October 10, 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:

The National Asian Pacific American Women's Forum (NAPAWF) and the undersigned organizations 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.[1]

NAPAWF is a national, multi-issue organization whose mission is to build a movement to advance the social justice and human rights of Asian American, Native Hawaiians, and Pacific Islander (AAs & NHPIs) women and girls living in the U.S. To that end, we use policy advocacy and community organizing to advance reproductive health and rights, immigrant rights, and economic justice. As a national organization, we work in several different cities with full-time community organizers including, in Chicago, Atlanta, and New York. In addition, our membership consists of local chapters based in eleven cities across the country.

At NAPAWF, we advocate through a reproductive justice lens. Reproductive justice is a framework rooted in the human right to control our bodies, our sexuality, our gender, and our reproduction. Reproductive justice will be achieved when all people, of all immigration statuses, have the economic, social, and political power and resources to define and make decisions about our bodies, health, sexuality, families, and communities in all areas of our lives with dignity and self-determination. NAPAWF is committed to ensuring no worker has to choose between their job and their health or a healthy pregnancy.

We thank the EEOC for issuing this strong and workable proposed rule implementing the Pregnant Workers Fairness Act ("PWFA"). This needed rule comes at a time when the gender wage gap continues to play a large role in hindering women's economic agency and autonomy. AA & NHPI women workers in 2022 on average made 80 cents for every dollar paid to their white, non-Hispanic male counterparts. However, disaggregated data also reveals that many women experience much larger wage gaps, particularly Southeast Asian and Pacific Islander women. For example, Burmese women earn only 50 cents for every dollar. The linkages between parenthood and pay gaps are well known and demonstrated through research and data. We need adequate protections to protect women in their reproductive ages to sustain their contributions to the workforce, support more gender-equal

[1] 88 Fed. Reg. 54714 (Aug. 11, 2023).

involvement in caregiving, and promote women in all walks of life in the workforce throughout the trajectories of their career – resulting in higher wages over time.

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. We hope the EEOC will make the following considerations in its implementation of the rule:

Language Access

In implementation of this rule, EEOC must consider how this rule can be clearly communicated to limited-English proficient (LEP) individuals. Under Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency" signed on August 11, 2000, federal agencies are required to develop and implement a system to provide those services so LEP persons can have meaningful access to them. EEOC should consider how it can provide in-language engagement, outreach, interpreters during EEOC federally conducted processes, and translated documents explaining key rights and processes.

Most importantly, we request that EEOC utilize and expand its current Language Access Plan to include the implementation of this proposed rule. The language access plan released here provides for the following:

- Assessment of language needs
- Written translation of materials
- Outreach and engagement of LEP communities, particularly by building coalitions with community-based organizations that may have expertise in specific languages common to their local areas

We suggest that the planning for the implementation of this rule include a "mini" language access plan in which EEOC plans for translation of notices. This would also require outreach to key nonprofits around the country that reach LEP communities; and interpretation and translation throughout EEOC's federally conducted activities and programs.

Language access is particularly important for our communities because AA & NHPIs represent over 30 countries and ethnic groups that speak more than 100 different languages. Yet, they often face barriers in accessing not only services, but also availing themselves of their basic constitutional rights because of lack of language access. According to the Urban Institute, in 2019, about 3 in 10 (30.8 percent) Asian American adults and 1 in 8 (12.1 percent) Native Hawaiian/Pacific Islander adults had LEP, compared with 32.9 percent of Hispanic adults, 3.1 percent of Black adults, and 1.4 percent of white adults.[2] An estimated 14.9 percent of Asian American adults lived in a household in which all members ages 14 and older reported having LEP. AA & NHPI adults with LEP were more likely than those proficient in English to be noncitizens and to have economic disadvantages such as lower incomes, lower levels of education, and higher uninsurance rates.

