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the work and family legal center

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The Honorable Charlotte A. Burrows
Chair of the Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Chair Burrows:

Thank you for the opportunity to provide input on the Equal Employment Opportunity Commission (EEOC)'s upcoming Strategic Enforcement Plan (SEP). We appreciate the transparency afforded by this process and join the EEOC in its goal of eradicating workplace discrimination across our country.

A Better Balance is a national nonprofit legal services and advocacy organization that uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. We run a free and confidential legal helpline through which we hear from thousands of workers a year, including workers who have experienced discrimination because of their pregnancies, disabilities, or caregiver status. We write today to highlight four critical areas we believe the EEOC should address in its new SEP and prioritize in the years ahead.

1) **Fighting Discrimination Against Caregivers**

In the wake of the pandemic, caregivers continue to face high rates of discrimination as they struggle to care for loved ones and remain economically secure. We are grateful for the technical assistance document the EEOC issued in March 2022 on the COVID-19 Pandemic and Caregiver Discrimination, and we have successfully used this document to support our advocacy and representation work. However, the EEOC's primary guidance documents on caregiver discrimination were issued over fifteen years ago. Since that time, the legal landscape has developed to provide additional legal support for both sex-based claims under Title VII and associational disability claims under the Americans with Disabilities Act Amendments Act (ADAAA). As the agency charged with enforcing our federal workplace civil rights, the EEOC should continue to prioritize combatting discrimination against caregivers by updating its 2007 guidance on unlawful disparate treatment of workers with caregiving responsibilities, as well as the companion Q&A and Best Practices documents, to provide more timely guidance.

As the EEOC turns to updating its 2007 caregiver discrimination guidance, following are recommendations for ways the EEOC can improve and update its legal framework:

- **Add disparate impact as an available theory under which workers can bring caregiver discrimination claims.** The current guidance addresses disparate treatment claims but omits the theory of disparate impact, which is also available to workers bringing Title VII sex discrimination claims. *See Dothard v. Rawlinson*, 433 U.S. 321 (1977). Examples the guidance might provide of potential disparate impact claims brought by caregivers are an employer's

maintenance of a mandatory overtime policy or a policy forbidding telecommuting or flexible work arrangements.

- **Replace references to the ADA with the ADAAA, including its expanded protections.** The ADAAA expanded the scope of disabilities covered by federal anti-discrimination law to include many temporary, pregnancy-related disabilities. It would be helpful for the EEOC to weave references to the ADAAA, specific additional types of disabilities covered, and ADAAA case law throughout the guidance.
- **Update the Pregnancy Discrimination section to include caselaw expanding rights for pregnant workers.**
    - The Supreme Court's 2015 decision in *Young v. United Parcel Serv., Inc.* clarified that the Pregnancy Discrimination Act (PDA) may require employers to make reasonable workplace accommodations for pregnant individuals, like granting lifting restrictions or a temporary transfer to a light duty position, if the employer provides such accommodations to others in the workplace with similar restrictions. 575 U.S. 206 (2015). Unfortunately, as discussed further below, courts interpreting *Young* have too often required plaintiffs to provide overly-exact comparators and improperly credited employers' arguments that minor inconveniences are sufficient to deny necessary accommodations to pregnant workers. The EEOC's caregiver guidance should therefore reference *Young*'s holdings and highlight recent caselaw where courts have applied it properly. The guidance should also make clear that employers should refer to the EEOC's 2015 Pregnancy Guidance for more information.
    - The guidance should also be sure to state that related medical conditions include, but are not limited to, lactation and the need to express milk, and provide an example in the guidance regarding potential discrimination against a lactating worker. *See, e.g.*, *Hicks v. City of Tuscaloosa*, 870 F.3d 1253 (11th Cir. 2017) (affirming judgment on PDA claim in favor of a patrol officer who was denied a breastfeeding accommodation); *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (holding that firing a woman because she is expressing milk at work violates Title VII).
- **Cite to the Supreme Court's 2020 decision in *Bostock v. Clayton County*, 140 S.Ct. 1731, which confirmed that discrimination on the basis of motherhood is intentional sex discrimination**. In *Bostock*, the Court noted that a woman who is rejected for a job because she is a mother, or because she has young children, need not show that *all* women were similarly discriminated against in order to sustain a sex discrimination claim under Title VII. Rather, "the Court did not hesitate to recognize that the employer . . . discriminated against the plaintiff because of her sex. Sex wasn't the only factor, or maybe even the main factor, but it was one but-for cause – and that was enough." *Id.* at 1745. *See also Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1047 (10th Cir. 2020) (Explaining that, in light of *Bostock*, "a sex-plus plaintiff does not need to show discrimination against a subclass of men or women. Instead, if a female plaintiff shows that she would not have been terminated if she had been a man – in other words, if she would not have been terminated but for her sex – this showing is sufficient to establish liability under Title VII.").
- **Include examples involving remote work and flexible schedules.** Caregivers were uniquely impacted by the COVID-19 pandemic as they struggled to keep themselves safe, earn an income, and ensure their loved ones' access to medical care and education. The EEOC should pull from the themes in its 2022 technical assistance document to highlight examples of discrimination against caregivers in contemporary workplaces. For example, a woman subjected to heightened scrutiny while working remotely because her supervisor assumes she is ignoring work to focus on her children, or a man denied a flexible schedule that would allow him to accompany his mother

to medical appointments while colleagues are granted similar schedules in order to attend college courses.

