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EO 12866 Meeting on the Proposed "Pregnant Workers Fairness Act Regulations," RIN 3046-AB30

Oral remarks

February 1, 2024

Thank you for the opportunity to provide comments on the Office of Information and Regulatory Affairs' review of the Equal Employment Opportunity Commission's (EEOC) final regulations implementing the Pregnant Workers Fairness Act.

I. The USCCB supported the Pregnant Workers Fairness Act.

The U.S. Conference of Catholic Bishops (USCCB) supported the Pregnant Workers Fairness Act (PWFA) and was heavily involved in negotiations and advocacy leading up to its passage – our statement in support of the bill was even quoted on the Senate floor – so we are well positioned to speak on what it does and does not mean.

The Pregnant Workers Fairness Act has the goal, consistent with the bishops' stated priority of building a society that cares for expectant mothers and their preborn children, of removing the unique disadvantages that pregnant women have experienced even under existing law when seeking accommodations in the workplace. The bishops have repeatedly called for circumstances of employment that better support family life, especially challenges associated with having children. This is why we worked hard to support passage of this historic, bipartisan legislation to support the well-being of pregnant workers and their preborn children.

So we were naturally dismayed that the EEOC's proposed rule on PWFA included a requirement to provide accommodations for abortion, contrary to Congress's clear intent. For the materials for this meeting, we have submitted the comments we filed on the proposed rule – those comments explain in detail why the proposed rule is unlawful for doing so.

In our remarks here today though, we would like to focus on a few specific issues that are especially relevant to OIRA's role in ensuring that the EEOC has properly considered the impact and workability of the final rule.

II. Regulatory Impact Analysis

The proposed rule's Regulatory Impact Analysis failed to offer estimates of at least two costs that the rule imposes.

First, the rule requires leave for the purposes of obtaining and recovering from an abortion, but the rule explicitly declines to attempt to estimate the costs this requirement would impose on employers, based on a lack of available data. To be sure, the calculation of this cost would be complex. Time of travel for abortion may vary from jurisdiction to jurisdiction. Time of recovery may vary based on the method of abortion, the stage of pregnancy at the time of the abortion, and the incidence of complications from the abortion. A functional estimate of the impact of an abortion leave requirement would need to account for each of these factors. But this complexity is no excuse for declining to estimate the cost imposed by the requirement of the rule to which employers are most likely to object in the first place.

Second, the Regulatory Impact Analysis does not acknowledge that providing accommodations for abortion could constitute pregnancy discrimination against pregnant employees who do not get abortions and are not offered equivalent benefits. For instance, consider an employer that offers leave for travel to see an out-of-state abortionist, but declines to offer leave for travel to see an out-of-state obstetrician on the grounds that there are local obstetricians, so leave for travel to an out-of-state obstetrician is not reasonable. Such a decision would nonetheless expose the employer to a claim that it is discriminating against women who do not get abortions. So the final rule's cost estimate will need to calculate the cost of additional benefits that employers would have to provide to avoid such discrimination charges, and the costs incurred by employers who do not provide such benefits and are sued for discrimination, and include those costs in the Regulatory Impact Assessment. This incoherence – construing a law meant to prevent sex discrimination in a way that results in sex discrimination – would also likely render the rule arbitrary and capricious and contrary to law.

III. Avoiding Inconsistency with Existing EEOC Guidance

The PWFA provides that "[t]his chapter is subject to the applicability to religious employment set forth in section 2000e-1(a) of this title [section 702(a) of the Civil Rights Act of 1964]." This is a cross-reference to Title VII's exemption for religious employers. The text of the proposed rule restates this statutory text as a rule of construction and quotes part of section 702(a).

The preamble to the proposed rule requests comment on a number of aspects of its application to religious employers, all suggesting that the EEOC is considering a range of interpretations about how PWFA's requirements interact with the Title VII religious employer exemption. But there should be little question about this, given that the EEOC's existing guidance on religious discrimination already points to the correct approach.

Let's take a step back for a moment to the text of section 702(a), the object of PWFA's cross-reference.

Section 702(a) states: "This title shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

The phrase "This title shall not apply" means that when a religious employer makes an employment decision "with respect to the employment of individuals of a particular religion," then that employer is exempt from all of Title VII, including claims arising from allegations of discrimination based on protected classes other than religion. Use of the term "title" in the exemption requires that result.

