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

By electronic submission: http://www.regulations.gov

Dear Mr. Windmiller:

These comments are submitted on behalf of the Retail Industry Leaders Association ("RILA"). RILA is a trade association of retail companies. Our members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, more than 42 million American jobs and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

RILA's members are concerned that the Commission's proposed regulations do not, in material ways, reflect the text of the PWFA or Congressional intent regarding reasonable accommodation protections for pregnant workers. RILA and our members strongly support the rights of pregnant workers in the workplace and are committed to building a 21st Century retail workplace that is diverse, innovative, and skilled and that meets the needs of retail workers. For this reason, RILA joined with other business groups, worker activists and bipartisan officials in support of the Pregnant Workers Fairness Act. See https://www.abetterbalance.org/resources/business-coalition-letter-to-the-house-of-representatives-in-support-of-pwfa. Congress passed the legislation overwhelmingly on the premise that the bill seeks to build off protections under the Americans with Disabilities Act and apply those protections to pregnant workers. In fact, RILA noted in a letter to the Senate that "[t]he PWFA takes advantage of the widely known and accepted interactive process associated with the Americans with Disabilities Act (ADA) that is used to find reasonable accommodations for employees covered by the ADA."

This letter sets forth the areas with which RILA members are particularly concerned and recommends certain revisions and clarifications to the proposed regulations to address these concerns.

Qualified employee or applicant (§ 1636.3(f)(2))

The PWFA provides that an employee shall be considered qualified even if the employee cannot perform one or more essential functions as long as (1) the inability to perform an essential function is for "a temporary period," (2) the essential function(s) could be performed "in the near future," and (3) the

inability to perform the essential function can be reasonable accommodated. This definition of qualified employee is included in the proposed regulations at § 1636.3(f)(2).

The proposed regulation, however, defines "in the near future" as meaning that "the ability to perform the essential function(s) will generally resume within forty weeks of the suspension" of an essential function.

As a threshold matter, RILA disagrees with the EEOC's decision to define "in the near future" to generally mean forty weeks as there are a number of problems with this definition from the perspective of RILA's membership. First, because forty weeks is the average length of a pregnancy, this definition, in effect, assumes that the inability to perform an essential function could start on the first day of conception and last the entirety of an employee's pregnancy. This would seem a highly unusual and highly unlikely scenario. Two, given that pregnancy itself is a temporary condition, a temporary inability of a pregnant worker to perform the essential functions of the job has to mean something less than the period of the entire pregnancy. If Congress had intended "in the near future" to mean a period as long the duration of an entire pregnancy, then the PWFA would have simply specified that pregnant workers do not have to be able to perform the essential functions of their job in order to be qualified. However, that is not what the PWFA says.

Indeed, this was a specific point of negotiation to gain bipartisan support for the PWFA. As introduced in the 116th Congress, the PWFA did not include a requirement that the employee or applicant be able to perform the essential functions of the job, with or without reasonable accommodation, in order to be entitled to accommodation. However, as noted in the House Committee Report on the PWFA, Ellen McLaughlin, a partner with Seyfarth Shaw LLP specializing in labor and employment law, raised significant concerns with this omission of the requirement that the employee or applicant be able to perform the essential functions of the job, with or without reasonable accommodation, when she testified before the Subcommittee on Civil Rights and Human Services in 2019, calling it a ''key provision of the ADA'' (on which the PWFA was based). House Committee Report at p. 28 (https://www.govinfo.gov/content/pkg/CRPT-117hrpt27/pdf/CRPT-117hrpt27-pt1.pdf).

To address these concerns, the PWFA was amended to add a requirement that the employee or applicant be ''qualified,'' meaning the individual, ''with or without reasonable accommodation, can perform the essential functions of the employment position.'' In addition, to address concerns from supporters of H.R. 1065 that workers with known limitations related to pregnancy who are temporarily unable to perform an essential function be able to receive an accommodation, the carefully crafted and negotiated amendment included an exception that an employee or applicant ''shall be considered qualified if—(A) any inability to perform an essential function is for a temporary period; (B) the essential function could be performed in the near future; and (C) the inability to perform the essential function can be reasonably accommodated."

