ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

June 30, 2025

Henry J. Kerner
Vice Chairman and Acting Chairman
U.S. Merit Systems Protection Board
1615 M Street NW, Fifth Floor
Washington, DC 20419

Desk Officer
U.S. Merit Systems Protection Board
c/o Office of Information and
Regulatory Affairs
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RE: Comment on OMB Control No. 3124–0NEW, Reasonable Accommodation Request Form (Agency Information Collection Activities; Proposed Collection; Comment Request, 90 FR 23068 (May 30, 2025), FR Doc Number 2025-09810)

Dear Member Kerner and Desk Officer,

The Merit System Protection Board (MSPB) should not require federal employers to facilitate abortions for federal employees. The Pregnant Workers Fairness Act's (PWFA) purpose is to support pregnant women, not to promote abortion. Yet the MSPB's Notice declares that under the PWFA, pregnancy "includes … having or choosing not to have an abortion." 89 Fed. Reg. 23068, 23069 n.1. That is both legally unsound and contrary to this administration's policy.

The MSPB's interpretation of the PWFA conflicts with the bipartisan protections that Congress provided for pregnant women and their children. The MSPB should not twist this law to prevent federal officials from fully and unconditionally supporting pregnant women and new life. The MSPB should thus make clear that its accommodation procedures (and related form) for federal employees do not apply to requests to facilitate an elective abortion. We also recommend the MSPB clarify and update its reasonable accommodation policy and procedure to reflect an accurate interpretation of the PWFA.[1]

Alliance Defending Freedom (ADF) is an alliance-building legal organization that advocates for the right of all people to freely live out and speak the truth. ADF pursues its mission through litigation, training, strategy, and funding. Since its launch in 1994, ADF has handled many legal matters involving the right to life, religious liberty, federal healthcare and employment laws, constitutional rights, and other legal principles.

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[1] MSPB, Reasonable Accommodation Policy and Procedures (May 19, 2025), https://mspbpublic.azurewebsites.net/about/eeo/MSPB_RA_Policy_Procedures_May2025.pdf.

Congress sought to help pregnant women, not to facilitate abortion.

Congress sought to help expectant mothers keep their jobs while protecting their health and the health of their unborn children. Pregnant Workers Fairness Act (PWFA), Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, div. II, 136 Stat. 4459, 6084–89 (2022) (codified at 42 U.S.C. §§ 2000gg to 2000gg-6). Employers must "make reasonable accommodations to the known limitations related to [a qualified employee's] pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000gg-1(1). A "known limitation" means a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000gg 1(1); *see* 29 C.F.R. § 1636.3. As the MSPB puts it, "an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 90 Fed. Reg. at 23069.

The bipartisan PWFA is not supposed to facilitate abortion. The PWFA's lead sponsor, Democrat Senator Bob Casey, said: "the Equal Opportunity Employment Commission, 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 abortions in violation of State law." 168 Cong. Rec. S7050 (Dec. 8, 2022). The lead Republican cosponsor, Senator Bill Cassidy, likewise said: "I reject the characterization that this would do anything to promote abortion." *Id*. Senator Steve Daines concurred: "I want to make clear for the record that the terms 'pregnancy' and 'related medical conditions,' for which accommodations to their known limitations are required under the legislation, do not include abortion … This legislation should not be misconstrued by the EEOC or Federal courts to impose abortion-related mandates on employers, or otherwise to promote abortions, contrary to the intent of Congress." 168 Cong. Rec. S10081 (Dec. 22, 2022).

Federal agencies misread the PWFA to require employers to facilitate abortion.

Nevertheless, the Equal Employment Opportunity Commission (EEOC) read an abortion-facilitation mandate into the PWFA when it promulgated regulations for the Act. The EEOC's definition of "related medical conditions" included "having or choosing not to have an abortion." EEOC, Implementation of the Pregnant Workers Fairness Act, 89 Fed. Reg. 29096 (Apr. 19, 2024). A federal court recently vacated that mandate. *See Louisiana v. EEOC II*, No. 2:24-CV-00629, 2025 WL 1462583 (W.D. La. May 21, 2025). But the MSPB indicates that it intends to continue forward with the same erroneous understanding. 89 Fed. Reg. at 23069 n.1. The MSPB should not do that.

The MSPB should not treat abortion as a pregnancy-related condition that it will facilitate through accommodations for federal employees. Reading abortion into the PWFA is atextual, and Congress never delegated the authority to mandate abortion accommodations to administrative agencies.

An abortion-facilitation mandate contradicts the PWFA's text.

For several reasons, the PWFA lacks any reference to facilitating abortion.

First, abortion is not a "medical condition" related to pregnancy and childbirth. The EEOC tried to ground its abortion mandate in the phrase "related medical condition." 29 C.F.R. § 1636.3(b). Employers must "make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions" of an employee, absent "undue hardship" to the employer. 42 U.S.C. § 2000gg-1(1).

The EEOC claimed "the phrase 'pregnancy, childbirth, or related medical conditions' includes *choosing to have* or not to have an abortion." 89 Fed. Reg. at 29106 (emphasis added). The MSPB's Notice says federal employers must "provide reasonable accommodations … related to an employee[ ] … having or choosing not to have an abortion." 90 Fed. Reg. at 23069 & n.1. That is wrong: "The decision to obtain a purely elective abortion is not undertaken to treat a 'medical condition' related to pregnancy or childbirth." *Louisiana v. EEOC I*, 705 F. Supp. 3d 643, 658 (W.D. La. 2024).

