



THE NATIONAL CATHOLIC BIOETHICS CENTER

Upholding the Dignity of the Human Person in Health Care and Biomedical Research since 1972



October 10, 2023

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

Subj: Proposed Regulations to Implement the *Pregnant Workers Fairness Act*, 29 CFR 1636, RIN number 3046–AB30; Document Citation 88 FR 54714 - 54794.

Dear Secretary Windmiller:

The Catholic Medical Association, The National Catholic Bioethics Center, and the National Association of Catholic Nurses, USA (NACN-USA) submit the following comments in opposition to certain significant provisions of the U.S. Equal Employment Opportunity Commission (EEOC) proposed “**Regulations to Implement the *Pregnant Workers Fairness Act***”¹ (Proposal). The Proposal would require a covered entity to provide reasonable accommodations to a qualified employee's or applicant's known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the business of the covered entity. Obviously, we are committed to the social justice implications related to the rights of workers, and the Catholic Church has issued strong statements, and even encyclicals on such rights.² Furthermore, as health care providers and ethicists we are strong supporters of the need to protect pregnant women and their children, in the womb and throughout life. The

¹ *Federal Register*/ 88 FR 54714/Thursday, August 11, 2023/Proposed Rules, 54714-54794.

<https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act>.

² Catholic Church. On the Hundredth Anniversary of *Rerum Novarum* = *Centesimus Annus* : Encyclical Letter, May 1, 1991. Washington, D.C.: Office for Pub. and Promotion Services, United States Catholic Conference, 1991.

https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html. Also, Catholic Church. Pope (1878-1903: Leo XIII). *Rerum Novarum*: Enciclica Di Leone XIII Sulla Questione Operaia. https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html.

Church speaks of human life as of intrinsic value that is inviolate, to be respected and protected.³

The National Catholic Bioethics Center (NCBC) is a faith-based organization engaged in bioethics publication, education and consultation to thousands of persons seeking its services. It has a membership of 1300 members, representing individuals, dioceses, parishes, health care corporations, educational institutions, among many others. Thus, the impact on membership far exceeds the official number of members. Through our consultation services increasingly we are made aware of challenges to religious freedom faced by individuals and institutions, including employers, seeking to address the health and human services needs of the very populations served by the federal government.

The Catholic Medical Association (CMA) has over 2,400 physicians and allied health members nationwide. CMA members seek to uphold the principles of the Catholic faith in the science and practice of medicine—including the belief that every person’s conscience and religious freedoms should be protected. The CMA’s mission includes defending its members’ rights to follow their consciences and Catholic teaching within the physicians’ practices. In physician practices there are numerous relationships with other health care workers assisting the physician in the life-giving practice of medicine, consistent with the Hippocratic Tradition. No one should be forced to cooperate in providing interventions, directly or indirectly through personnel policies, that are violative of the aforementioned civil rights.

The National Association of Catholic Nurses, USA is a non-profit group of hundreds of nurses of diverse backgrounds, focusing on promoting moral principles of patient advocacy, professional development, spiritual development, the integration of faith and health, all within the Catholic context in nursing. It provides guidance, support, continuing education, and networking for Catholic nurses and nursing students, as well as other healthcare professionals and non-healthcare professionals who support the mission and objectives of the NACN-USA. It has advocated on numerous occasions for the human rights of vulnerable populations and the rights of health care providers to protect those persons, as well as the rights of health care providers to have protected their own deeply held moral and religious beliefs. Many nurses are employers, administering organizations such as home care agencies.

We recognize the benefits of the *Pregnant Workers Fairness Act* (PWFA), passed in December 2022, filling the gaps in employment law.⁴ The *Americans with Disabilities Act* (ADA)⁵ provides some accommodation protections for persons with disabilities, and Title VII prohibits employment discrimination based on sex.⁶ Relevantly, the ADA was amended by the *Pregnancy Discrimination Act* (1978) to prohibit discrimination based on “pregnancy, childbirth, or related medical conditions.”⁷

³ John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life], The Holy See, March 25, 2995, sec. 97, https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html.

⁴ 117–328, div. II, §101, Dec. 29, 2022, 136 Stat. 6084.

⁵ *Americans with Disabilities Act* of 1989, Public Law 336, U.S. Statutes at Large 104 (1990): 327-378.

⁶ Title VII of the *Civil Rights Act* of 1964, 42 U.S.C. §§ 2000e - 2000e17 (as amended).

⁷ *Pregnancy Discrimination Act* of 1978, Public Law 95-555. Washington: U.S. G.P.O., 1979-1980, Sec.1, Subsection (k).