Language access is also a huge barrier to resources among AA & NHPI women and girls. Left with no other option, many choose to engage a "family interpreter" for a variety of scenarios or use

[2] https://www.urban.org/research/publication/many-asian-american-and-native-hawaiianpacific-islander-adults-may-face-health

community-based organizations that have language translation capacity, but those translators do not receive compensation. Being able to communicate in and be understood in one's own language is a basic right, and social services, government agencies must make a priority of providing translation and other tools necessary for AA & NHPI communities.

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."[3] 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. To ensure workers can get the accommodations they need without unnecessary delay, we recommend the EEOC make several changes to the proposed rule and proposed appendix:

Strengthen the "Unnecessary Delay" Definition

1. **1636.4(a)(1)** We applaud the EEOC for recognizing that unnecessary delay may result in a failure-to-accommodate violation. However, EEOC should clarify that unnecessary delays at any point during the accommodation process may result in violation, not just delays in "responding to a reasonable accommodation request." 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 change will emphasize that employers must prioritize timeliness throughout the entire accommodation process, rather than using an initial response to the employee's request as a means to avoid a violation.

2. **1636.4(a)(1)(vi).** We agree that covered entities should provide interim accommodations during the interactive process if the employee's original accommodation request cannot be immediately granted. However, providing an interim accommodation should not excuse "unnecessary delay" if employers proceed to delay the provision of the ultimate accommodation the worker requests and needs. We therefore recommend that the EEOC remove the sentence "If an interim reasonable accommodation is offered, delay by the covered entity is more likely to be excused."

3. **1636.4(a). We appreciate the EEOC's inclusion of a variety of factors to be considered when evaluating unnecessary delay. We recommend the EEOC add one additional factor to the list: "The urgency of the requested accommodation."**
   In some cases, pregnant people who do not receive immediate relief can face tragic consequences, such as employees who are denied permission to seek emergency medical care, and as a result, experience complications or loss.[4] This additional factor speaks to the importance of immediacy when it comes to providing accommodations under the PWFA and will better assist the EEOC and courts in evaluating whether an unnecessary delay has occurred."[5]

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[3] 88 Fed. Reg. 54789 & n. 98 (Aug. 11, 2023).
[4] *See, e.g.*, A Better Balance, Long Overdue: It is Time for the Pregnant Workers Fairness Act 8, 11 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf (citing examples of workers who fainted and needed emergency care or experienced pregnancy loss as a result of not being accommodated).
[5] *See* 88 Fed. Reg. 54789 & n.97 (Aug. 11, 2023).

State That "Unnecessary Delay" in the Interactive Process Can Violate PWFA

1. **1636.3(k). 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).[6] The regulation itself should underscore this directive by making clear that unnecessarily delaying the interactive process may result in a violation of the PWFA.

2. **1636.3(k). We also request that the EEOC add an example in the proposed appendix that illustrates how quickly and informally the interactive process can occur.** For example, the EEOC can include a scenario where an employee makes a simple request of her immediate supervisor, and her immediate supervisor agrees on the spot to make the requested change.

Add A Definition of "Interim Accommodation" to the Reasonable Accommodation Definition

1636.3(h). Providing employers a clear understanding of the meaning of the term "interim accommodation" will encourage them to rely on such accommodations to avoid delay. To that end, we suggest adding a new subsection 1636.3(h)(6) that reads: "Interim Reasonable Accommodation means any temporary or short-term measure put in place immediately or as soon as possible after the employee requests an accommodation that allows the employee to continue working safely and comfortably while the employer and employee engage in the interactive process, or the employer implements a reasonable accommodation arrived at through the interactive process."

Strengthen the Supporting Documentation Framework to Ensure Documentation Demands Do Not Contribute to Unnecessary Delays

4. **1636.3(l) Supporting documentation:** We urge the EEOC to adopt the changes suggested below to ensure employers do not impose burdensome and unnecessary medical certification requirements that often contribute to substantial delays in accommodation.