Clearly, defining "in the near future" to be forty weeks would completely eviscerate this amendment because a pregnant worker could still be entitled to accommodation even if she could not perform the

essential functions of her job for the entire length of her pregnancy. This is plainly not what Congress intended.

Moreover, the House Committee Report on the PWFA itself provides additional evidence the legislature did not intend "in the near future" to mean 40 weeks. On page 28, the House Committee Report notes that, under the ADA, "courts have found workers are entitled to reasonable accommodations if they only need a finite leave of absence or a transfer that would allow them to perform the essential functions of the job in the near future." House Committee Report at p. 28 (https://www.govinfo.gov/content/pkg/CRPT-117hrpt27/pdf/CRPT-117hrpt27-pt1.pdf). The case example cited in the House Committee Report for this proposition is *Roberts v. Board of County Commissioners of Brown County, Kansas*, 691 F.3d 1211, 1218 (10th Cir. 2012). In *Roberts*, the Tenth Circuit laid out a framework for determining the reasonableness of a request for leave under the ADA, noting there are two limits on bounds of reasonableness for a leave of absence due to a temporary inability to perform the functions of the job:

> The first limit is clear: The employee must provide the employer an estimated date when she can resume her essential duties. Without an expected end date, an employer is unable to determine whether the temporary exemption is a reasonable one. The second is durational. A leave request must assure an employer that an employee can perform the essential functions of her position *in the "near future.*"

691 F.3d at 1218 (internal citations omitted and emphasis added). The Tenth Circuit went on to hold that, "[a]lthough this court has not specified how near that future must be, the Eighth Circuit ruled in an analogous case that a six-month leave request was too long to be a reasonable accommodation." *Id*. (citing *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 (8th Cir. 2003)). The *Roberts* case is viewed as establishing a bright line that six months is too long to mean in the near future. Indeed, the Tenth Circuit acknowledged as much in its subsequent decision in *Hwang v. Kansas State University*, 753 F.3d 1159, 1161-62 (10th Cir. 2019). The House Committee Report's explicit citation to the Tenth Circuit's opinion in *Roberts* can only mean Congress intended "in the near future" to be a maximum of six months – not 40 weeks.

Given that the PWFA is based on the ADA framework, the definition of "in the near future" should be changed to "a period of no more than six months" under § 1636.3(f)(2) to be consistent with the case law under the ADA. Likewise, the definition of "temporary" in the proposed regulations as a period that "may extend beyond 'in the near future'" needs to be changed. For the same reasons that "in the near future" should not exceed six months, the term "temporary" should not exceed six months generally and should not "extend beyond" the period delineated by "in the near future." These periods should be co-extensive as used in the proposed regulation. For example, assume there is an employee who cannot perform the essential function of squatting temporarily as a result of being pregnant, but the employee will be able to squat again in six months (i.e., in the near future). The length of the temporary inability to perform the

essential function and the time in which the employee will be able to perform the function again are the same.

There is also the issue of the standard applicable to an employer decision that an employee who cannot perform the essential functions of her job is not "qualified" under the secondary definition of "qualified" under the PWFA. That secondary definition provides that an individual is qualified only if the temporary suspension of essential functions can be reasonably accommodated by the employer. Rather than provide specific guidance on what might be a scenario in which the employer cannot reasonably accommodate the inability to perform an essential function, the proposed regulation gives examples only of when the temporary inability to perform essential functions can be reasonable accommodated.