- **Note that there may be applicable state and local laws that expressly prohibit caregiver discrimination and require accommodations for pregnant and breastfeeding workers.** While the guidance does not need to discuss state or local laws, it should note, especially in the Best Practices document, that there may be state and local protections that go beyond federal law in protecting workers based on their caregiver or familial status, and entitling them to accommodations based on pregnancy, childbirth, and lactation.

In its revisions, the EEOC should also be sensitive to the overall framing of the document. The current document focuses heavily on the challenges faced by working mothers rather than all parents and caregivers and stresses individual struggle rather than systemic failures that bring about caregiver discrimination. This framing can itself reinforce stereotypes, and the EEOC should be careful in its revisions to use a broad and inclusive frame when characterizing the nature of caregiving responsibilities and who is a caregiver.

Following are recommendations for ways the EEOC can improve and update framing of its 2007 caregiver discrimination guidance and related documents:

- **Make consistent throughout the guidance that loved ones for whom care is provided can and should be defined in a broad and inclusive way.** There are no statutory definitions limiting who is covered in the caregiver discrimination context under Title VII, as is the case in the FMLA, so the guidance should not be limited in its scope either. The current Employer Best Practice guidance contemplates an inclusive definition of family in some places, but not in others. This should be made consistent by, for example, using phrases like "providing care for relatives and loved ones" rather than "providing care for relatives."
- **Add guidance around anti-retaliation and anti-discrimination protections for men who take bonding leave.** The guidance should include examples featuring men being treated less well as a result of stereotypes about who is a caregiver, such as a scenario where a man is offered less parental bonding leave than women in the same office, or one where a man is denied a promotion once his supervisor learns that he is the sole caregiver for his mother.
- **Reframe the language to be more gender inclusive, rather than relying on a male/female binary or an assumption that women will be the birthing parents.** The inclusion of a same-gender couple as one of the examples in the EEOC's 2022 technical assistance document is a powerful example of how gender-inclusive language can help guide employers and workers in expanding the conversation around caregiving.
- **Offer more examples of intersectional discrimination.** For example, an example in which an employer assumes that an immigrant worker of color is more likely to live in intergenerational households and thus be a caregiver.
- **Better acknowledge the systemic forces that make it challenging for caregivers to juggle work and family.** For example, referencing the lack of paid leave for millions of American workers and many employers' use of punitive attendance policies and other overly-rigid and unpredictable workplace policies acknowledges that the discrimination many workers face is based on systemic, rather than individual, barriers.

2) Ending Discriminatory Absence Control Policies

The EEOC has long been a leader in recognizing that inflexible leave policies discriminate against workers with disabilities, pregnant workers, and workers with caregiving responsibilities. In our 2020 report, *Misled and Misinformed: How Some U.S. Companies Use "No Fault" Attendance Policies to Trample on Workers' Rights*, A Better Balance demonstrated how some of the nation's largest companies maintain policies that mislead workers into falsely believing that they lack any right to reasonable accommodations and job-protected time off, and then penalize workers for legally-protected absences. These policies interfere with workers' ability to exercise their civil rights and punish them for taking time off to care for themselves and their loved ones. Moreover, employers who misuse or misapply absence control policies risk violating workers' rights to reasonable accommodations, engaging in a pattern of intentional discrimination, and creating an unlawful disparate impact in violation of the ADAAA, PDA, and Title VII.

It is vital that the EEOC engage in robust enforcement against employers who knowingly maintain discriminatory absence control policies. As a governmental agency with powerful investigative and enforcement authority, the EEOC is uniquely situated to identify and remedy workplace-wide violations that are often outside the knowledge or reach of individual workers. As such, the EEOC should allocate investigative resources to identifying employers who apply absence control policies in a discriminatory manner and, when conciliation of these charges is unsuccessful, commit additional resources to pursuing claims against them in court.

