U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

The Honorable Robert C. Scott
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington DC, 20515

Dear Mr. Chairman,

This letter provides the views and recommendations of the Department of Justice ("Department") on H.R. 1065, the Pregnant Workers Fairness Act. The Department has constitutional concerns, which are outlined below.

The bill, the Pregnant Workers Fairness Act, offered as an amendment in the nature of a substitute to H.R. 1065, seeks to ensure that employers reasonably accommodate employees experiencing limitations relating to pregnancy, childbirth or related conditions. Our comment involves just one aspect of the bill: its abrogation of state sovereign immunity in connection with private lawsuits against states for failing to make such accommodations or taking other prohibited pregnancy-related actions. Because Congress's authority to abrogate state sovereign immunity is limited, we are concerned that H.R. 1065 as currently drafted is vulnerable to constitutional challenge. Congress can mitigate this significant litigation risk by making changes to the bill, for example by more clearly delineating the right that it seeks to protect and building a robust legislative record to demonstrate the need for this protection with respect to state governmental employers.

Under H.R. 1065, it would be an unlawful employment practice for covered entities, which include state employers, to refuse to "make reasonable accommodations to the known limitations related to pregnancy, child-birth, or related medical conditions of a qualified employee," unless they can show that "the accommodation would impose an undue hardship." H.R. 1065, § 2(1); *see also id.* § 5(2)(B)(i), (iii) (defining "covered entity" to include "an employer" under Title VII of the Civil Rights Act of 1964, which includes state employers, as well as "an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991"). H.R. 1065 would also prohibit covered entities from taking a range of actions relating to these known limitations, such as requiring an employee affected by such conditions to take leave. *Id.* §§ 2(3)–(4); *see also id.* § 2(2) (an employee cannot be required to accept an accommodation other than the one negotiated under the bill's provisions). The bill

would then create a cause of action against covered entities, including state employers, for engaging in the unlawful employment practices defined in the Act. *Id.* §§ 3(a)(1), 3(d)(1). It would also provide for monetary damages, *id*. §§ 3(a)(3), 3(d)(3), and include a provision explicitly abrogating state sovereign immunity, *id.* § 6.

As a general matter, Congress lacks authority under Article I to abrogate states' immunity from suit in state and federal courts. *See Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001); *Alden v. Maine*, 527 U.S. 706, 741–54 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996). Congress may, however, abrogate states' sovereign immunity pursuant to its enforcement power under Section 5 of the Fourteenth Amendment. *United States v. Georgia*, 546 U.S. 151, 158–59 (2006); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004). Such legislation must exhibit "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

In *Hibbs*, the Court upheld the abrogation of state sovereign immunity for violations of the family leave provisions of the Family and Medical Leave Act, concluding that they were a congruent and proportional response to "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits." *Id*. at 735. In so doing, the Court emphasized that gender discrimination triggers heightened scrutiny, making it "easier for Congress to show a pattern of state constitutional violations." *Id*. As part of the evidence of this pattern of gender discrimination, the Court pointed to discrimination in maternity and paternity leave policies, as well as childcare leave. *Id*. at 729–31. Notably, the family leave provisions at issue were not limited to prohibiting gender discrimination in leave policies but rather provided "an across-the-board, routine employment benefit for all eligible employees." *Id*. at 737. In upholding the provisions nonetheless, the Court explained that the gender-neutral framing was important to counter the sex stereotypes that underlay discriminatory leave policies:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. *Id.* at 736.

On the other hand, in *Garrett* the Supreme Court rejected the ADA's abrogation of sovereign immunity for suits based on a state employer's failure to make "reasonable accommodations" for disability. 531 U.S. at 360–61. The Court emphasized that distinctions based on disability do not trigger heightened scrutiny so long as they are rational, making it

difficult to show a pattern of unconstitutional discrimination on the basis of disability. *Id*. at 367. Moreover, even assuming a record showing such a pattern, the Court held that a statutory requirement that employers make any "reasonable accommodation" for a disabled employee lacked congruence and proportionality because the additional economic cost of a reasonable accommodation was a rational basis for refusing to undertake it. *Id.* at 372.