The MSPB should not make the same mistake as the EEOC. Procedures are not medical conditions, and neither is a choice to obtain products or services. Because the PWFA applies only when the employee has a "physical or mental condition" related to pregnancy or childbirth, 42 U.S.C. § 2000gg(4), adding elective abortion departs from the text of the Act.

Second, the act of seeking an elective abortion is not a "limitation." To qualify for accommodations under the PWFA, an employee must have a "known limitation," meaning a "physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000gg(4).

The EEOC claimed the PWFA required accommodating an employee's "decision to have, or not to have, an abortion." 29 C.F.R. § 1636.3(b). But an action, such as the act of seeking healthcare or obtaining an abortion, is not a limitation as defined in the PWFA. 42 U.S.C. § 2000gg-1(1). Again, abortion is not a "physical or mental condition," it's a procedure—one that ends the pregnancy, rather than helping maintain it. Abortion cannot be a "known limitation" that triggers the PWFA because it is not a "physical or mental condition." 42 U.S.C. § 2000gg(4). So

an abortion is not a limitation within the meaning of the statute. And if there's no "known limitation," the statute's requirements do not apply.

The MSPB should not apply the PWFA to include accommodation for elective abortions, as the Notice suggested. *See* 90 Fed. Reg. at 23069 n.1.

Third, Title VII as amended by the Pregnancy Discrimination Act of 1978 (PDA) does not provide grounds to add abortion to the PWFA. The EEOC wrongly justified its now-vacated mandate based on its own past practice under Title VII, and this Notice uses similar language. *See* 90 Fed. Reg. at 23069 n.1. The EEOC reasoned that the PWFA must include abortion because "[f]or nearly 45 years … [the EEOC] has interpreted 'pregnancy, childbirth, or related medical conditions' in Title VII to include the decision to have—or not to have—an abortion and to prohibit discrimination in employment practices because an employee had or did not have an abortion." 89 Fed. Reg. at 29106 & n.66. That is no justification (even assuming the EEOC's past practice is legitimate).

Title VII and the PWFA are different statutes: Title VII prohibits all discrimination because of a woman's pregnancy, *see* 42 U.S.C. § 2000e(k), but does not require employers to make accommodations for her pregnancy. In contrast, the PWFA requires employers to accommodate a "known limitation" of pregnancy—which it defines as a "mental or physical condition"—unless doing so would be an undue hardship. *Id.* § 2000gg-1. Indeed, adding an accommodation requirement was the whole point of enacting the PWFA. Title VII's antidiscrimination rule is a negative prohibition, while the PWFA creates an affirmative requirement.[2]

Title VII says nothing about "known limitations," physical or mental conditions, or accommodations. 42 U.S.C. § 2000e(k). In the PWFA, Congress did not define discrimination to include lack of accommodation. It instead created a freestanding type of "unlawful employment practice," separate from discrimination. *See* 42 U.S.C. § 2000gg-1. Even assuming it would be sex-based discrimination to fire a woman for having an abortion, that doesn't make abortion a "medical condition" under the PWFA.

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[2] The Notice could be read to suggest that Title VII, as amended by the PDA, also "requires employers to provide reasonable accommodations" for pregnancy-related conditions. 90 Fed. Reg. at 23069 ("Each Act …"). That would be contrary to precedent recognizing that Title VII does not require accommodations—something the EEOC acknowledges. 89 Fed. Reg. at 23099; *see, e.g.*, *EEOC v. Hous. Funding II, Ltd.*, 717 F.3d 425, 430 (5th Cir. 2013) (Jones, J., concurring) (noting that "the PDA does not mandate special accommodations to women because of pregnancy or related conditions").

Facilitating Abortion is a Major Question that Congress Never Delegated to Federal Agencies.

The Supreme Court has established a basic presumption that Congress intends to make major policy decisions itself, not leave those decisions to administrative agencies. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). Abortion is a matter of "staggering" "political significance," *Biden v. Nebraska*, 600 U.S. 477, 502 (2023), and "presents a profound moral question" that has dominated American political debate for half a century, *see Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022). So under the major questions doctrine, the EEOC and the MSPB would have to show "clear congressional authorization" for an abortion mandate in the PWFA at the time of enactment. *West Virginia*, 597 U.S. at 723.

In the recent decision vacating the EEOC's rule, the district court held that the EEOC's abortion-facilitation mandate "exceeded its statutory authority to implement the PWFA and, in doing so, … unlawfully expropriated the authority of Congress." *Louisiana v. EEOC II*, 2025 WL 1462583, at *15. "If Congress had intended to mandate that employers accommodate elective abortions under the PWFA, it would have spoken clearly when enacting the statute." *Id.* at *16. But Congress did not clearly place abortion in the PWFA.

The MSPB should respect the President's Policy on Federal Funding of Abortions.

In the first week of his second term, President Trump issued an Executive Order implementing the Hyde Amendment and banning the use of Federal taxpayer dollars to fund elective abortions. Exec. Order No. 14,182, 90 Fed. Reg. 8751 (Jan. 24, 2025). This Order criticized the Biden administration for "embedding forced taxpayer funding of elective abortions in a wide variety of Federal programs." *Id.* § 1.

The abortion accommodation mandate in the (now-vacated) language of the EEOC's PWFA rule is a prime example. The taxpayers should not bear the cost of federal employees receiving accommodations—like paid time away from work beyond normal allowance—to undergo elective abortion procedures. The MSPB should adhere to the President's unambiguous direction "to end the forced use of Federal taxpayer dollars to fund or promote elective abortion." *Id.*

The MSPB's accommodation process and form should not be used to facilitate abortion, and the MSPB should clarify and update its reasonable accommodation policy and procedure to reflect the most accurate interpretation of the PWFA: it does not include abortion.

Respectfully Submitted,

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