Inclusion of Abortion Regulation by EEOC Exceeds Its Mandate

Pregnancy itself is not a disability, even though certain physical conditions related to pregnancy might be classified as a disability. Erroneously treating pregnancy as a disability can violate the Congressional intent of the PWFA. Specifically, EEOC has no authority to include an abortion mandate in PWFA regulations. PWFA seeks to protect women in the workplace, not to facilitate abortion. This legislation requires accommodations for pregnant women relating to pregnancy, childbirth, and related medical conditions, such as morning sickness or gestational diabetes. The PWFA provides a defense for employers that work with employees in good faith to identify alternative accommodations that are equally effective to the accommodation requested by the employee, and do not cause an undue hardship.

The EEOC's rulemaking powers conferred by the PWFA are intended to clarify commonsense ways that employers can help pregnant mothers and their families, without compelling employers to sponsor abortions and to impose an abortion mandate on employers across the country. Congress spoke clearly when it referred to pregnancy, childbirth, and related conditions, and it did not include abortion in this list of protected conditions. Such a violation of Congressional intent would require employers to "accommodate" or facilitate elective abortions, regardless of state laws protecting unborn life and regardless of employers' conscience positions or religious beliefs. This will create immediate problems for thousands of employers. The PWFA also does not require paid or unpaid leave for abortion travel through its provisions—a point that EEOC should recognize in its rulemaking. The PWFA does not create an absolute right to an accommodation, but requires a fact-specific, case-by-case determination. It does not require the adoption of any across-the-board policy. The question is whether there would be a reasonable accommodation (it does not have to be the employee's preferred accommodation) that does not pose an undue hardship to the employer. But an abortion accommodation of any kind would impose a per se undue hardship on an employer, especially an employer that opposes abortion, and so any abortion mandate would lack statutory authority as applied.

An abortion mandate, as presented in the Proposal, thus could subject employers to crippling lawsuits if they decline to facilitate abortion. Similarly, there is concern that employers could be sued for anything that would be construed under the Proposal to "interfere" with a woman seeking leave for an abortion. These concerns are particularly acute for religious organizations and certain secular entities, like closely held family or small businesses. The PWFA only concerns related medical conditions within a pregnancy to support and bring forth life, rather than externally related procedures to terminate life, e.g., abortion. However, the Proposal does not mention the unborn child, only references maintaining the health of the pregnancy. "Fetus" does not appear anywhere in the Proposal. To be pregnant there must be an embryo/fetus. It's arbitrary and capricious to not include the health of the unborn child when the goal is to maintain the health of the pregnancy.

Ambiguity of Terms

Although pregnancy and childbirth are not, in and of themselves, terms that create conflict in providing reasonable accommodations, the issue is the vague phrase, “related medical condition,” in the Proposal cited as:

[M]edical 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; 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.⁸

Furthermore, “[T]his 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.”⁹ Not only does this list extend far beyond medical conditions actually related to pregnancy, but also included are requirements for reasonable accommodations for certain activities for which there exist in federal law conscience protections, such as abortion, certain infertility interventions, and contraception. The Proposal explicitly cites:

An employee who requests leave for IVF treatment for the worker to get pregnant has a related medical condition (difficulty in becoming pregnant or infertility) and is seeking health care related to it.¹⁰

Also, clearly an employer who does not want to cooperate with abortion would be required to grant a leave for an abortion. Such expansion of terms is far more extensive than what Congress intended, and the intention of the Congressional sponsors said it shouldn’t cover abortion:

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

⁸ *Id.*, at 54767.

⁹ *Id.*

¹⁰ *Id.*, at 54720.

abortion leave, nor does the act permit the EEOC to require employers to provide abortion leave in violation of state law.¹¹

I reject the characterization that this [the *Pregnant Workers Fairness Act*] would do anything to promote abortion.¹²

Further demonstrating Congressional intent is the fact that the *Pregnant Workers Fairness Act*:

makes clear that an employer-sponsored health plan is not required under the PWFA to pay for or cover any item, procedure, or treatment and that the PWFA does not affect any right or remedy available under any other Federal, State, or local law with respect to any such payment or coverage requirement. For example, nothing in the PWFA requires or forbids an employer to pay for health insurance benefits for an abortion.¹³

An undefined area is the area of mandates and accommodations as related to “Gender Identity.” It would be inconsistent with Congressional intent if EEOC initiates such mandates based on “related medical conditions.” Areas of concern which would violate rights of conscience and religious freedom of the employer include:

- Womb transplantation.
- Gender transitioning interventions.
- Chest feeding by biological males.
- The inclusion of invitro fertilization as fertility treatment.
- Surrogacy.

