

Congress of the United States

Washington, DC 20515

October 10, 2023

VIA Federal eRulemaking Portal

The Honorable Raymond Windmiller
Executive Officer, Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE, Washington, DC 20507

RE: Comments on Proposed Rule: Equal Employment Opportunity Commission Regulations to Implement the Pregnant Workers Fairness Act, 29 CFR Part 1636, RIN 3046-AB30, Docket ID EEOC-2023-0004

Dear Mr. Windmiller:

As Members of Congress, we support policies to ensure women are provided with access to necessary accommodations in the workplace during pregnancy to support the health of both the woman and her unborn child. This was the goal of the Pregnant Workers Fairness Act (PWFA), and we write to share our strong opposition to the illegal imposition of abortion mandates in the Equal Employment Opportunity Commission's (EEOC) proposed regulations, published on August 11, 2023, to implement the PWFA.

We urge the Commission to modify the regulations to reflect clear Congressional intent by removing the abortion and other anti-life mandates from any final rule. The Commission must also clarify that pro-life and religious employers are exempt from making any accommodations under the PWFA that violate their sincerely held religious beliefs or moral convictions.

The Pregnant Workers Fairness Act did not include abortion, and the EEOC has illegally imposed an abortion mandate.

Abortion¹ is not included under the PWFA. The exclusion of abortion is clear in the plain meaning of the Act's text, and the legislative intent has been reiterated by the sponsoring Members.

The PWFA was signed into law on December 29, 2022, through H.R. 2617, Consolidated Appropriations Act, 2023. It requires employers with 15 or more employees to make "*reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions*" of an employee.² The accommodations in this bill are intended to help female employees maintain employment while supporting their health and the health of their babies during pregnancy and childbirth, as well as after involuntary loss through miscarriage and stillbirth.

The PWFA does not include abortion. In fact, abortion is antithetical to the Act's purpose because it is intentionally anti-pregnancy and anti-childbirth. Abortion is not health care. It ends the lives of unborn children

¹ As used in this letter, "abortion" refers to an intentional termination of the pregnancy of a woman and does not include termination of pregnancy with the intent to produce a live birth, treatment of a miscarriage or removal of a deceased unborn child caused by a miscarriage, treatment of an ectopic pregnancy; or emergency treatment intended to preserve the life of the woman.

² H.R.2617 - Consolidated Appropriations Act, 2023. <https://www.congress.gov/bill/117th-congress/house-bill/2617/text?s=3&r=4&q=%7B%22search%22%3A%5B%22pregnant%22%2C%22workers%22%2C%22fairness%22%2C%22act%22%5D%7D>

through suction, dismemberment, or chemical poisoning, and it can lead to significant physical complications and mental health risks for women.^{3,4}

The bill sponsors further clarified that the bill was not intended to address abortion. During floor debate, Sen. Bob Casey (D-PA), the lead Democrat cosponsor in the Senate, said, *“I want to say for the record, however, that under the act, under the Pregnant Workers Fairness Act, 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 abortion leave in violation of state law.”*⁵ Senator Bill Cassidy (R-LA), the lead Republican cosponsor, said, *“I reject the characterization that [the Pregnant Workers Fairness Act] would do anything to promote abortion.”*⁶

The EEOC has acted, without Congressional authorization and directly contrary to Congressional intent, to impose an abortion mandate on employers throughout the United States.

Despite the Act not mentioning abortion once and clear Congressional statements to the contrary, the EEOC has inaccurately claimed that abortion is included in the definition of “pregnancy, childbirth, or related medical condition.”⁷ If finalized, the EEOC’s Proposed Rule would now mandate that employers provide a “reasonable accommodation” for abortion.

Such accommodations could include the use of paid leave, unpaid leave, or transfer to a position in another state, to seek an abortion at *any* stage in pregnancy up until birth, even for employers in States that prohibit most abortions.⁸ Employers could also be required to provide women seeking abortions with access to employer-provided transportation.⁹

Congress enacted a law to support mothers during pregnancy and childbirth, protecting and benefiting the health of the mother and her unborn child. Issuing regulations to implement this law that mandates employers facilitate abortions flips that pro-pregnancy, pro-childbirth law on its head. It neglects the plain text of the law, and if finalized, it would have the opposite intent of the bipartisan law Congress enacted. An abortion mandate for employers was not present in this legislation and has no place in any implementing regulations.

The Proposed Rule Exceeds EEOC Authority.

The PWFA delegated regulatory authority to the EEOC only to develop regulations to implement the goals defined in the PWFA. Promoting abortion is not one of those goals. Agencies may not issue regulations with vast political significance unless clearly directed by Congress, as the Supreme Court has affirmed under the major questions doctrine.¹⁰ The EEOC does not have the legal authority to create an abortion mandate for employers in defiance of statutory text and Congressional intent.

³ Skop, Ingrid, M.D., FACOG; “Immediate Physical Complications of Induced Abortion.” Charlotte Lozier Institute. December 8, 2022. <https://lozierinstitute.org/immediate-physical-complications-of-induced-abortion/>

⁴ “Study Finds Increased Risk of Mental Health Disorders After Abortion.” Elliot Institute. September 16, 2016. <https://afterabortion.org/study-finds-increased-risk-of-mental-health-disorders-after-abortion/>

⁵ Senator Casey, speaking on S. 4431, 117th Cong., 2nd sess., Congressional Record Vol. 168, No. 191 (December 8, 2023): S 7049 <https://www.congress.gov/congressional-record/volume-168/issue-191/senate-section/article/S7049-2>

⁶ Senator Cassidy, speaking on S. 4431, 117th Cong., 2nd sess., Congressional Record Vol. 168, No. 191 (December 8, 2023): S 7050 <https://www.congress.gov/congressional-record/volume-168/issue-191/senate-section/article/S7049-2>

⁷ Equal Employment Opportunity Commission. 29 CFR Part 1636. RIN 3046-AB30.” Federal Register, Vol. 88, No. 154. August 11, 2023. Page 54767. <https://www.govinfo.gov/content/pkg/FR-2023-08-11/pdf/2023-17041.pdf>

⁸ Ibid. Page 54768.

