

October 5, 2023

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

***Submitted via regulations.gov***

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

Dear Mr. Windmiller:

March of Dimes submits these comments in support of the Equal Employment Opportunity Commission’s (“EEOC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”), RIN 3046–AB30, Regulations To Implement the Pregnant Workers Fairness Act, published in the Federal Register on August 11, 2023.<sup>i</sup>

On behalf of March of Dimes, the nonprofit organization leading the fight for the health of all moms and babies, we appreciate this opportunity to submit a statement for the record. We began that fight 85 years ago as an organization dedicated to eradicating polio in the U.S., a goal that we achieved. We continue that fight today as we work to address some of the biggest threats to moms and babies, such as premature birth and maternal mortality, through research, education, programs and advocacy.

As an organization dedicated to maternal and infant health, we are committed to ensuring no worker has to choose between their job and their health or a healthy pregnancy.

March of Dimes’ ongoing work to improve maternal and infant health is more important than ever as our nation is in the midst of a dire maternal and infant health crisis. Rates of preterm birth reach a 15-year high in 2021, the U.S. is one of the most dangerous places to give birth in the developed world, and there are unacceptable disparities in birth outcomes between women and infants of color and their White peers. We also know the health and well-being of mothers and infants are inextricably linked, and it’s important that mothers are supported during pregnancy, especially in the workplace. The passage and enactment of the Pregnant Workers Fairness Act represents a long overdue step in the right direction.

We thank the EEOC for issuing this 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 with known limitations related to pregnancy, childbirth, or related medical conditions can remain healthy and working.

The following is March of Dimes’ response to the selected topics.

### **Unnecessary Delay**

We applaud the EEOC for making clear that employer delay in responding to accommodation requests “may result in a violation of the PWFA.”<sup>ii</sup> Too often employers delay providing accommodations for weeks or even months. Delays can often adversely impact the health of workers and/or the health of their pregnancies, a concern that the PWFA was meant to address.

March of Dimes recommends that the EEOC strengthen the unnecessary delay definition as unnecessary delays at any point during the accommodation process may result in violation, not just delays in “responding to a reasonable accommodation request.” To that end, we recommend the EEOC amend 1636.4(a)(1) by striking “An unnecessary delay in responding to a reasonable accommodation request may result in a violation of the PWFA” and replacing it with “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. We also recommend the EEOC to state that unnecessary delay in the interactive process can violate PWFA.

### **Supporting Documentation**

As the EEOC recognizes in the proposed appendix, many workers face barriers in obtaining appointments with health care providers in a timely way, or altogether, posing significant barriers to obtaining medical documentation.<sup>iii</sup> This is especially true for workers in rural areas and low-wage workers who may not have consistent access to health care and disproportionately lack control over their work schedules.<sup>iv</sup> Furthermore, women of color, particularly Black women, often face additional barriers due to medical racism that may inhibit or delay their ability to secure supporting documentation.<sup>v</sup>

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 wellbeing.<sup>vi</sup>

To that end, under this section, March of Dimes recommends the following clarification on supporting documentation for certain straightforward requests to include:

- Time off, up to 8 weeks, to recover from childbirth.<sup>vii</sup> Time off to attend healthcare appointments related to pregnancy, childbirth, or related medical conditions, including, at minimum, at least 16 healthcare appointments.<sup>viii</sup>
- Flexible scheduling or remote work for nausea<sup>ix</sup>
- 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, such as to be closer to a bathroom or lactation space, or away from toxins
- Providing personal protective equipment
- Reprieve from lifting over 20 pounds
- Access to closer parking

Lastly, we applaud the EEOC for its comprehensive 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 Commission 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).

### **Temporary Excusal from Essential Functions**

We thank the EEOC for the thoughtful framework it set out to determine whether an employee or applicant is qualified if they cannot perform one or more essential functions. We recommend that the definition of “in the near future” post-pregnancy be one year rather than forty weeks, except with respect to lactation, which we believe should be extended to 2 years. Furthermore, we support the EEOC’s approach to not combine periods of temporary suspension of an essential function during pregnancy and post-pregnancy.

In 2021, Congress passed the American Rescue Plan Act, which included a provision that allowed states to provide up to 12 months of postpartum coverage under Medicaid, and in late 2022, this option became permanent. To date, 37 states provide this option.

