October 10, 2023

VIA ELECTRONIC SUBMISSION

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

RE: RIN 3046–AB30, Regulations to Implement the Pregnant Workers Fairness Act

Dear Mr. Windmiller,

Physicians for Reproductive Health (PRH) is pleased to have the opportunity to submit comments in support of the Equal Opportunity Commission's (EEOC) Notice of Proposed Rulemaking (NPRM), RIN 3046-AB30, Regulations to Implement the Pregnant Workers Fairness Act.

PRH is a physician-led national advocacy organization that organizes, mobilizes, and amplifies the voices of medical providers to advance reproductive health, rights, and justice. Our programs combine education, advocacy, and strategic communications to ensure access to comprehensive sexual and reproductive health care. We believe this work is necessary for all people to live freely with dignity, safety, and security. As a network of physicians who care for pregnant people at different points in their lives and pregnancies, we are committed to ensuring no one has to choose between their job and their health.

We are pleased that the EEOC has issued an incredibly strong and workable proposed rule implementing the Pregnant Workers Fairness Act (PWFA). The proposed rule provides important clarity for both workers and employers and will fulfill the law's purpose of ensuring people who need accommodations or care related to pregnancy, childbirth, or related medical conditions can remain healthy and do their jobs.

While the proposed rule is effective, we appreciate the EEOC's consideration of the following suggestions on ways the NPRM could be strengthened before a final rule is issued. The patients we care for deserve the strongest implementing regulations possible to ensure they are able to obtain the care they need.

PRH applauds the EEOC for making clear that employer delay in responding to accommodation requests "may result in a violation of the PWFA."

Too often employers delay providing the reasonable accommodations individuals request for weeks or even months. Delays in accommodations often adversely impact the health of workers and the health of their pregnancies. The PWFA was intended to address this exact concern. To

ensure people are able to get the accommodations they need without unnecessary delay, we recommend the EEOC make several changes to the proposed rule and proposed appendix.

First, we suggest the EEOC strengthen the definition of "unnecessary delay" in the following ways:

1. We urge the EEOC to clarify that unnecessary delays at any point during the accommodation process may result in a failure-to-accommodate violation, not just delays in "responding to a reasonable accommodation request." We suggest the following language be added: "an unnecessary delay in responding to a reasonable accommodation request, engaging in the interactive process, or providing a reasonable accommodation may result in a violation of the PWFA." This will clarify that employers cannot avoid a violation simply by providing an initial response to the employee's request but must instead avoid delay during the entirety of the accommodation process.
2. We appreciate the EEOC's inclusion of a variety of factors to be considered when evaluating whether an employer has caused an unnecessary delay. We recommend the EEOC add one additional factor to the list: "The urgency of the requested accommodation." As a network of physicians, we know that while many people will have healthy pregnancies, in some cases, significant pregnancy complications can develop. Pregnant people who do not receive immediate relief can face tragic consequences to their health and well-being.
3. We respectfully ask the EEOC to add a sentence to the definition of *Interactive Process* as follows: "Unnecessary delay, as defined in § 1634.4(a)(1), in the interactive process may result in a violation of the PWFA." The proposed appendix already recognizes the importance of expediency in carrying out the interactive process, stating "a covered entity should respond *expeditiously* to a request for reasonable accommodation and act *promptly* to provide the reasonable accommodation." (emphasis added). The regulation itself should underscore this directive by making clear that unnecessarily delaying the interactive process may result in a violation of the PWFA.

PRH appreciates the EEOC's question as to whether the supporting document framework the agency sets out in the proposed rule strikes the right balance between the needs of workers and employers – we believe the following modification to the supporting document framework would be beneficial.

As a network of physicians, we are all too familiar with the barriers many individuals face obtaining necessary care. Even obtaining appointments with health care providers in a timely manner, or at all, can be difficult and poses a significant barrier to obtaining medical documentation. This is especially true for people who live and work in rural or geographically isolated areas and for people who have low wages, who may not have health coverage or consistent access to health care and disproportionately lack control over their work schedules. Furthermore, people of color, particularly Black and Indigenous people, often face medical racism that may inhibit or delay their ability to secure supporting documentation. For example, medical racism can deter people from making appointments or seeking care altogether, can result in individuals being denied available appointments, or can result in individuals' symptoms or concerns being dismissed and supporting documentation refused. In addition, in some instances,

medical providers impose fees to fill out forms, which can grow to significant amounts over time, as employers request new or different documentation.

