

November 1, 2023
Charlotte A. Burrows, Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Submitted via regulations.gov

RE: RIN 3046–ZA02, Proposed Enforcement Guidance on Harassment in the Workplace

Dear Chair Burrows:

The undersigned organizations write to express support for the Equal Employment Opportunity Commission’s (“EEOC”) Proposed Enforcement Guidance on Harassment in the Workplace (“Proposed Guidance”).¹

As organizations committed to the protection and advancement of sexual and reproductive health, rights, and justice, we are committed to protecting against all forms of discrimination in the workforce, including sex-based harassment. We strongly support the Proposed Guidance’s recognition that this protection extends to harassment on the basis of “pregnancy, childbirth, or related medical conditions,” including an employee’s reproductive health care decisions.²

Decades of case law and EEOC guidance make clear that Title VII’s prohibition of discrimination on the basis of sex includes, but is not limited to, discrimination on the basis of pregnancy, childbirth, or related medical conditions, including termination of pregnancy, miscarriage, stillbirth, contraception, and fertility treatment.³ Importantly, federal courts have consistently found that Title VII prohibits discrimination against an employee for obtaining or contemplating an abortion.⁴ And the EEOC has made clear that Title VII “necessarily includes a prohibition on discrimination related to a woman’s use of contraceptives.”⁵

We encourage the EEOC to provide additional examples of this form of sex-based harassment in the Final Guidance. In particular, and in light of the new Pregnant Workers Fairness Act,⁶ we recommend that the Final Guidance include an example of a worker who is harassed because of their request for, or receipt of, a reasonable accommodation related to pregnancy, childbirth, or a related medical condition, including

¹ 88 Fed. Reg. 67750 (proposed Oct. 2, 2023); U.S. EQUAL EMP. OPPORTUNITY COMM’N, PROPOSED ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE, <https://downloads.regulations.gov/EEOC-2023-0005-0001/content.pdf> [hereinafter Proposed Guidance].

² Proposed Guidance at 9-10.

³ See generally U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#> (discussing the EEOC’s interpretation of the coverage of Title VII as amended by the Pregnancy Discrimination Act and citing federal case law similarly holding that discrimination based on lactation, infertility treatment, use of contraception, and abortion or the decision not to have an abortion violate the PDA).

⁴ See, e.g., *Doe v. C.A.R.S. Protection Plus, Ind.*, 527 F.3d 358, 363-64 (3d Cir. 2008) (holding that employer violated the PDA by discriminating against a woman who had an abortion); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1213-14 (6th Cir. 1996) (holding that an employer violates the PDA by discriminating against a woman who has or even contemplates having an abortion); *Ducharme v. Crescent City Déjà Vu, L.L.C.*, 406 F.Supp.3d 548, 556 (E.D. La. 2019) (holding that the PDA’s prohibition on adverse employment actions based on pregnancy-related conditions applies to abortion because abortion “is a medical procedure that may be used to treat a pregnancy related medical condition”); see also *Doe v. First Nat. Bank of Chicago*, 668 F. Supp. 1110, 1111-12 (N.D. Ill. 1987), aff’d, 865 F.2d 864 (7th Cir. 1989) (stating an assumption that the PDA protects a woman who has an abortion based on the legislative history and EEOC interpretation); *Nat’l Conference of Catholic Bishops v. Smith*, 653 F.2d 535, 537 n.2 & 538 (D.C. Cir. 1981) (stating that “related medical conditions” includes abortion in course of dismissing constitutional challenge to PDA).

⁵ See Equal Emp’t Opportunity Comm’n, No. 915.003, EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues>.

⁶ 42 U.S.C. § 2000gg et seq. (employers must provide reasonable accommodations for workers who have limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship).

termination of pregnancy. In addition, as workers continue to be threatened or punished at work for their reproductive health decisions,⁷ we recommend that the final guidance include examples that illustrate how such harassment may manifest—for example, an unmarried woman who becomes pregnant and faces harassment based on the gendered expectation that women should not have sex outside of marriage, or a worker who faces harassment based on their decision to have or not to have an abortion, use contraception, or to use infertility treatment to start a family. We further urge the EEOC to explicitly recognize that transgender and nonbinary individuals can also experience sex-based harassment related to their reproductive health care decisions.

We thank you for the opportunity to submit comments on this Proposed Guidance.

Signed,

American College of Obstetricians and Gynecologists
Association of Maternal & Child Health Programs
Autistic Women & Nonbinary Network
Catholics for Choice
In Our Own Voice: National Black Women's Reproductive Justice Agenda
Ipas
League of Women Voters of the United States
National Asian Pacific American Women's Forum
National Organization for Women
National Partnership for Women & Families
National Women's Health Network
National Women's Law Center
Physicians for Reproductive Health
Planned Parenthood Federation of America
Positive Women's Network-USA
Reproductive Freedom for All (formerly NARAL Pro-Choice America)
RH Impact: The Collaborative for Equity and Justice

⁷ See, e.g., *States Take Action to Stop Discrimination Based on Reproductive Health Care Decisions*, NAT'L WOMEN'S LAW CTR. (Mar. 2022), https://nwlc.org/wp-content/uploads/2022/03/NWLC_FactSheet_State-Laws-Against-Employment-Discrimination-Based-on-Reproductive-Health-Decisions-3.25.22.pdf (describing examples in which employers fired or threatened to fire workers who used assisted reproductive technology, became pregnant outside of marriage, had an abortion, or used birth control).