Extending Medicaid coverage from the current requirement of 60-days postpartum to 12-months nationwide is critical to lowering the nation’s alarming maternal mortality rate. Medicaid covers at least 40% of all births in the United States, a disproportionate number of which are to Black, Hispanic, and Indigenous women. In the first year postpartum, new parents can face a multitude of health challenges, including pregnancy-related complications, exacerbated chronic conditions, mental health conditions, and substance use disorders. Twelve months of continuous Medicaid eligibility for postpartum individuals would remove key access barriers that often prevent them from getting the care they need after birth.

### **Reasonable Accommodation**

We appreciate 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 earning an income.

We suggest three ways the Commission can better emphasize that reasonable accommodation includes modifications or adjustments to alleviate pain and discomfort and to avoid health risks.

- 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.”
- Additionally, we strongly urge the EEOC to delete the language in 1636.3(i)(2) which qualifies that “adjustments to allow an employee or applicant to work without increased pain or increased risk” must be “due to the employee’s or applicant’s known limitation.”

We commend 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.

In its discussion on leave, the Commission notes one potential accommodation as “The ability to choose whether to use paid leave ... or unpaid leave *to the extent that the covered entity allows employees using leave not related to pregnancy... to choose...*” 1636.3(i)(3)(iii). Similarly, the Commission notes in the proposed appendix that “an employer must continue an employee’s health insurance benefits during their leave period *to the extent that it does so for other employees in a similar leave status.*” Fed. Reg. 54780-81. We respectfully suggest that, under PWFA, whether these potential accommodations should be provided turns on the question of undue hardship, not on how other employees are treated. Accordingly, we urge the EEOC to modify its treatment of these leave-related accommodations by deleting the comparative reference to other employees.<sup>x</sup> As with all accommodations, employers may be obligated to modify standard practices to accommodate people with limitations related to pregnancy, childbirth or related medical conditions, even if a particular benefit is not routinely offered to other employees.<sup>xi</sup>

We also 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.

Lastly, we urge the Commission to expand the examples of reasonable accommodation for lactation. We appreciate the EEOC’s highlighting the reasonable accommodations often needed by lactating workers who are pumping milk. While we wholeheartedly celebrate the recent passage of the PUMP for Nursing Mothers Act, that law is limited to providing reasonable break time and private space for only one year following the birth of an employee’s child.<sup>xii</sup> However, many lactating employees require other reasonable accommodations, including the pumping accommodations identified by the Commission in 1636.3(i)(4)(ii), as well as accommodations that are unrelated to pumping. We encourage the Commission to highlight some of these other lactation accommodations by adding a new section 3(i)(4)(iii): “Any other job modification, including those identified in 1636.3(i)(2), that would remove barriers to producing or expressing human milk, breastfeeding, or chestfeeding; avoid or alleviate lactation-related health complications; or reduce the risk of contaminating human milk produced by the employee.”

**Related Medical Conditions**

The definition of “pregnancy, childbirth, and related medical conditions” is appropriately expansive. In expressly seeking to supplement the protections currently afforded to workers under the Pregnancy Discrimination Act (PDA), the PWFA is properly read to incorporate the case law interpreting the PDA’s parallel language.<sup>xiii</sup>

We encourage 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.

**Undue hardship**

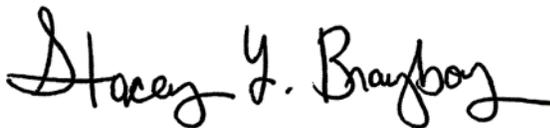
March of Dimes recommends adding the following accommodations to the list of predictable assessments:

- 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 16 health care appointments related to pregnancy or childbirth

The above accommodations are similar to the four accommodations the EEOC included in the proposed rule as “predictable assessments” as they, too, are simple and straightforward.

Thank you again for the opportunity to express March of Dimes’ strong support for the EEOC’s efforts on enacting the Pregnant Workers Fairness Act. This new law will provide basic, common sense safety measures for pregnant women in the workplace. If you have questions, please feel free to contact us.

Sincerely,



Stacey Y. Brayboy  
Sr. Vice President, Public Policy & Government Affairs

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<sup>i</sup> 88 Fed. Reg. 54714 (Aug. 11, 2023).

<sup>ii</sup> 88 Fed. Reg. 54789 & n. 98 (Aug. 11, 2023).