The PWFA recognizes the importance of workers obtaining accommodations in a timely fashion to protect their health. Several aspects of the proposed rule on supporting documentation would unfortunately impose an unnecessary financial, physical, and mental burden on workers, contribute to substantial delay in receiving reasonable accommodations, and deter workers from seeking the accommodations they need for their health and well-being. We suggest the following changes:

1. We suggest the EEOC clarify what an "obvious need" is. We agree with the EEOC that employers should not be permitted to seek medical documentation when the need for accommodation is "obvious." We are concerned, however, that employers could unilaterally impose restrictions based on paternalistic stereotypes about what pregnant or postpartum people "obviously" need, or that the proposed rule could have the unintended consequence of making the employee's body the subject of invasive scrutiny as employers consider whether their pregnancy is "obvious." For these reasons, we encourage the EEOC to maintain this important concept in the final regulations, but to clarify how it is to be applied. We suggest replacing the current text of 1636.3(l)(1)(i) with the following: "(i) When the employee has confirmed, through self-attestation, that they have a limitation related to pregnancy, childbirth, or a related medical condition, and the need for accommodation is obvious." We encourage the EEOC to warn employers in the proposed appendix against imposing accommodations not requested by the employee based on assumptions that the need for accommodation is "obvious."
2. We applaud the agency for making clear that employers cannot seek supporting documentation for certain straightforward accommodation requests. We urge the EEOC to expand the list to also include:

    - Time off, for at least 8 weeks, to recover from childbirth
    - Paid time off to attend health care appointments related to pregnancy, childbirth, or related medical conditions, including, at minimum, at least 16 health care appointments
    - Flexible scheduling or remote work for pregnancy symptoms including, but not limited to, nausea, increased bodily pain, discomfort, fatigue, changes in thirst and appetite, headaches, lightheadedness, mood changes, heartburn and indigestion, and leg cramps
    - Modifications to uniforms or dress code
    - Allowing rest breaks, as needed
    - Eating or drinking at a workstation
    - Minor physical modifications to a workstation, such as a fan or chair
    - Moving a workstation, for example to be closer to a bathroom or lactation space, or away from toxins
    - Providing personal protective equipment
    - Reprieve from lifting heavy objects, for example reprieve from lifting over 20 pounds
    - Access to closer parking

3. We commend the EEOC for making clear that employers may only demand "reasonable documentation." This is critical. In the early months of PWFA implementation, some

employers have imposed extremely onerous documentation requirements, similar to those under the FMLA and ADA, that far exceed "reasonable." As a result, many employees have not received the accommodations they need in a timely manner. We strongly encourage the agency to do the following to ensure employers request only "reasonable" documentation:

- modify the definition of reasonable documentation found in 1636.3(l)(2). It is unnecessarily invasive for an employer to demand to know their employee's precise condition or a description of it; rather it should be sufficient for a health care provider to (1) describe the employee's limitation that necessitates accommodation, (2) confirm that the limitation is related to pregnancy, childbirth, or a related medical condition, and (3) state that they require an accommodation. For example, medical documentation need not state that a worker needs to attend a medical appointment related to a miscarriage but can simply state that the employee needs to attend a medical appointment during the workday (the limitation) due to pregnancy, childbirth, or a related medical condition, and thus a modified start time (the accommodation) is recommended.
- Make clear in the proposed rule or proposed appendix that employers cannot require employees to submit any particular medical certification form, so long as the health care provider documents the requisite three pieces of information, as explained immediately above. Additionally, make clear that employers cannot require employees to complete ADA or FMLA certification forms in order to receive a PWFA accommodation, as such forms seek substantially more information than is "reasonable" under PWFA.
- We urge the EEOC to clarify that under no circumstances may an employer require an employee to take any sort of test to confirm their pregnancy or to provide documentation or other proof of pregnancy. The EEOC should clarify that self-attestations of pregnancy are sufficient.