What is more concerning, however, is the fact that the Commission appears to be conflating the term "reasonably accommodate" in Section f(2)(iii) with undue hardship. The Commission suggests several times in the NPRM that, in order to for an employer to take the position that an employee is not "qualified" under the definition in Section f(2), it must demonstrate that the proposed accommodation places an undue hardship on the employer. However, this is not what the PWFA says. Indeed, it is not even what the proposed regulation says. An employer must only establish that the temporary suspension of the essential function cannot be "reasonably accommodated" in order to deny a reasonable accommodation under section f(2). Understanding the impact to employers of having to excuse the performance of an essential function, even on a temporary basis, Congress expressly chose the term "reasonably accommodate," which is a lower standard than undue hardship, in the negotiated amendment that resulted in the second definition of qualified employee.

Thus, the proposed regulation should acknowledge this lower burden and include examples of when an employer could not reasonably accommodate a temporary inability to perform an essential function. Although the proposed regulation contains a specific definition of undue hardship, its definition for reasonable accommodation under Section f(2) is singularly unhelpful. In 1636.3(i)(5), the proposed regulation states that the "temporary suspension of one or more essential function(s) . . . is a reasonable accommodation if an applicant or employee with a known limitation is unable to perform one or more essential functions with or without reasonable accommodation and the conditions in paragraph (f)(2) of this section are met." This is a circular definition because Section f(2) itself requires a determination by the employer that the suspension cannot be reasonably accommodated.

In addition, the following issues should be addressed in the proposed regulation set forth in Section 1636.3:

(1) The proposed regulation should state that an employee's compensation can be adjusted during the period in which the performance of an essential job functions is suspended or if the employee has to be placed in a lower paying position as an accommodation. This is not specifically addressed in the NPRM but would be consistent with language elsewhere in the NPRM stating that, if a production standard is lowered as an accommodation, the employee's pay can be proportionately reduced.

(2) The proposed regulation permits a scenario in which more than one period of temporary inability to perform essential functions can occur during a pregnancy. However, the PWFA refers to "*a* period of temporary inability." Despite this, the proposed regulation appears to contemplate multiplate periods of temporary inability – each of a potential 40-week duration -- that could be stacked to result in the requirement for removal of essential functions for far beyond a total of 40 weeks (for example, 40 weeks pre-pregnancy, 40 weeks during pregnancy, and then 40 weeks following return from leave/recovery from childbirth). This amounts to a period well over two years and, as set forth above, is not what Congress intended by "in the near future." The proposed regulations should clarify that there is only one period of temporary inability per pregnancy or that multiple periods together cannot exceed the duration stated in the definition of "in the near future," which we proposed by no more than six months.

Interplay with ADA Accommodation Process

The legislative history of the PWFA is replete with references to the fact that the PWFA was intended to fill in the gaps left by the ADA in terms of reasonable accommodation for pregnant workers. For example, the House Committee Report on the PWFA notes that, although a pregnant worker has some level of recourse through the ADA and PDA when it comes to accommodation, "varying legal frameworks have created an unworkable legal framework" and "frustrated pregnant workers' ability to secure reasonable accommodations." House Committee Report at 11. During the House debate on the PWFA, Congressman Jerrold Nadler incorporated into the record a letter from the National Women's Law Center that noted its support for the PWFA because it "would fill the holes left in the[] protections [from the PDA and ADA] with a common ground and common-sense approach that ensures pregnant workers are accommodated when the accommodations they need are reasonable and do not pose an undue hardship to employers." Congressional Record, May 14 2021, H2336.

Under the ADA, absent a condition arising out of pregnancy that constitutes a disability within the meaning of the ADA, employers are not required to accommodate pregnancy and pregnancy-related conditions. Under the PWFA, a non-disabling condition arising out of pregnancy must be accommodated. An important distinction between the two laws is that the PWFA contains an express exception the ADA does not: an employee need not be able to perform the essential functions of the job in order to be qualified for accommodation under the PWFA (as long as the inability to perform essential functions is temporary, the essential functions can be performed again in the near future, and accommodating the inability to perform the essential functions does not place an undue hardship on the employer). Thus, the PWFA has a more lenient standard for accommodation, or what could be considered a "super accommodation" obligation when compared to the ADA.