Supporting Documentation

EEOC has asked whether the supporting documentation framework the agency sets out in proposed rule 1636.3(l) strikes the right balance between the needs of workers and employers. Many workers face barriers in obtaining appointments with health care providers in a timely way, or altogether, posing significant barriers to obtaining medical documentation.[7] This is especially true for workers in rural areas and low-wage workers who may not have consistent access to health care and disproportionately

[6] 88 Fed. Reg. 54786 (Aug. 11, 2023).
[7] 88 Fed. Reg. 54787 & n.87 (Aug. 11, 2023).

lack control over their work schedules.[8] Furthermore, women of color often face medical racism that may inhibit or delay their ability to secure supporting documentation.[9] Burdensome documentation requirements will disproportionately impact individuals with limited English proficiency, those working in informal jobs, and those who work as caretakers, disproportionately impacting AA & NHPI communities. Additionally, language barriers that are prevalent in the AA & NHPI community cause increased delay in treatments.

Attaining proper medical documentation is also particularly burdensome for AAs &NHPIs who tend to have higher uninsurance rates than Whites. As a result, providing supporting documentation adds additional costs and burdens – many individuals simply will not have access to providers who can provide the appropriate documentation for them. As of 2019, the uninsured rate for AA & NHPIs was 6.8 percent. Many Asian American women lack health coverage and more than one in five Asian American women of child-bearing age—ages 15 to 44—is uninsured. Coverage rates vary by AA & NHPI subgroup, with uninsured rates of 2.8 percent for Japanese Americans, 5.2 percent for Indian Americans, 5.5 percent for Filipino Americans, 6.0 percent for Chinese Americans, 8.3 percent for Vietnamese Americans, 10.0 percent for Korean Americans, and 12.3 percent for Native Hawaiian and Other Pacific Islander Americans (NHPIs) in 2019. Uninsurance rates for NHPI and certain AA & NHPI populations were at times significantly higher than the rate for White people. While uninsurance rates for white or nonelderly Whites were 7% in 2021, uninsurance rates were 14% for nonelderly Bhutanese, 28% for nonelderly Mongolians, and 11% for all NHPIs.

An estimated 5.8 percent of AA & NHPI parents (294,000 parents) were uninsured in 2018–19. Uninsurance was twice as high among noncitizen AA & NHPI parents as among their citizen counterparts (8.8 versus 4.3 percent), and 50.1 percent of uninsured AA & NHPI parents were noncitizens. Immigration-related restrictions limit eligibility for publicly subsidized coverage and contribute to uninsurance. Although AA & NHPI parents were more likely to be uninsured than AA & NHPI children, one in four uninsured AA & NHPI children were either noncitizens or had at least one noncitizen parent. Uninsured children fail to secure public coverage because of their immigration status or are facing immigration-related barriers for their parents in enrolling in public programs.

Lastly, immigrants and particularly refugees in our community, would be burdened by documentation requirements as they also tend to have higher rates of uninsurance. As of 2023, half (50%) of likely undocumented immigrants and one in five (18%) lawfully present immigrants say they are uninsured compared to 6% of naturalized citizens and 8% of U.S.-born citizens. Almost one third (31.4 percent) of the U.S.'s 44.9 million immigrants were AA & NHPI in 2019 and the number of AAPI immigrants increased by 80 percent between 2000 and 2019.

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[8] *See, e.g.*, C. Brigance et. al, March of Dimes, Nowhere to Go: Maternity Deserts Across the U.S. 5, 11 (2022), https://www.marchofdimes.org/sites/default/files/2022-10/2022_Maternity_Care_Report.pdf (noting that 4.7 million women live in counties with limited access to maternity care, and that half of women who live in rural communities have to travel over 30 minutes to access an obstetric hospital).

[9] *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/ ("Clinicians acknowledged that racism causes and impacts the provision of inequitable care provided to Black women, highlighting Black women are 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/ (As part of a listening session with Black birth workers and organizational leaders on the difficulties Black pregnant people experience obtaining accommodations prior to the PWFA, one participant remarked: "How do I prioritize going to the doctor's office, when it's gonna take me forever when I get there, because I'm at a public 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.").

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 wellbeing.[10]

We urge the EEOC to modify the supporting documentation framework as follows:

1. **1636.3(l)(1)(i). Clarifying "obvious" needs.** We agree with the Commission 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 Commission 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."