4. We applaud the EEOC for its comprehensive, albeit non-exhaustive, list of health care providers from whom employees can seek documentation. However, employers should not have the discretion to second guess the judgment of licensed health care providers due to an assumption that they are not "appropriate" for the situation. We therefore urge the EEOC to remove the terms "appropriate" and "in a particular situation" from the sentence "The covered entity may request documentation from the *appropriate* health care provider *in a particular situation*" (emphasis added). We also urge the EEOC to make clear in the proposed rule or proposed appendix that employers must accept documentation from telehealth care providers. And finally, PRH greatly appreciates the EEOC for making clear that employers cannot require employees to be examined by the employer's health care provider, as this employer practice invades privacy, could lead to differential evaluations based on race, imposes unnecessary delay, and is a significant deterrent to seeking accommodation. We also applaud the EEOC's emphasis on ensuring employers maintain employee privacy when seeking documentation.

PRH appreciates the EEOC's detailed discussion of reasonable accommodations, which reflects the range of accommodations workers impacted by pregnancy, childbirth, and related medical conditions need to remain healthy and continue working.

We suggest the following additions to improve what constitutes a reasonable accommodation:

1. We urge the EEOC to add a new subsection to 1636.3(i) that provides as an additional example of reasonable accommodation: "modifications that alleviate pain or discomfort and reduce health risks for the employee or applicant or their pregnancy." We appreciate the EEOC's highlighting in the proposed appendix the critical nature of accommodations that alleviate increased pain and health risks. We suggest that the EEOC make this category of accommodation more prominent in the rule itself and add additional examples to the proposed appendix. Employers have historically denied pregnant workers accommodations due to a lack of "evidence" of a measurable and diagnosable complication, and many health care providers believe they are not allowed to recommend accommodations without the same evidence. Highlighting the law's purpose as it relates to risk and pain avoidance, therefore, is critical. This is especially true for women of color, who are more likely to work in physically demanding jobs. Moreover, scientific research supports that Black women in particular are more likely to have their employers and health care providers underestimate their pain and apply higher levels of risk tolerance toward them.
2. We suggest adding to the proposed appendix the following examples of reasonable accommodation to alleviate increased pain and discomfort or to avoid increased risk to health: 1) a farmworker being temporarily transferred to an indoor position to avoid the risks of falling in a slippery field and exposure to toxic pesticides, (2) a secretary experiencing pelvic pain being allowed to work remotely to alleviate pain that would be exacerbated by the commute and sitting upright all day; (3) a warehouse worker being given a portable cooling device to avoid pregnancy risks from excessive heat; and (4) a security guard being temporarily reassigned from nighttime to daytime shifts to avoid increased fatigue and the health risks (miscarriage and preterm birth) associated with working at night.

PRH commends the Commission's thoughtful treatment of leave as a reasonable accommodation and suggest modifications.

PWFA's purpose could not be realized without access to leave as an accommodation. The most at-risk workers have zero sick days and are ineligible for FMLA. For them, before PWFA's passage, taking a few days off to attend health care appointments put them at risk of lawful termination. While the U.S. desperately needs a comprehensive paid leave program, leave provided as an accommodation under PWFA will provide a lifeline to many who would have otherwise been fired for seeking basic medical care or taking time to recover from childbirth.

We strongly urge the Commission to include "continuation of health insurance benefits during the period of leave" in 1636.3(i)(3) as another potential leave-related accommodation that must be provided absent undue hardship. For many workers, the opportunity to access leave as a reasonable accommodation is hollow without continuation of health benefits, as access to uninterrupted health care is vital during pregnancy and the postpartum period. This interpretation is supported by the intent of the PWFA, which not only has the goal of continued employment, but also the goal of promoting maternal and child health. Indeed, the House report on the PWFA clearly stated that pregnant people "want, and oftentimes need, to keep working during their pregnancies, both for income and to retain health insurance."