⁹ 88 FR 54729

¹⁰ Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014)

The Proposed Rule Violates Religious Liberty.

During consideration of the law, Congress deliberated protections for religious entities extensively.¹¹ Based on the strong jurisprudence of the religious organizations exemption in Title VII, Congress tied Title VII's exemption to the entirety of the law through the rule of construction and concluded that such language would ensure the religious organization exemption in Title VII would apply to all accommodations and other claims covered by the law.^{12 13}

Further, in line with the statutory text, Congress continues to understand Title VII's religious exemption to "encompass the entire employment relationship, not merely limited to hiring and firing."¹⁴ As Courts have held, in Title VII, Congress "painted with a broader brush, exempting religious organizations from the *entire subchapter* of Title VII with respect to employment of persons of a particular religion."¹⁵

Title VII broadly defines religion to include "all aspects of religious observance and practice as well as belief." It is this broad understanding of religion that Congress had in mind when it included the religious organizations exemption to the PFWA. Congress intended the rule of construction to protect religious entities from making *any* accommodation that would conflict with *any* aspect of their religion. As such, the EEOC must make explicit in the final rule that any objection to an accommodation for an activity that conflicts with the entity's religion is to be respected and protected by the rule of construction.

In addition to the Title VII protections, the EEOC should also continue to recognize the application of the Religious Freedom Restoration Act in its final rule. As the proposed rule acknowledges, RFRA applies to the underlying statute. Congress would have had to expressly exclude RFRA for RFRA's protections to be waived, which it did not. RFRA is an important shield for people and organizations from being forced to violate their faith, which will happen under the proposed expansive interpretation of this Act.

The Proposed Rule Ignores Conscience Objections.

Under the EEOC's proposal, the regulations would impose an abortion mandate on other employers who are pro-life based on religious or moral conviction but are not formally affiliated with a religious organization. It would force these employers to express views and to act in ways that violate their religious and moral convictions.

It would also violate the objecting employer's constitutional rights to freedom of speech and expressive association by requiring them to inaccurately present abortion as health care and as comparable to pregnancy and childbirth.

Further demonstrating the EEOC's expansive interpretation exceeds statutory authority, there are no protections for pro-life employers and entities. The proposed rule includes abortion, contraception, and IVF while remaining silent on the implications this creates for individuals with moral, ethical, medical, or other objections.

¹¹ U.S. Senate Committee on Health, Education, Labor & Pensions Minority. (2022, December 17). Applicability of Religious Entities Exception to Title VII of the Civil Rights Act of 1964. <https://www.lankford.senate.gov/wp-content/uploads/2023/09/12.17.22-Title-VII-Memo-HELP.pdf>

¹² Senator Cassidy, speaking on S. 4431, 117th Cong., 2nd sess., Congressional Record Vol. 168, No. 200 (December 22, 2023): S 10070 <https://www.congress.gov/congressional-record/volume-168/issue-200/senate-section/article/S10065-2>

¹³ U.S. Senate Committee on Health, Education, Labor & Pensions Minority. (2022, December 17). Applicability of Religious Entities Exception to Title VII of the Civil Rights Act of 1964. <https://www.lankford.senate.gov/wp-content/uploads/2023/09/12.17.22-Title-VII-Memo-HELP.pdf>

¹⁴ *Id* citing Garcia v. Salvation Army, 918 F.3d 997 (2019); Kennedy, 657 F.3d at 192.

¹⁵ *Id* citing Garcia, 918 F.3d at 1004.

Even without the PWFA, many pro-life employers and organizations have already implemented employment practices that support pregnant mothers and their unborn children.

The proposed rule ignores the presence of the unborn child and instead steamrolls employers into promoting or being complicit with abortion and other items or actions employers may reasonably object to or even find antithetical to the organization's mission. This is not what Congress intended and not the PWFA Congress passed.

The EEOC must make it clear in the final rule that the undue hardship defense protects pro-life employers and entities from having to make accommodations that would be contrary to the mission of the organization.

Conclusion

In these regulations, the EEOC has moved far beyond the power delegated by Congress. The Commission was directed to implement a bipartisan law designed to provide accommodation protections for pregnant women in the workforce. Instead, it has sought to impose an unconstitutional nationwide abortion mandate on employers.

We urge you to remove abortion mandates from the scope of this rule, protect employers with religious and moral objections, and finalize a rule that accurately reflects the Congressional mandate to promote healthy pregnancies and childbirth, not abortion.

Sincerely,



James Lankford
United States Senator



Christopher H. Smith
Member of Congress



Cindy Hyde-Smith
United States Senator



Erin Houchin
Member of Congress



John Thune
United States Senator



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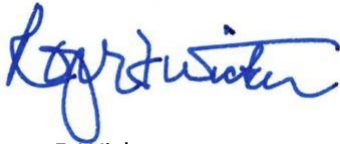
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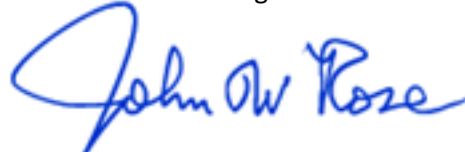
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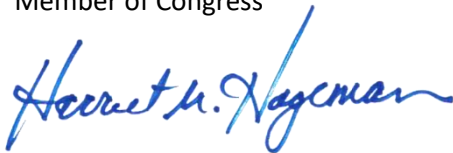
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