   Additionally, we suggest providing guidance on how an employer may determine whether the need for accommodation is obvious: "A need for accommodation is obvious if, in light of the pregnant employee's known limitation, the employer either knew or should have known that the employee would need or did need the accommodation." For example, if a pregnant employee self-attests to regular vomiting and requests temporary relocation of their workstation closer to the bathroom, the need for accommodation is "obvious" because the employer knows, or should have known, that the employee needs easy bathroom access. Similarly "obvious" would be a police officer who self-attests pregnancy and whose uniform and bulletproof vest no longer fit due to her physical changes and asks for larger sizes.

   Finally, we encourage the Commission 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. 1636.3(l)(1)(iii). We applaud the agency for making clear that employers cannot seek supporting documentation for certain straightforward accommodation requests.[11] We urge the EEOC to expand the list to also include:[12]

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[10] 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) (Questions for the record submitted by Dina Bakst, Co-Founder & Co-President, A Better Balance, at 13, arguing against the inclusion of a medical documentation requirement because employers often seek medical notes as a "way to prolong having to provide a very simple or reasonable accommodation").

[11] 88 Fed. Reg. 54769 (Aug. 11, 2023) (stating that it is not reasonable to require supporting documentation beyond self-attestation when the accommodation is one listed as a predictable assessment or relates to lactation or pumping).

[12] In New York City, employers with 4 or more employees are not permitted to ask for medical documentation for many of the accommodations on this list. Any accommodations listed here that are not on New York City's list are similarly minor in nature. *See* NYC Commission on Human Rights Legal Enforcement, Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation

- Time off, up to 8 weeks, to recover from childbirth.[13]
- Time off to attend healthcare appointments related to pregnancy, childbirth, or related medical conditions, including, at minimum, at least 16 healthcare appointments.[14]
- Flexible scheduling or remote work for nausea[15]
- 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

We note that this new list will diverge from the list of predictable assessments included in the "undue hardship" definition, as the principles underlying whether a particular accommodation warrants medical certification differ from the principles underlying the undue hardship question.

3. **1636.3(l)(2):** 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."[16] 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:
    a. 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

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Accommodations, and Sexual or Reproductive Health Decisions 10 (2021), https://www.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2021.pdf.

[13] *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.

[14] 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 Peahl 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 (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 (recommending at least two postpartum care appointments, with ongoing care as needed).

[15] *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.").

[16] Examples on file with the Center for WorkLife Law & A Better Balance.

the workday (the limitation) due to pregnancy, childbirth, or a related medical condition, and thus a modified start time (the accommodation) is recommended.

b. 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.
c. 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 Commission should clarify that self-attestations of pregnancy are sufficient.

4. **1636.3(l)(3) Health care providers.**
    a. We applaud the EEOC for its comprehensive, albeit non-exhaustive, list of healthcare providers from whom employees can seek documentation. However, employers should not have the discretion to second guess the judgment of licensed healthcare 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).
    b. We also urge the EEOC to make clear in the proposed rule or proposed appendix that employers must accept documentation from telehealth care providers.
    c. We applaud the Commission for making clear that employers cannot require employees to be examined by the employer's healthcare 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.

5. We appreciate that the EEOC mentioned in the proposed appendix that it is a best practice for employers to provide interim accommodations if an employee is delayed in obtaining supporting documentation.[17] We suggest the agency strengthen this provision by clarifying that the interim accommodation provided must be an accommodation that meets the employee's needs and would not constitute an adverse action, such as forced unpaid leave, against the employee.

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.

[17] 88 Fed. Reg. 54787 (Aug. 11, 2023) ("[T]he Commission encourages employers who choose to require documentation, when that is permitted under this regulation, to grant interim accommodations as a best practice if an employee indicates that they have tried to obtain documentation but there is a delay in obtaining it…").

