October 10, 2023

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

RE: Notice of Proposed Rulemaking, Regulations to Implement the Pregnant Workers Fairness Act, RIN 3046-AB30

Dear Mr. Windmiller:

The HR Policy Association ("HR Policy" or "Association") welcomes the opportunity to submit the following comments for consideration by the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") in response to the published Notice of Proposed Rulemaking ("NPRM") and Request for Comments regarding implementing regulations for the Pregnancy Workers Fairness Act ("PWFA" of "Act").[1]

HR Policy is a public policy advocacy organization that represents the most senior human resources officers in nearly 400 of the largest corporations doing business in the United States and globally. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce, and 20 million employees worldwide. The Association's member companies are committed to ensuring that laws and policies affecting the workplace are sound, practical, and responsive to the needs of the modern economy, and submits the following comments for review by the Commission.

[1] Notice of Proposed Rulemaking: Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714 (Aug. 11, 2023).

- **HR Policy and its member companies support the Pregnant Workers Fairness Act and appropriate protections for pregnant workers.**

The Association strongly endorsed the Pregnant Workers Fairness Act ahead of its passage in 2021. Along with other business groups, HR Policy engaged with lawmakers in Congress and submitted a letter outlining its strong support for passage of the bill. As the letter stated:

> The [bill] would protect the interests of both pregnant employees and their employers...the PWFA would clarify an employer's obligation to accommodate a pregnant employee or applicant with a known limitation that interferes with her ability to perform some essential functions of her position.[2]

Association members are committed to meeting the needs of their employees and providing the highest level of benefits, and therefore endorsed the Act as providing needed legal protections for pregnant employees and clarifying obligations for employers.

The Association similarly endorses the EEOC's implementing regulations for the Act, to the extent that they align with the purposes of the Act and provide stakeholders with clarity and consistency regarding their legal obligations. Unfortunately, certain provisions of the EEOC's proposed regulations stray impermissibly beyond the text and purpose of the Act, and accordingly, should be revised as recommended below.

- **The Commission's definitions of "temporary" and "in the near future" are too broad.**

The PWFA includes in its definition of "qualified employee" those employees who are unable to perform an essential job function, provided such inability is "for a temporary period" and the employee will be able to perform such function "in the near future."[3] The Act directed

[2] Letter to Chair Murray and Ranking Member Burr, HR Policy Association et al. (August 2, 2021).
[3] 42 U.S.C. 2000gg(6).

the EEOC to define "temporary period" and "in the near future" in its implementing regulations. In other words, the EEOC was tasked with defining the duration that an employer would have to reasonably accommodate an employee who is unable to perform an essential job function due to a known limitation related to pregnancy or related medical condition.

The EEOC proposes to define "in the near future" as "lasting for a limited time, not permanent, and may extend beyond in the near future," and "in the near future" as "generally forty weeks from the start of the temporary suspension of an essential function."[4] Essentially, the EEOC would define the maximum duration that an employer must reasonably accommodate (absent undue hardship) an employee unable to perform an essential job function at "generally forty weeks," and in fact contemplates increasing this duration to a full year in the final rule.[5] The Commisssion notes that it based this duration on the "time of a full-term pregnancy."[6] Finally, the proposed regulations emphasize that such periods are for each known limitation related to pregnancy or related medical condition.

Defining "in the near future" and "temporary period" as nearly a full year is significantly overbroad and at odds with Congressional intent. A reasonable person's conception of "near future" and "temporary period," particularly within the context contemplated here – being unable to perform one or more essential functions of a job – does not resemble 40-52 weeks, nor perhaps even close to that number. Further, and more importantly, if Congress intended such a duration, it would have simply spelled out in the statute that it should be the length of a full-term pregnancy. Finally, courts interpreting the ADA in a similar context have identified six months

[4] Notice of Proposed Rulemaking: Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54767 (Aug. 11, 2023).
[5] See Notice of Proposed Rulemaking: Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54724-26 (Aug. 11, 2023).
[6] *Id*. at 54724.

as reasonably resembling "in the near future," something that was explicitly cited in the House Report on the Act.[7]

Under the proposed regulations, employers could be required to reasonably accommodate an employee unable to perform any essential job functions for multiple periods each lasting potentially up to a year. Such a situation could pose significant problems for business operations, increase costs, disrupt productivity, and lead to schedule unpredictability. At the very least, the Commission should define such periods to be no more than six months.

- **The "predictable assessments" should be eliminated.**

The proposed rule includes four specific accommodations the Commission has deemed as essentially *de facto* reasonable and that employers must make such accommodations when requested "in virtually all cases."[8] The Commission also proposes to make it unlawful for employers to request supporting documentation in such cases. Once again, the Commission has impermissibly moved beyond the text and scope of the PWFA. The Act specifically incorporates the ADA's definition of reasonable accommodation, which involves an interactive process between an employer and employee and individualized assessments to determine an appropriate accommodation in each case.

Nevertheless, the Commission deemed it appropriate to remove this important process for a set of arbitrarily decided accommodation requests. The Commission requests comment on whether it should expand this list; the Association submits that the list should be removed altogether. There is no reason why the normal accommodation process, which works for countless disabilities under the ADA and for other requests under the PWFA, cannot work for

[7] H.R. Rep. No. 117-27 pt. 1, at 28 (2021); *See also* Robert v. Bd. Of Cty. Comm'rs, 691 F.3d 1211, 1218 (10th Cir. 2021).
[8] Notice of Proposed Rulemaking: Regulations to Implement the Pregnant Workers Fairness Act, 88 Fed. Reg. 54714, 54769 (Aug. 11, 2023).

the arbitrary list created by the Commission. Such predictable assessments create significant potential for abuse because the Commission would allow employees to self-attest the need such and would prohibit employers from requesting documentation. The ADA's interactive process is an established method to arrive at an accommodation that works for both employer and employee, and there is no reason to abandon that process on an arbitrary basis. Accordingly, the Commission should remove the "predictable assessments" from the final rule.

Sincerely,

/s/ Gregory Hoff

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