PRH affirms the definition of "pregnancy, childbirth, and related medical conditions" is intended to be expansive. We make the following suggestions in light of that understanding:

1. PRH encourages the EEOC to clarify that the term pregnancy includes "common pregnancy symptoms," such as increased bodily pain, discomfort, fatigue, changes in thirst and appetite, headaches, lightheadedness, mood changes, heartburn and indigestion, and leg cramps.
2. PRH strongly supports the inclusion of termination of pregnancy, including abortion, in the enumerated examples of "related medical conditions" that may require accommodation under the PWFA. In addition to comprising an essential component of reproductive health care needed by hundreds of thousands of people in the U.S. every year, abortion's place among the full range of statutorily-protected "related medical conditions" is rooted in decades of legislative, administrative, and judicial authority. In fact, by enacting the Pregnancy Discrimination Act (PDA), Congress expressly confirmed its intent that the statute protect workers from discrimination for obtaining abortion care. The EEOC reaffirmed abortion as a "related medical condition" in its 2015 guidance. It also made it explicit that fringe benefits like paid sick days must be provided for abortions if they are provided for other medical conditions. Finally, as the EEOC notes in the proposed Interpretive Guidance, courts consistently have found that the PDA's protections encompass the right to be free from discrimination on the basis of contemplating or obtaining abortion care.
3. Additionally, we appreciate the EEOC's comprehensive reading of the circumstances in which medical conditions are "affected by" pregnancy or childbirth. We encourage the EEOC to specifically include examples of conditions that are "affected by" pregnancy, childbirth, or related medical conditions—i.e. exacerbated by pregnancy or childbirth. Including additional examples will clarify that employees might need accommodations to mitigate an existing condition, chronic illness, or disability that is aggravated by pregnancy or childbirth or that is aggravated because the employee must discontinue their usual treatment or medication due to pregnancy.
4. We also applaud the EEOC's inclusion of "menstrual cycles" as a "related medical condition" that employers are obligated to accommodate. As physicians, we know a person's reproductive life lasts for decades, and an individual's needs will differ at various points during those years, not to mention from pregnancy to pregnancy. Consistent with that reality, we urge the agency to add perimenopause and menopause to the list of "related medical conditions." While we recognize that the list of examples is non-exhaustive, and that both of these conditions fall within a reasonable construction of "menstrual cycles," the documented dismissiveness perimenopausal and menopausal women face from their employers demands making those conditions' inclusion explicit. Recent studies confirm what most of us already know: that perimenopause and menopause symptoms can last for years and can interfere with work in myriad ways. Like menstruation, infertility, and the use of birth control – all of which are specifically included in the regulation – perimenopause and menopause are related to a worker's capacity for pregnancy, and their explicit inclusion will provide valuable guidance to employers and the millions of affected workers.

PRH supports the proposed rule's explanation of "predictable assessments," meaning examples of accommodations requested by employees due to pregnancy that will, in nearly all instances, not be considered to impose an undue hardship on the employer.

PRH appreciates the proposed rule's understanding that many pregnancy- and childbirth-related limitations are temporary, common, and predictable and require only "simple and straightforward" workplace adjustments that do not pose undue hardships on most if not all employers. The EEOC seeks comment on whether more accommodations should be included under this category. In response, we urge the EEOC to 1) make clear that predictable assessments with respect to undue hardship should be extended to also include accommodations requested due to childbirth and related medical conditions; and 2) add the following accommodations to the list of predictable assessments:

- Modifications to uniforms or dress code
- Minor physical modifications to a workstation, such as a fan or chair
- Allowing rest breaks, as needed
- Moving a workstation, such as to be closer to a bathroom or lactation space, or away from toxins
- Providing personal protective equipment
- Access to closer parking
- Eating or drinking at a workstation
- Time off to attend a minimum of 16 health care appointments related to pregnancy or childbirth

In conclusion, PRH thanks the EEOC for its thoughtful consideration around implementation of the PWFA to ensure no one is forced to choose between their health and their ability to sustain themselves and their families. Please do not hesitate to reach out MiQuel Davies, Director, Public Policy, mdavies@prh.org, to provide further information.

Sincerely,

Dr. Jamila Perritt, MD, MPH, FACOG
President & CEO
Physicians for Reproductive Health