they hire employees who may have a different religious belief on the condition that those employees live in accord with the employer's religious belief. Title VII's religious organization provision exempts such decisions from the reach of Title VII, and such decisions should be exempted from the reach of the PWFA as well. The PWFA regulations should clearly state that religious entities are exempt from the PWFA whenever those entities make decisions about hiring, firing, or the terms and conditions of employment based on religious faith -- whether or not this religious faith also touches on sex. The EEOC's carve-out from the religious exemption for sex-based hiring decisions is inconsistent with the statute and brings genuinely religious decisions within the prohibition.

v. The regulations should direct EEOC investigators to refrain from investigating religious organizations that have made employment decisions based on religious faith.

Having had the opportunity to advise several religious employers on matters before the EEOC, I know that some EEOC investigators seem misguided and undirected about the need to refrain from over-involvement with matters related to religious institutions making employment decisions based on religious faith.

All that the proposed regulations say on the subject is that "the Commission has previously stated that a qualified religious organization may argue as a defense that it made the challenged decision on the basis of religion." To say only that the religious organization may argue religious exemption as a defense is insufficient protection for religious organizations and does not pass Constitutional muster.

While the religious institutions I have advised will happily accommodate pregnancy, childbirth, and truly related medical conditions, many of them will be unable to accommodate abortion, *in vitro* fertilization, or hormone treatment designed to alter biological sexual functions.

Once a religious employer has explained that an employment decision -- or, under the PWFA, a non-accommodation -- is based on religious faith, the EEOC should decline further investigation unless there is a substantial reason to believe the employer's asserted religious rationale is pretextual. The EEOC commonly receives from religious employers position statements explaining that an employment decision was made based on religious beliefs about sexuality. Because some matters of religious faith -- such as sexuality or abortion -- are well known, are well grounded in religious tradition, and arise often, the EEOC should conclude that the matter falls within the religious organization exemption and should issue the charging party a Notice of Right to Sue, thereby relieving the agency of further investigation. When these matters arise in

Court, the EEOC should take the position that the case is outside its purview because of the religious organization exemption. This is the only way to prevent government entanglement in matters of religion, as the Constitution requires.

4. The regulations should not rely on the ADA regulations' definition of "qualified."

I note one problem with relying on the ADA even in part for a definition of a "qualified" employee. The term "qualified" under the ADA regulations, includes the criterion that the "individual ... satisfies the requisite ... education ... of the employment position ...." I suggest removing the education requirement because employees who were originally hired even though they did not meet the education requirement but who have successfully performed their jobs for years should be covered by the ADA, notwithstanding the fact that they do not meet the listed education requirements for the job.

5. The regulations should be reasonable with regard to "essential functions" and "temporary period."

The proposed regulations permit an employee to be deemed "qualified" even if the employee cannot perform one or more essential functions of the job. The reasonableness of this definition depends very much on how many essential functions a job has and how many other workers are available to pick up the slack.

If a small employer has hired an employee to do only one thing and the employee is unable to do that one thing, it is unreasonable to say that that is a qualified employee who must be accommodated for the "near future", which the proposed regulations define as "40 weeks" -- a time period that exceeds what most people ordinarily mean when they talk about the "near future." This provision is especially unreasonable in light of the fact that the proposed regulations require the employer to continue to provide "an employee's health insurance benefits during their leave period to the extent that it does so for other employees in a similar leave status." Taken together, this suggests that the EEOC intends to use the PWFA regulations to require employers to provide health insurance benefits for employees who are unable to work for almost ten months at a time.

Without proof of undue hardship, does an employee who has received 40 weeks of accommodation for a pregnancy become entitled to another 40 weeks of accommodation immediately upon announcement of a new pregnancy or a new related medical condition? Or immediately upon her return to the workplace?

Forcing even very small employers to accommodate an employee who, for a period of almost ten months, cannot do the primary tasks she was hired to do will increase employers' incentive to discriminate against women of childbearing age in their hiring.

Discriminatory hiring cases are the most difficult of all for employees to prove. This is antithetical to accomplishing the goals of the Pregnant Workers Fairness Act.

6. The regulations should not require, as an accommodation, the granting of leave in excess of that which is required by the FMLA.

The PWFA provides that the term "reasonable accommodation" in the PWFA has the same meaning as the term "reasonable accommodation" when used in the Americans with Disabilities Act of 1990 (ADA). The ADA provides eight categories of "reasonable accommodations:"

a. Making existing facilities readily accessible,
b. job restructuring,
c. reassignment to a vacant position,
d. acquisition or modification of equipment,
e. modifications of examinations, training materials or policies,
f. provision of qualified readers or interpreters, and
g. other similar accommodations.

None of these accommodations is leave. And leave is not similar to any of the accommodations listed.

Not the ADA but the Family and Medical Leave Act is the federal statute that requires employers to provide qualified employees up to twelve weeks of leave per year. If employers should be required to provide more leave for employees, that is the law that should be amended to accomplish that purpose and require that leave.

The PWFA should provide categories of "reasonable accommodations" that are similar to those in the ADA. Leave -- especially leave that lasts for nearly ten months -- is not a reasonable accommodation. It is very important that employers accommodate pregnant women who, with a reasonable accommodation, can do the jobs for which they were hired. It is not reasonable to require employers, especially small employers, to accommodate pregnant women who, for the entire duration of their pregnancies, are unable to work at all. When a pregnancy is over and the new mother is able to apply for work, Title VII and the ADA protects her right to re-apply to open positions at her former employer at no disadvantage, because she once had to quit work due to pregnancy.

Not every law is supposed to accomplish every good, and there is nothing in the PWFA to suggest that ten months of leave is a reasonable accommodation under that act.

7. The regulations should not be a means for controlling frequency of pregnancy.

Granting leave under the PWFA would be problematic. The regulations do not address an employer's obligation to the employee who returns from PWFA leave but who is pregnant with another child and once again requests a leave accommodation, other than saying:

> [I]f an employer can demonstrate that the leave requested as a reasonable accommodation poses an undue hardship—for example, because of its ... frequency ... it may lawfully deny the requested leave under the PWFA..

The "frequency" language is incompatible with the PWFA, which appears to be aimed at protecting all pregnant workers. The language excepting employers from providing accommodations under the PWFA based on "frequency" is also very concerning, as it should be neither the employer's or the government's province to monitor how many pregnancies a woman has and how frequent they are. The PWFA regulations are offensive to the extent that they provide a means for employers and courts to coerce women and families into having few children based on what pregnancies are and are not accommodated under the PWFA.

The more unreasonably onerous the employer's obligations are, the more likely it is to discriminate against women. The employer's obligations should be reasonably limited to accommodating pregnant women who are able to perform their jobs with a reasonable accommodation (including leave that does not exceed that already provided by the Family and Medical Leave Act), so that a woman of child-bearing age can bear her children without the permission of her boss.

Respectfully submitted,

/S/

Sharon Fast Gustafson