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July 28, 2014

The Honorable Jacqueline A. Berrien  
Chair  
U.S. Equal Employment Opportunity Commission  
131 M Street, NE  
Washington, D.C. 20507

Dear Chair Berrien:

On July 14, 2014, the Equal Employment Opportunity Commission (EEOC) issued enforcement guidance on pregnancy discrimination and related issues (guidance). We believe the dissenting statements of Commissioners Constance S. Barker and Victoria A. Lipnic raised valid concerns about the guidance that need to be answered. We therefore request you respond to us regarding all the concerns raised in the dissenting statements, which are attached to this letter.

Both commissioners expressed disappointment in the commission's failure to make a final draft of the guidance available for public review and comment prior to the approval vote. Intriguingly, they wrote that a majority of commissioners endorsed this position, yet the guidance was approved without public review.

Commissioner Lipnic states she argued on two different occasions the draft guidance should be offered for public notice and comment. Such input from the public "would have been invaluable, particularly in light of the fact that the Guidance adopts new and dramatic substantive changes to the law." Public review would have "strengthened any final document, but perhaps more important, provided for the increased transparency and credibility of the Commission."<sup>1</sup>

Similarly, Commissioner Barker reiterated her standing request that proposed new or revised enforcement guidance be made available for public review. As she recommended with respect to the 2012 criminal background checks guidance, Commissioner Barker wrote in her dissenting statement on the July 14 guidance that "significant policy changes should be made available to

<sup>1</sup> Statement of the Honorable Victoria A. Lipnic, Commissioner, U.S. Equal Employment Opportunity Commission, "Enforcement Guidance on Pregnancy Discrimination and Related Issues" [Lipnic Statement] at 1 (July 14, 2014).

the public for comment before they are approved by the Commission” to better satisfy “the Administration’s emphasis on full transparency in the government.”<sup>2</sup>

The two commissioners also questioned the wisdom of not waiting to issue the guidance given two recent developments at the Supreme Court. First, on July 1, 2014, the Court granted review in *Young v. United Parcel Service, Inc.*,<sup>3</sup> to decide the very issues addressed in the guidance. As Commissioner Barker noted, if EEOC’s “interpretation of the [*Pregnancy Discrimination Act of 1978*] PDA does not correspond exactly with the Court’s decision, we will have provided an incorrect interpretation on a very significant issue that the public will rely on.”<sup>4</sup> Likewise, Commissioner Lipnic warned, “the credibility of the Commission is done no favor by issuing *any* guidance on these points while these critical questions are pending” (emphasis in original).<sup>5</sup>

Second, the Court handed down its decision in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>6</sup> on June 30, 2014, holding federal regulations mandating employer contraceptive coverage under the *Patient Protection and Affordable Care Act* violated the rights of certain employers with religious objections under the *Religious Freedom Restoration Act of 1993*. The guidance was thus “overtaken by events,” according to Commissioner Lipnic, because the commission did not have the opportunity to thoroughly review the decision’s effect on employers’ legal obligations with respect to health insurance.<sup>7</sup>

Commissioners Barker and Lipnic pointedly criticized the substance of the guidance, which states pregnant workers are entitled under the PDA to “reasonable accommodation” as defined by the *Americans with Disabilities Act of 1990* (ADA).<sup>8</sup> Commissioner Barker called this a “novel interpretation of the PDA for which there was no legal basis.”<sup>9</sup> Similarly, Commissioner Lipnic wrote, “No federal Court of Appeals has adopted this position; indeed, those which have addressed the question have rejected it.”<sup>10</sup>

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<sup>2</sup> Public Statement of Commissioner Constance S. Barker: Issuance of EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues [Barker Statement] (July 14, 2014), attaching Memorandum from Constance S. Barker, Commissioner, to Jacqueline A. Berrien, Chair; Jenny R. Yang, Vice Chair; Chai R. Feldblum, Commissioner; and Victoria A. Lipnic, Commissioner re Draft Enforcement Guidance on Pregnancy Discrimination and Related Issues Circulated for Review and Comment April 14, 2014 [Barker Memorandum] at 4 (May 23, 2014).

<sup>3</sup> 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 86 USLW 3602 (U.S. July 1, 2014) (No. 12-1226).

<sup>4</sup> Barker Statement at 1.

<sup>5</sup> Lipnic Statement at 1.

<sup>6</sup> --- S. Ct. ---, 2014 WL 2921709 (June 30, 2014).

<sup>7</sup> Lipnic Statement at 2.

<sup>8</sup> EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues, I.A.5. Persons Similar in Their Ability to Work (July 14, 2014).

<sup>9</sup> Barker Statement at 1.

<sup>10</sup> Lipnic Statement at 2.

The guidance also interpreted the PDA to require employers providing comprehensive health insurance to also provide prescription contraceptive coverage. The commission offered this interpretation even though “[n]o authority other than a Commission decision was offered to support this proposition,” wrote Commissioner Barker. Indeed, the guidance acknowledged an Eighth Circuit decision holding that excluding contraception coverage does not violate the PDA, but the guidance “simply declines to follow it.”<sup>11</sup>

Commissioner Lipnic concludes in her dissent:

[I]t is not the proper role of the Commission to decide those questions of policy, particularly where, as here, the law enacted by Congress plainly does not contemplate the Commission’s answers to those questions. ... By its actions with respect to the Pregnancy Guidance, the Commission is not regulating, or even interpreting current law; rather, we are legislating – a task far beyond our purview.<sup>12</sup>

We believe the valid concerns raised by Commissioners Barker and Lipnic necessitate a response. Please provide to us a response to all the procedural, substantive, and legal concerns raised in the dissenting statements of Commissioners Barker and Lipnic by August 11, including:

1. EEOC’s reasons for not making the guidance available for public review and comment prior to voting on it, when a majority of the commission favored making it available for public review and comment.
2. The reasons EEOC issued the guidance even though the Supreme Court granted review in *Young v. United Parcel Service, Inc.*, prior to it being issued.
3. The reasons for issuing the guidance without thoroughly analyzing *Burwell v. Hobby Lobby Stores, Inc.*
4. Legal analysis responding to the two dissenting statements with respect to reasonable accommodation.
5. Legal analysis concerning provision of health insurance coverage.

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<sup>11</sup> Barker Memorandum at 3.

<sup>12</sup> Lipnic Statement at 4.

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Should you have any questions regarding this request, please contact John Martin or Molly Conway, House Education and the Workforce Committee, (202) 225-7101.

Sincerely,



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JOHN KLINE  
Chairman  
Committee on Education and the Workforce



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TIM WALBERG  
Chairman  
Subcommittee on Workforce Protections

CC: The Honorable Jenny R. Yang, Vice Chair  
The Honorable Constance S. Barker, Commissioner  
The Honorable Chai R. Feldblum, Commissioner  
The Honorable Victoria A. Lipnic, Commissioner