H.R. 1065's requirement that employers make reasonable accommodations for pregnancy-related limitations is very similar to the ADA prohibition at issue in *Garrett*. A critical difference, however, is that H.R. 1065 plainly seeks to remedy gender discrimination, with its focus on limitations relating to pregnancy and childbirth, rather than disability discrimination. As a result, H.R. 1065's abrogation of state sovereign immunity stands a better chance of being found constitutional. Even so, subsequent to *Hibbs* the Court rejected Congress's abrogation of state sovereign immunity for the self-care leave provisions of the FMLA, concluding that the "well-documented pattern of sex-based discrimination in family-leave policies" found in *Hibbs* was lacking with respect to self-care leave. *Coleman v. Ct. of Appeals of Maryland*, 566 U.S. 30, 36-37 (2012) (plurality opinion). The Court also noted that nearly all states offered sick leave and that "Congress did not document any pattern of States excluding pregnancy-related illnesses from sick-leave or disability-leave policies." *Id*. at 39. *Coleman* emphasized that "States may not be subject to suits for damages based on violations of a comprehensive statute unless Congress has identified a specific pattern of constitutional violations by state employers." *Id*. at 42.

Also, relevant to assessing the constitutionality of H.R. 1065's abrogation of state sovereign immunity is that the Supreme Court held many decades ago that discrimination against pregnant employees is not in itself gender discrimination. In examining a state disability program's refusal to pay disability benefits on account of a "normal pregnancy" under the Equal Protection Clause, the Court concluded that the "program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities" and represented not a "sex-based classification" but instead a distinction "between pregnant women and nonpregnant persons." *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). The Court accordingly conceived of the employer's refusal as based solely on physical disability, subjected it to mere rational-basis review, and upheld it against constitutional challenge. *See id.* at 495-45; *see also General Elec. Co. v. Gilbert*, 429 U.S. 125, 135 (1976) ("[E]xclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all."), *superseded by statute*.

Notably, however, more recent statements of the Court suggest recognition that distinctions by state employers based upon pregnancy and women's perceived roles as mothers are often a form of impermissible gender discrimination. *See Coleman*, 566 U.S. at 39 (emphasizing that existing leave policies likely covered pregnancy-related illnesses in rejecting a pattern of constitutional violations that self-care leave would address); *Hibbs*, 538 U.S. at 729–31 (identifying gender distinctions with respect to maternity and paternity leave as reinforcing sex stereotypes); *cf, Bostock v. Clayton Cty*, 140 S. Ct. 1731, 1739 (2020) (assuming that "sex" in Title VII means at a minimum "biological distinctions between male and female"); *id*. at 1761 n.16 (2020) (dissenting opinion) (describing pregnancy as "biologically tied to sex").

These decisions suggest that, although H.R. 1065's abrogation of state sovereign immunity raises substantial litigation risk, there are also important ways in which Congress can bolster H.R. 1065's constitutionality, including:

- Clearly identifying the right against gender discrimination that H.R. 1065 is seeking to protect. *See Garrett*, 531 U.S. at 365 (emphasizing the need to "identify with some precision the scope of the constitutional right at issue").

- Providing legislative findings documenting the relationship between employers' refusal to offer reasonable accommodations for limitations associated with pregnancy, childbirth, or related conditions and gender discrimination. *See id.* at 370–71 (stating that if "Congress truly understood this information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings").

- Developing a legislative record demonstrating gender discrimination by states in granting disability accommodations, particularly discrimination relating to pregnancy, childbirth, and related conditions, and identifying how stereotypes respecting women's roles contributes to employers' refusals to accommodate known limitations related to pregnancy and childbirth. *See Coleman*, 566 U.S. at 42 (plurality opinion); *Hibbs*, 538 U.S. at 736, 738.

- Explaining why existing protections, such as in the Pregnancy Discrimination Act, are not sufficient to protect women against such discrimination and why the additional measures in H.R. 1065 are therefore needed. *See Coleman*, 566 U.S. at 39 (plurality opinion); *Hibbs*, 538 U.S. at 737–38; *see also Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1344 (2015) (concluding that the Pregnancy Discrimination Act "requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work").

Thank you for the opportunity to present our views. We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

JOSEPH GAETA Digitally signed by JOSEPH GAETA Date: 2021.05.03 17:15:37 -04'00'

Joe Gaeta
Deputy Assistant Attorney General