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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

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June 08, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Charlotte A. Burrows
Chair
Equal Employment Opportunity Commission
131 M Street, NE
Washington, D.C. 20507

Dear Chair Burrows:

Last year, the Pregnant Workers Fairness Act (PWFA), a bill that prohibits employers from engaging in employment practices that discriminate against reasonable accommodations for workers affected by pregnancy, childbirth, or related medical conditions, was enacted into law as part of the Consolidated Appropriations Act of 2023.¹ However, despite considerable time and notice since the PWFA's passage, the Equal Employment Opportunity Commission (EEOC or Commission) has failed to issue a Notice of Proposed Rulemaking (NPRM) pursuant to the Administrative Procedure Act (APA) to fulfill its requirements under the PWFA.

The PWFA requires the EEOC to "issue rules . . . providing examples of reasonable accommodations addressing known limitations relating to pregnancy, childbirth, or related medical conditions."² However, as of the date of this letter, and less than 30 days before the law's implementation, the EEOC has not issued a NPRM to give stakeholders notice of a forthcoming rule or the opportunity to comment on "examples of reasonable accommodations."³ Instead, EEOC released guidance on its website titled, "What You Should Know About the Pregnant Workers Fairness Act," and announced that it will "start accepting charges under the PWFA on June 27, 2023."⁴

¹ H.R. 2617, 117th Cong. (2022) (enacted).

² *Id.*

³ H.R. 2617, 117th Cong. (2022) (enacted).

⁴ *What You Should Know About the Pregnant Workers Fairness Act*, EEOC, <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act> (last viewed June 1, 2023).

EEOC's regulations require that, "if a guidance documents set[] forth the Commission's position on a legal principle for the first time or change[] the Commission's legal position on any issue," the guidance documents must be approved by a majority vote of the Commission.⁵ Unfortunately, the EEOC has frequently bypassed its own rules and regulations by issuing guidance without a majority vote. For example, in June 2021, the EEOC issued guidance without public comment or a majority vote of the Commission purporting to educate employees and employers of their rights and obligations following the U.S. Supreme Court's decision in *Bostock v. Clayton County*.⁶ The EEOC's guidance addressed issues that went well beyond the holding of the Court, including whether employers have the right to provide "sex-segregating bathrooms, locker rooms, and dress codes" for men and women.⁷

As a result, in July 2022, the United States District Court for the Eastern District of Tennessee granted a preliminary injunction in *State of Tennessee v. United States Department of Education*, and held that EEOC's guidance impermissibly went beyond the holding of *Bostock* and violated the APA because it "identifies and creates rights for applicants and employees that have not been established by federal law, and it directs employers to comply with those obligations to avoid liability."⁸ In October 2022, the United States District Court for the Northern District of Texas held, in *Texas v. Equal Employment Opportunity Commission*, that the EEOC's issuance of guidance interpreting the Court's holding in *Bostock* "exceeded [EEOC's] authority," that EEOC's decision to issue this "substantive" legislative rule violated the APA, and that Chair Burrows lacked the authority to unilaterally interpret the Court's holding without a vote by EEOC commissioners.⁹ The court vacated EEOC's guidance, declaring it unlawful.¹⁰

The rulemaking requirements under the APA are not advisory. They are designed to preserve and enshrine the procedural due process rights of stakeholders by providing stakeholders notice of proposed binding legal obligations and the ability to comment on enforcement policy affecting their liberty interests. As the lead Republican sponsor of the PWFA, I care deeply about this law being implemented properly to ensure that pregnant women have the workplace accommodations they need. Therefore, I request that you provide answers to the following questions, on a question-by-question basis, by **June 22, 2023**.

1. How does the EEOC plan to follow its legal obligations under the PWFA?
2. Does the EEOC plan to issue a proposed rule for public comment pursuant to the statutory requirements of the PWFA? If so, when does EEOC anticipate releasing this proposed rule?

⁵ 29 C.F.R. § 1695.2(d).

⁶ *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020).

⁷ EEOC, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity, NVTA-2021-1 https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender#_ednref6.

⁸ 615 F.Supp.3d 807, 840 (July 15, 2022).

⁹ 2022 WL 4835346 (N.D. Texas Oct. 1, 2022).

¹⁰ *Id.*

3. Does the EEOC plan to issue additional technical assistance, policy guidance, or other types of memoranda interpreting the PWFA?
 - a. If so, please produce copies of any and all such documents to the Committee.
 - b. Will these be subject to a vote by EEOC commissioners?
 - c. If not, why not? If so, when does the EEOC plan to schedule this vote?

4. Following the decisions in *State of Tennessee v. United States Department of Education* and *Texas v. Equal Employment Opportunity Commission*, how will the EEOC ensure that it does not violate the APA when issuing technical assistance, policy guidance, or other types of memoranda interpreting substantive legal questions?

Thank you for your prompt attention to this important matter.

Bill Cassidy, M.D.

Bill Cassidy, M.D.
Ranking Member
U.S. Health, Education, Labor, and Pensions
Committee