1636.3(i)(3): 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. 1.3 million AA & NHPI women live in states that have banned or are likely to ban abortion. AA & NHPI women often work without paid medical, sick, or family leave, making it difficult or impossible to have the resources to take time off from work to travel and get the care they need. For AA & NHPI women relegated to low-wage industries, longer hours and multiple jobs do not guarantee fair pay, let alone paid family or medical leave. 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. Further, leave as a PWFA accommodation will protect the employment of the many workers who have access to state-administered paid leave, but previously had inadequate job protection.

We suggest two modifications to the proposed rule regarding leave as an accommodation in 1636.3(i)(3).

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.[18] 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.[19]

Additionally, 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 healthcare is vital during pregnancy and the postpartum period.[20] This interpretation is supported by the intent of the PWFA,[21] which not only has the goal of continued

[18] Of course, if other employees receive a particular accommodation, that may be evidence of no undue hardship.
[19] 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).
[20] Centers for Medicare and Medicaid Services, Improving Access to Maternal Health Care in Rural Communities 6 ("A lack of access to maternal health care can result in a number of negative maternal health outcomes including premature birth, low-birth weight, maternal mortality, severe maternal morbidity, and increased risk of postpartum depression"), https://www.cms.gov/About-CMS/Agency-Information/OMH/equity-initiatives/rural-health/09032019-Maternal-Health-Care-in-Rural-Communities.pdf.
[21] H.R. Rep. No. 117-27, at 22-24 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf.

employment, but also the goal of promoting maternal and child health.[22] 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."[23] The reasonableness of providing continued health insurance benefits during a period of leave is also supported by the FMLA requirement that employers do so for up to 12 weeks every year,[24] as well as state laws that require continued health benefits during leave taken for pregnancy or other health reasons.[25]

Known Limitation

We applaud the proposed rule for making clear that a "limitation" can be "modest, minor, and/or episodic."[26] We also appreciate that the EEOC set out principles that reflect the realities of how employees – who are rarely trained in law– typically communicate their needs to an employer and suggest some further clarification to the definition.

1636.3(c). The PWFA is clear that a "representative" of the employee or applicant can communicate the employee's limitation and need for accommodation on the employee's behalf.[27] We support that the proposed rule defines "employee representative" to include a family member, friend, and health care provider. We suggest the EEOC add "co-worker," "union representative," and "manager" to this list.[28] Often, AA & NHPI LEP individuals rely on a family member or friend who can help them interpret and communicate. We support any additional flexibility to ensure that these individuals have representatives who can facilitate linguistically-appropriate communication between the employee and employer. The proposed rule also states the employee's representative can include an "other representative." We suggest the EEOC replace "other representative" with a more descriptive definition, e.g, a "a person who communicates to the employer (with the worker's consent) the needs of the employee or applicant." It is critical that the EEOC make clear in the proposed rule that third parties cannot communicate the employee's limitation and need for accommodation to the covered entity without the employee's consent in order to ensure third parties are not stereotyping or making assumptions about employees' needs.

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[22] ADA guidance from 2002 states that employers must continue insurance benefits when an employee is on leave as an ADA accommodation only to the same extent they do so for other employees. *See* EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, at text after n. 59 (2002), http://www.eeoc.gov/laws/guidance/enforcementguidance-reasonable-accommodation-and-unduehardship-under-ada. However, the statutory text of the ADA and its implementing regulations support the principle that providing continued health benefits during leave may be a reasonable accommodation, even if other employees do not receive the same benefit, where the continued benefits can be provided without undue hardship. The longstanding ADA principle that gives employees with disabilities an affirmative right to receive the same health insurance benefits as are provided to other employees stems from the ADA's prohibition on "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability" *See* 42 U.S.C. § 12112; 29 C.F.R. pt. 1630 app. 1630.5 ("this part is intended to require that employees with disabilities be accorded equal access to whatever health insurance coverage the employer provides to other employees."). But this non-discrimination concept should not be conflated with the standard for providing reasonable accommodation, which does not turn on how other employees are treated. Even if the principle from the 2002 guidance were supported by the ADA, it would not be instructive in the PWFA context, given the clear legislative intent of the PWFA to promote healthy pregnancies and reproductive health and to allow employees to take leave following childbirth, all while maintaining their health insurance.