As used in section 702(a), what does "religion" mean? Section 701 of the Civil Rights Act, 42 U.S.C. § 2000e, provides the answer. It states:

> "[T]he term 'religion' includes *all aspects* of religious *observance and practice*, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

The reference to "observance" and "practice" in section 701 makes clear that "religion" includes conduct in conformance with religious mores.

Read together, the text of section 702(a) and of the definition of religion in Title VII has two important consequences. First, religious employers have a right to employ not just their co-religionists, but persons whose beliefs and conduct are consistent with the employer's own religious beliefs. Second, when religious employers exercise this right, none of the rest of Title VII (including Title VII's prohibition on sex discrimination) applies.

The EEOC's guidance on religious discrimination reflects these consequences. The guidance states that "section[] 702(a)…allow[s] a qualifying religious organization to assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision on the basis of religion. The definition of 'religion' found in section 701(j) is applicable to the use of the term in section[] 702(a)." It goes on to note that "[c]onsistent with applicable EEO laws, the prerogative of a religious organization to employ individuals 'of a particular religion' . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer." It then provides the following example:

> Justina taught mathematics at a small Catholic college, which requires all employees to agree to adhere to Catholic doctrine. After she signed a pro-choice advertisement in the local newspaper, the college terminated her employment because of her public support of a position in violation of Church doctrine. Justina claimed sex discrimination, alleging that male professors were treated less harshly for other conduct that violated Church doctrine. Because the exemption to Title VII preserves the religious school's ability to maintain a community composed of individuals faithful to its doctrinal practices, and because evaluating Justina's

> discipline compared to the male professors, who engaged in different behavior, would require the court to compare the relative severity of violations of religious doctrines, Title VII's religious organization exemption bars adjudication of the sex discrimination claim.

In light of this guidance from the EEOC, in assessing the impact of the PWFA final rule on employers, OIRA should consider whether employers will be able to understand what the rule requires of them. Needless to say, if the final rule contradicts standing EEOC guidance, it will be difficult for employers to understand their obligations, leading to needless costs incurred by both employers and the EEOC.

IV. Impact on Religious Employers' Policies on Employee Conduct

The example just discussed, from the EEOC's guidance on religious discrimination, points to another possible impact of the PWFA final rule – an impact on religious employers' general policies about employee conduct that is inconsistent with the employers' religious beliefs and mission.

The proposed rule includes anti-retaliation provisions that prohibit employers from discriminating against employees who oppose acts or practices made unlawful by PWFA, and from "interfering with" rights protected under PWFA.

It is common for religious and mission-driven employers to maintain policies about employee conduct that are designed to protect the integrity of the organizations' religious or mission-oriented identity. Those policies often impose discipline on employees who contradict the organization's religious beliefs or mission, and are constitutionally protected exercises of free speech, expressive association, and/or the free exercise of religion. Naturally, these policies are made known to employees as a condition of employment – employees are told that, if they engage in future conduct contrary to the employer's religious beliefs, they may be subject to discipline.

Those policies, viewed in relation to employees asserting rights under PWFA – that is, claims to a right to an accommodation for abortion – could be regarded as "interfering with" that supposed right, in violation of PWFA's anti-retaliation provisions. That is the case not only with *ex post* enforcement of the policies against a particular employee over particular conduct, but also *ex ante* maintenance and dissemination of the policies. In other words, even if a religious employer never has an employee request paid leave for an abortion, the PWFA rule, if finalized as proposed, could expose the employer to liability simply for maintaining policies intended to ensure the integrity of its religious identity and mission.

V. Conclusion

So far our comments today have largely elided the central flaw of the proposed rule: its inclusion of abortion. There are numerous, powerful reasons that the final rule should not

interpret the Pregnant Workers Fairness Act to require accommodations for abortion, especially on grounds of express, bipartisan legislative intent. We covered those in the comments we submitted on the proposed rule, and we encourage you to review those comments. For the purposes of OIRA's scope of review, though, we have confined our remarks today to issues focused more directly on impact of the final rule.

That said, we cannot fail to mention the most consequential impact that the rule would have if finalized as proposed: the killing of innocent preborn children who would otherwise have lived. The interpretation of the PWFA that would be the greatest benefit to our country is the one that Congress intended– a law that is both pro-woman and pro-life. We strongly urge the EEOC to leave abortion out of the PWFA final rule.

Thank you very much for your time and consideration.