A number of faiths dogmatically prohibit formal and immediate cooperation in these interventions. Clearly, providing an accommodation, fiscally or even through personnel policies requiring leave-time, constitutes such cooperation violative of conscience rights and religious freedom. At the same time, no provision is made in the Proposal to protect the employment rights of persons becoming parents by adoption.

Another ambiguous term is “Reasonable Accommodation.” The Proposal does not restrict a period of time for a leave. It states that a leave for personal use does not have to be accommodated, but how is that differentiated? The employer’s “undue hardship” standard of the *Americans with Disabilities Act* is included in the Proposal.¹⁴ However, violations of

¹¹ Senator Bob Casey, Senate Democratic sponsor, 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>

¹² Senator Bill Cassidy, Senate Republican sponsor, 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>.

¹³ 42 U.S.C. 2000gg-5(a)(2).

¹⁴ "Undue hardship" is defined as an 'action requiring significant difficulty or expense' when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer's operation." ADA National Network, "Top ADA Frequently Asked Questions." (ND). <https://adata.org/faq/what-considered-undue-hardship-reasonable-accommodation>.

conscience and religious freedom clearly create an undue hardship on the employer and are not addressed sufficiently.

The language of the PWFA addresses prohibitions against employer retaliation, including to “coerce, intimidate, threaten or interfere,” but the Proposal is also adding “harassment,” which is not included in the PWFA. Even if an employer was unable to provide reasonable accommodation or to do so would constitute an undue hardship, a number of the claims will be filed accusing retaliation, harassment, or coercion. Such claims could be brought by anyone, not just the individual. There needs to be clarity concerning what constitutes “retaliation,” in response to the accommodation request.

Procedural Questions:

PWFA gives EEOC rulemaking authority. However, under Title VII, EEOC does not have the authority to promulgate regulations with the force and effect of law. They have guidance documents that are persuasive and relied upon but are not legally binding on employers. These regulations will be legally binding. This legal contradiction needs to be addressed.

Many employers provide services across state lines, including in a number of states. There remain unaddressed questions concerning the impact of the Proposal based on state laws, especially in the areas of abortion and transgender issues. This Proposal is fraught with the potential of endless litigation, the results of which most likely will recognize the well-founded rights of conscience and religious freedom, as well as state’s rights, especially related to the statutorily unfounded basis of the inclusion of abortion.

The EEOC certifies that the proposed rule would not adversely affect the well-being of families, as discussed under section 654 of the *Treasury and General Government Appropriations Act of 1999*:¹⁵ “...by providing reasonable accommodation to workers with known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship, the proposed rule would have a positive effect on the economic well-being and security of families.¹⁶ On the contrary, mandating that abortion be included as a “related medical condition” impacts the very creation of the family, with a growing body of evidence that it has long lasting negative consequences.¹⁷

Conscience, Religious Freedom, and Free Speech Rights

The Proposal cites that it is subject to the applicability to religious employment set forth in the Title VII Religious Organization Exemption Provision.¹⁸ This leaves open the question of the scope of the religious organization exemption under Title VII. “Religious” under Title VII is defined broadly to include all aspects of religious observance as well as belief. The Proposal

¹⁵ *Treasury and General Government Appropriations Act*, 2000, Pub. L. No. 106-58 (1999).

¹⁶ Proposed Rule, 54766.

¹⁷ Carlo V. Bellieni MD, Giuseppe Buonocore MD, PhD, “Abortion and subsequent mental health: Review of the literature,” *Psychiatry and Clinical Neurosciences*. First published: 16 July 2013. <https://doi.org/10.1111/pcn.12067>.

¹⁸ Proposed Rule, 54746

does reference the “Ministerial Exception,”¹⁹ the Proposal questions whether this construct should be interpreted narrowly (coreligionist) or (Second Option) in a manner that does not require religious entities to make accommodations that would conflict with their religion. While the rule of construction should be one that “allows religious institutions to continue to prefer coreligionists in the pregnancy accommodation context,”²⁰ specifically in connection with accommodations that involve reassignment to a job or to duties for which a religious organization has decided to employ a coreligionist, the Second Option also should be included in the final regulation. Clearly, the Religious Tenets Protection from the ADA ought to apply to these regulations. It provides that a religious entity may give preference to individuals of its own religion and may require that all applicants and employees follow the entity’s religious rules.²¹

Most significantly, the regulatory mandates would require employers to cooperate in procedures and interventions, such as abortion, contraception, and certain interventions to address infertility, that could violate rights protected by the U.S. Constitution’s First Amendment, the *Religious Freedom Restoration Act* (RFRA), Title VII of the *Civil Rights Act* of 1964 (Title VII), Title IX of the *Education Amendments Act* of 1972, the Church Amendments, Section 245 of the *Public Health Service Act*, and the Weldon Amendment of the *Consolidated Appropriations Act*. There is a need to provide clarity concerning the obligations of the federal government to “accommodate” employer’s and organization’s deeply held moral beliefs, rights of conscience (unaddressed in the Proposal), religious identity, affiliation, and free religious exercise. It has been demonstrated that Americans are “uncomfortable with the idea of government penalizing groups and individuals for living out their religious beliefs.”²² There is no need for this conflict to occur.