In addition, the EEOC should capitalize on its high profile and strong relationships with employers and their representatives to conduct robust outreach and education informing employers of the significant risks of these policies and how to implement them in a manner compliant with federal anti-discrimination law. We recommend that the EEOC prioritize creating written resources and trainings that give guidance to employers who wish to implement absence control policies on the following best practices for ensuring compliance:

- Employers should write clear workplace policies that comprehensively and accurately outline workers' rights to reasonable accommodations and time off without penalty to care for themselves and their loved ones.
- Employers should make all workplace policies easily accessible to employees through multiple means, including both hard copy and electronic, and in languages that they believe can be read and understood by their workforce.
- Employers should regularly train and re-train supervisory and managerial staff to ensure they understand the various categories of absences that are legally protected and know how to quickly and accurately exclude those absences from points systems and disciplinary actions.
- Employers should exercise caution when partnering with third-party companies that administer accommodations and leaves of absence. Employers should understand that these companies are agents of the employer, and that their actions can therefore create legal liability for the employer. Employers should be advised to provide clear guidelines to third-party administrators to ensure they comply with the law, and to maintain open channels of communication so the employer is always aware when an employee is in the process of seeking an accommodation or job-protected leave of absence.

3) Enforcing Protections for Pregnant Workers

We appreciate the significant steps the EEOC has taken in recent years to prioritize both guidance and enforcement efforts to combat pregnancy discrimination. We ask the EEOC to continue this critical work by explicitly prioritizing enforcing protections for pregnant workers in its new SEP and actively seeking opportunities – through guidance, enforcement, and amicus submissions – to reinforce the correct interpretation of the Supreme Court's holding in *Young v. United Parcel Service, Inc.*, 575 U.S. 206 (2015). Too many courts in the years since *Young* have failed to follow its holding by, for example, requiring plaintiffs to show unnecessary comparators or dismissing claims based on an employer's unsupported assertion that accommodating a pregnant worker would have been too expensive or inconvenient. *See, e.g.*, *Santos v. Wincor Nixdorf, Inc.*, No. 16 Civ. 440, 2018 WL 1463710, at *8 (W.D. Tex. Mar. 23, 2018) (dismissing PDA claim by project analyst who requested a modified work arrangement and was terminated a few days before giving birth because she could not offer "names, titles, and other information" of "similarly situated" employees); *Adduci v. Fed. Express Corp.*, 298 F. Supp. 3d 1153, 1161–63 (W.D. Tenn. 2018) (affirming grant of summary judgment to employer on PDA claim because employee did not provide sufficient comparator evidence despite identifying other employees in her job title who were provided accommodations). The EEOC must continue to prioritize supporting pregnant workers, especially as rollbacks in abortion rights increase the number of pregnant workers nationwide.

In addition to supporting accurate interpretation of existing precedent, the EEOC can help ensure pregnant workers access to their legal rights by fast-tracking pregnancy and lactation accommodation claims where the charging party is currently in need of accommodation. Given the time-sensitive nature of these claims, a pregnant or breastfeeding worker who must wait for an intake appointment or standard investigation may never be accommodated, and too often may lose their job or quit breastfeeding as a result. By creating systems that prioritize filing and investigation of these accommodation claims, the EEOC will help ensure that pregnant and breastfeeding people are able to stay in the workforce and ensure their families' economic security.

Finally, the EEOC should capitalize on its partnerships with FEPAs in jurisdictions with enacted Pregnant Workers' Fairness Acts and ensure that its district-level staff are identifying and referring pregnancy accommodation claims to FEPAs that can file and investigate them under broader state and local standards.

4) Avoiding Discriminatory Technology

We are grateful for the EEOC's recent guidance on the best practices for employers who use artificial intelligence (AI) to screen and evaluate applicants and employees. However, given the ever-increasing availability of commercial products that use AI to support human resources tasks, we encourage the EEOC to continue to expanding the scope and detail of its own guidance to employers on how to avoid the discriminatory use of this technology.

Too often, employers are encouraged to invest in "off-the-shelf" technology products that result in discriminatory outcomes. For example, AI-based candidate screening tools may rely on discriminatory inferences about applicants' residential zip codes or family photos captured from social media to screen out otherwise qualified candidates. Similarly, AI-based tools that monitor employee performance may seem like an effective way of keeping tabs on workers, but these tools can falsely undervalue the productivity of pregnant and breastfeeding workers, workers with disabilities, and those with flexible schedules, leading to discriminatory outcomes. When these technological tools are employed in discriminatory ways, workers and their families suffer.

The complexity of the ever-expanding array of available AI-based HR products makes it challenging for employers, especially those without access to sophisticated counsel, to understand the risks of these products and how to avoid them. As a prominent federal agency with the ability to disseminate free guidance and trainings on these topics, the EEOC is ideally situated to apply its expertise to demystifying this technology and supporting employers in using it in a non-discriminatory manner. We encourage the EEOC to leverage its connections with AI experts in other branches of the federal government, such as the National AI Advisory Committee, and continue to develop trainings and guidance in this area.

We thank you again for this opportunity to contribute to the EEOC's work.

Sincerely,

Dina Bakst
Co-Founder & Co-President

Sarah Brafman
National Policy Director

Katherine Greenberg
Director of Strategic Litigation