<sup>iii</sup> 88 Fed. Reg. 54787 & n.87 (Aug. 11, 2023).

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<sup>iv</sup> See, e.g., <https://www.marchofdimes.org/about/news/new-march-dimes-research-shows-access-to-maternity-care-worsening-millions-women-us>

<sup>v</sup> See, e.g., Brittany D. Chambers et al, *Clinicians' Perspectives on Racism and Black Women's Maternal Health*, 3 *Women's Health Rep.* 476, 479 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9148644/> (often dismissed and not included as active participants in care decisions and treatment."); see also Black Mamas Matter Alliance and A Better Balance, *Centering the Experiences of Black Mamas in the Workplace* (2022), <https://www.abetterbalance.org/centering-black-mamas-pwfa/> clinic, but I need this money, and I'm gonna be in there with a doctor for 10 minutes, but I spent all day trying to get those 10 minutes. Just the entry point, the access, sometimes is an issue.").

<sup>vi</sup> The legislative record is clear that the PWFA did not intend to include a supporting documentation framework that would be onerous for workers. For example, while the Minority Views of the House Report stated that "the bill presumably allows employers to require such documentation when the need for an accommodation is not obvious," the Majority did not incorporate that analysis. H.R. Rep. No. 117-27, at 57 (2021), <https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf>; see also *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694) Before the Subcomm. on Civil Rights Human. & Servs. of the H. Comm. on Educ. & Labor*, 116th Cong. (2019).

<sup>vii</sup> See, e.g., NYC Commission on Human Rights Legal Enforcement, *Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions 10* (2021), [https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy\\_InterpretiveGuide\\_2021.pdf](https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2021.pdf).

<sup>viii</sup> Nearly every state paid sick time law permits employers to request a healthcare provider note only if the person needs time off for 3 or more consecutive days. See A Better Balance, *Know Your Rights: State and Local Paid Sick Time Laws FAQs* (last updated July 7, 2022), <https://www.abetterbalance.org/resources/know-your-rights-state-and-local-paid-sick-time-laws/>. We suggest a minimum of 16 appointments as it reflects the average number of appointments for prenatal and postnatal care for low-risk pregnancies. See Alex Friedman Pehl et. al, A Comparison of International Prenatal Care Guidelines for Low-Risk Women to Inform High-Value Care, 222 *American Journal of Obstetrics & Gynecology* 505, 505 (2020), [https://www.ajog.org/article/S0002-9378\(20\)30029-6/fulltext](https://www.ajog.org/article/S0002-9378(20)30029-6/fulltext) (stating that the median number of recommended prenatal care visits for a low-risk pregnancy in the United States is 12-14 visits); ACOG Committee Opinion No. 736: Optimizing Postpartum Care, 131 *Obstetrics & Gynecology* 140, 141 (2018), [https://journals.lww.com/greenjournal/fulltext/2018/05000/acog\\_committee\\_opinion\\_no\\_\\_736\\_\\_optimizing.42.aspx](https://journals.lww.com/greenjournal/fulltext/2018/05000/acog_committee_opinion_no__736__optimizing.42.aspx) (recommending at least two postpartum care appointments, with ongoing care as needed).

<sup>ix</sup> See 29 CFR § 825.115(f) ("Absences attributable to incapacity [due to pregnancy] qualify for FMLA leave even though the employee . . . does not receive treatment from a health care provider during the absence . . . . An employee who is pregnant may be unable to report to work because of severe morning sickness.").

<sup>x</sup> Of course, if other employees receive a particular accommodation, that may be evidence of no undue hardship.

<sup>xi</sup> Similarly, we respectfully suggest that employers may be required to "provide reserved parking spaces" as a PWFA reasonable accommodation, even when it is not the case that "the employee is otherwise entitled to use employer provided parking." 88 Fed. Reg. 54779 (Aug. 11, 2023).

<sup>xii</sup> Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) (Pub. L. 117–328 Division KK).

<sup>xiii</sup> See 168 Cong. Rec. H. 10528 (2022) (statement of Rep. Nadler), <https://www.congress.gov/117/crec/2022/12/23/168/201/CREC-2022-12-23.pdf> ("The Pregnant Workers Fairness Act aligns with Title VII in providing protections and reasonable accommodations for "pregnancy, childbirth, and related medical conditions", like lactation.")