The PWFA and the proposed regulations are silent on the practical interplay between the PWFA and the ADA when applying this "super accommodation" obligation to pregnancy-related conditions that also constitute ADA disabilities can result in disparate treatment.

An example of how this can play out in the workplace highlights the issue. A male and female employee both have back injuries and are unable to lift more than 20 pounds. The male employee's injury is due to obesity; the female employee's back injury arises from pregnancy. Lifting more than 20 pounds is an essential function of both employees' jobs. Both employees submit medical certifications that state they can lift 20 pounds again in nine months.

The employer would not be required to accommodate the male employee under the ADA because the employee is not qualified. By contrast, the same employer would be required to accommodate the female employee under the current regulatory framework because she would be qualified if the inability to perform the essential functions can be reasonably accommodated because the proposed regulation explicitly states that, under the PWFA, in the "near future" is 40 weeks. In theory, the employer could choose to place the male employee on unpaid leave, but, under the PWFA, the employer could not place the female employee on leave during the period in which she cannot perform the essential functions of her job unless it showed there was no on-the-job accommodation available.

The Commission should provide guidance to employers on how to address requests for reasonable accommodation under the PWFA based on conditions that constitute disabilities under the ADA. RILA submits that employers should, in the first instance, process requests for accommodation under the ADA when the pregnancy-related condition constitutes a disability. Only if the condition is not covered under the ADA, should it be processed as a request for accommodation under the PWFA. If the PWFA is a gap-filling measure, this would seem to be the right result and would lead to consistent treatment in the workplace, which is the goal of the legislation enforced by the EEOC.

§ 1636.3(d) Communicated to the Employer

The accommodation process under the PWFA will only be effective to the extent an employer is adequately and appropriately put on notice of the need for accommodation under the statute.

The proposed regulation states that a covered worker should be permitted to request an accommodation through multiple avenues and means, including "a supervisor, manager, someone who has supervisory authority for the employee (or the equivalent for an applicant), or human resources personnel, or by following the covered entity's policy to request an accommodation." RILA supports this definition as consistent with the process that many employers follow for requesting an ADA accommodation, especially since it expressly contemplates that employers can create a policy with their own, more narrow process for making an accommodation request. However, RILA believes that any expansion of the universe of persons to whom an accommodation request can be made beyond supervisory personnel or human resources would create an unmanageable process for employers.

The proposed regulations also state that, in order to request a reasonable accommodation, the employee or applicant need only communicate: (1) the limitation, and (2) that the employee/applicant needs an adjustment or change at work. RILA believes that the proposed regulation should be modified to state that the employee must communicate (1) the limitation; and (2) that the employee/applicant needs an

adjustment or change at work due to the limitation. This slight change would clarify that the employee may only request accommodations that are necessitated by the limitation. Case law interpreting the ADA is clear that, while the burden to provide notice under the ADA sufficient to initiate the reasonable accommodation process is not a heavy one, adequate notice does require that the employee or applicant inform the employer both of the disability, limitations associated with the disability, and the need for accommodations based on that disability. *EEOC v. Fed. Express Corp.*, 513 F.3d 360, 369 (4th Cir. 2008).

Undue Hardship - Predictable Assessments § 1636.3(j)(4)

The PWFA incorporates the definition of reasonable accommodation and undue hardship from the ADA. Under the ADA, the Commission advises that employers must make undue hardship determinations on a case-by-case basis and determine reasonable accommodations through an interactive process between the worker and the employer. Through individualized assessments, employers and employees work cooperatively to arrive at reasonable workplace accommodations based upon the specific essential functions of a job, the nature of the workplace, and the employer's specific business needs. The Commission's inclusion of four "predictable assessments" for accommodations under the PWFA, which are deemed to be reasonable in every circumstance, is unwarranted and undercuts the individualized assessment that is the foundation of reasonable accommodation and the interactive process under the ADA.