Furthermore, the right to free speech needs to be protected. Employers and employees must be allowed to exercise their free speech in expressing an opinion about the dignity of human life, without fear of retaliation. There are other unaddressed concerns that have been generated by the Proposal:

- What accommodations provided under PWFA, 42 U.S.C. 2000gg–1, may impact a religious organization’s employment of individuals of a particular religion, and what accommodations may not impact a religious organization’s employment of such individuals?
- How accommodations provided under PWFA, 42 U.S.C. 2000gg–1, may affect those individuals’ performance of work connected with the religious organization’s activities, and when they may not affect those individuals’ performance of such work?
- When may the prohibition on retaliatory or coercive actions in PWFA, 42 U.S.C. 2000gg–2(f), impact a religious organization’s employment of individuals of a particular religion, and when it may not impact a religious organization’s employment of such individuals?

¹⁹ *Id.*

²⁰ *Id.*

²¹ ADA, Title I

²² Becket Law, *Religious Freedom Index: American Perspectives on the First Amendment*, First Edition (2019). www.Becketlaw.org/Index.

- When may prohibiting retaliatory or coercive actions as described in PWFA, 42 U.S.C. 2000gg–2(f), affect those individuals’ performance of work connected with the religious organization’s activities, and when it may not affect those individuals’ performance of such work?
- Can employers have a work culture supportive of all human life, regardless of the stage of development? Can they express support for the *Dobbs decision*?²³ Can they promote adoption over abortion?

The public would benefit from the Commission providing a more detailed interpretation of PWFA, 42 U.S.C. 2000gg–5(b), that would inform the Commission’s case-by-case consideration of whether provisions apply to a particular set of facts. Perhaps more guidance could be provided by referencing resolved cases in which Title VII protections of religious freedom or the Free Exercise clause are cited:

In *Bear Creek Bible Church and Braidwood Management v. Equal Employment Opportunity Commission* the decision to apply RFRA in Title VII holds that the federal government must demonstrate very specific compelling interest when forcing a religious organization to violate its understanding of sex.²⁴ And *Fulton* calls for strict scrutiny of the Free Exercise clause when there is a threat to religious freedom by the federal government.²⁵

Conclusion

In conclusion, we support the Congressional intent of the *Pregnant Workers Fairness Act* but raise significant concerns as to how the Proposal will not contravene that intent, particular with the overly broad definition of medical conditions “which relate to, are affected by, or arise out of pregnancy or childbirth.”²⁶ While we support regulations that support and protect pregnant families in successfully bringing forth human life, there are provisions that contradict that intent, e.g., related procedures to terminate life. The Proposal does not even mention the unborn child. It’s arbitrary and capricious to not include the health of the unborn child when the goal is to maintain the health of the pregnancy.

Including abortion in that definition is contrary to Congressional intent are violative of numerous federal laws: U.S. Constitution’s First Amendment, the *Religious Freedom Restoration Act* (RFRA), Title VII of the *Civil Rights Act* of 1964 (Title VII), Title IX of the *Education Amendments Act* of 1972, the Church Amendments, Section 245 of the Public Health Service Act, and the Weldon Amendment of the Consolidated Appropriations Act. Since the list is non-exhaustive there can be further intrusions into conscience rights and religious freedom in the area of gender identity. Furthermore, significant legal jurisdictional questions can be raised

²³ *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. ____ (2022)

²⁴ *Bear Creek Bible Church & Braidwood Mgmt. v. Equal Emp’t Opportunity Comm’n*, 571 F.Supp.3d 571 (2021).

²⁵ *Fulton v. City of Philadelphia*, 593 U.S. ____ (2021).

²⁶ Proposed Rule, 54767.

concerning even the EEOC's ability to promulgate these regulations as they address Title VII provisions.

We thank you for this opportunity to provide our input into the Proposal and look forward to ongoing collaboration with you in protecting civil rights, mindful that religion is referenced in the very First Amendment to the United States Constitution.

Sincerely yours,



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