[23] H.R. Rep. No. 117-27, at 24 (2021), https://www.congress.gov/117/crpt/hrpt27/CRPT-117hrpt27.pdf.

[24] Family and Medical Leave Act, 29 U.S.C. § 2614(c); 29 C.F.R. § 825.209.

[25] For example, under the California Pregnancy Disability Leave Law and the California Family Rights Act, employees have a right to take up to 7 months of leave *with continued health insurance benefits* during pregnancy and following childbirth. Cal. Code Regs., tit. 2, § 11044(c) (employer must continue to provide health insurance benefits during 4 months of pregnancy disability leave); Cal. Code Regs., tit. 2, § 11092(c) (continued health insurance benefits for up to 12 weeks for leave taken to bond with a new child).

[26] 88 Fed. Reg. 54767.

[27] 42 U.S.C. 2000gg(4).

[28] We ask the EEOC to make clear that only a manager who is not an employee's direct supervisor can act as the employee's third party representative.

We also recommend that the EEOC include an example in the proposed appendix of a third party communicating the employee's limitation to the covered entity and illustrating how the covered entity should respond to the request. The example should make clear that once the third party has made the covered entity aware of the employee's need for accommodation, the employer must engage in the interactive process directly with the employee who is in need of accommodation (not their representative).

1636.3(d)(1). We applaud the proposed rule's specific directives that oral notice is sufficient to make a worker's pregnancy-related limitation "known" to the employer, and that an employer may not require written notice before responding to a request for accommodation. We further support the proposed appendix's recognition that a worker need not use any "specific words or phrases" or legalese like "reasonable accommodation" to make their limitation "known."

Strengthening 1636.3(d) & 1636.3(d)(3). Despite correctly recognizing that workers often express the need for accommodation in indirect ways – for instance, by telling a supervisor, "I'm having trouble getting to work at my scheduled time because of morning sickness"[29] – the proposed rule states that "communicated to the employer" means a worker "has made [a] *request for accommodation*." Section 1636.3(d) (emphasis added). The proposed rule then states that to "[r]equest an accommodation," the worker "need only communicate to the covered entity that the employee . . . (i) Has a limitation, and (ii) *Needs an adjustment or change* at work." Section 1636.3(d)(3) (emphasis added). Framing the mandated communication as a "request" assumes a worker's knowledge of the right to such modifications and demanding that the worker convey a "need" for a modification similarly assumes that the worker believes they are entitled to have their "needs" met by the employer. But most workers – and especially low-wage workers, people who are new to the workforce, immigrants, and/or non-native English speakers – do not even know they are entitled to such accommodation, much less feel empowered to request one.

As such, a better approach to defining "Communicated to the employer" would be to:

a) Revise § 1636.3(d) to read, "'Communicated to the employer' means an employee or applicant, or a representative of the employee or applicant, *has communicated to the covered entity that the employee or applicant: (i) Has a limitation <u>that</u> (ii) <u>Necessitates</u> an adjustment or change at work.*"
b) Revise the list of employer representatives to whom the employee may communicate their limitations. The proposed appendix appropriately states that employees may communicate their needs to "the people who assign them daily tasks and whom they would normally consult if they had questions or concerns." However, the language used in the proposed regulation itself—"communicating with a supervisor, manager, [or] someone who has supervisory authority for the employee" 1636.3(d)—doesn't accurately capture as broad of a range of individuals to whom the employee may communicate their limitation. We therefore suggest replacing the phrase "who has supervisory authority" with "who plays a supervisory role."

We applaud the EEOC for its comprehensive proposed rule on the Pregnant Workers Fairness Act, which fairly balances the interest of employers with the interest of employees to protect their pregnancy and reproductive health without compromising their health or their family's economic security. Thank you for the opportunity to comment on the proposed regulation.

[29] 88 Fed. Reg. 54722.