The Commission's assumption that the specific modifications proposed as "predictable assessments" will be reasonable in every case ignores the vast array of jobs and workplaces that exist in this country. For example, providing seating to perform work tasks is not reasonable for every type of job and workplace. Requests for additional breaks to eat and drink are not *per se* reasonable in every situation. Rather, the determination of reasonableness necessarily depends upon the specific accommodation being sought (*e.g.*, how many breaks, how much time for each break, etc.) and the type of work they are performing.

To compound this issue, the proposed regulation states that it would not be reasonable for employers to require documentation when an employee or applicant seeks an accommodation that falls under one of the four "predictable assessments." Not allowing an employer to request documentation for the "predicable assessments" deprives the employer of the ability to confirm that an employee who is not obviously pregnant is, in fact, pregnant. The Commission proposes that an employee's self-attestation should be sufficient to support a request for one of the "predictable assessments." However, RILA members are concerned that sole reliance on self-attestation will open the door to abuse.

Accordingly, RILA urges the Commission to remove the "predictable assessments" from the proposed regulations altogether. Employers and pregnant workers should engage in an appropriate interactive process under the PWFA for all accommodation requests to determine reasonable accommodations on a case-by-case basis, which is what is contemplated by the law and intended by Congress. The interactive process is a hallmark of the ADA and the term is incorporated by reference into the PWFA from the ADA. There is no principled reason to depart from that process.

Supporting Documentation (Section 1636.3(l))

The proposed regulations allow an employer to require supporting documentation for a request for accommodation when it is "reasonable under the circumstances." Under the ADA, an employer can require documentation to support a request for accommodation except when the need for the accommodation is obvious. The rule should be no different under the PWFA. Our members are comfortable applying the ADA framework, and bright line guidance helps employers more than the application of a "reasonableness" standard. When going through the accommodation process, it would be difficult for an employer to know when the "reasonableness" of their decision to request documentation is going be to be second-guessed.

RILA agrees with the Commission that it is not reasonable for an employer to require proof of pregnancy when the pregnancy is obvious. However, the proposed regulations should provide that an employer can require proof of pregnancy through some sort of non-invasive means when the pregnancy is not obvious. Moreover, whether or not the pregnancy itself is obvious, the employer should be able to require medical documentation that the requested accommodation is related to the pregnancy-related medical condition and that the requested change or adjustment at work medically necessary. Along these lines, an employer should be allowed to obtain medical documentation to support whether an employee is having morning sickness or is fatigued. The proposed self-attestation opens the door to abuse by an employee, especially when paired with a limitation on the ability to require documentation of a non-obvious pregnancy. The NPRM suggests that pregnant workers seem to face more challenges getting documentation from a health care provider than an employee suffering from an impairment that is not related to pregnancy. However, a pregnant worker's ability to obtain medical documentation is no different than an employee under the ADA who suffers from a new impairment or non-chronic impairment for which the employee has not previously consulted to health care provider. Both may not have already been consulting a physician when the limitation arose, but medical documentation can be obtained. Thus, an employer should be able to request medical documentation under the PWFA to the same degree that it can under the ADA.

RILA also believes that the Commission should allow employers to request periodic updates from the employee, including medical documentation, as to the necessity of continued accommodation. For example, an employee who is suffering from morning sickness in early pregnancy who asks to come into work at a later time, may not need that accommodation later in the pregnancy. An employer should be able to require medical documentation on a reasonable basis to determine whether the accommodation continues to be needed as it can under the ADA.

CONCLUSION

Thank you for the opportunity to submit comments on the Commissions proposed regulations. RILA believes that by leaning into existing accommodation structures, such as those within the ADA, HR professionals and business executives will be better equipped to provide for pregnant workers who may seek accommodations under the PWFA. Please do not hesitate to contact me if RILA may be of assistance as the Commission considers this matter.

Best,

Evan Armstrong