May 9, 2022

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Regulation No. 52-013. 16 Pa. Code, Chapter 41, subchapter D, § 41.201 — 41.207 Protected Classes

To the Honorable Members of the Independent Regulatory Review Commission:

I write on behalf of the Pennsylvania Chamber of Business and Industry (PA Chamber) in response to the Pennsylvania Human Relations Commission's (PHRC or the Commission) April 9, 2022 Final Form Regulation which seeks to amend Pennsylvania Human Relations Act (PHRA) regulations. Thank you for the opportunity to submit these comments.

The PA Chamber is Pennsylvania's largest broad-based business advocacy association. Our membership comprises around 10,000 employers of all sizes and industry sectors throughout the Commonwealth – from sole proprietors to Fortune 100 companies – representing nearly 50 percent of the state's private workforce.

The PHRA is Pennsylvania's primary state law prohibiting discrimination in employment, housing, commercial property, education, and public accommodations. The law applies to employers with four or more employees and the employer community is an important stakeholder in this area of public policy.

It is therefore disappointing that employer input was apparently not sought as these proposed regulations were being developed. When asked by the Independent Regulatory Review Commission (IRRC) to "Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation," the PHRC makes no mention of small businesses, or any employers for that matter.

According to their response, the PHRC consulted with "stakeholders in the LGBTQ community," the Governor's office and the New York City Commission on Human Rights, and incorporated their feedback into the regulatory proposal.

It stands to reason that these groups would likely offer important perspective and constructive feedback; yet it is perplexing and unfortunate that the PHRC would seek input from an out-of-state government agency and not Pennsylvanians directly impacted the proposal. Moreover, it is clear that forgoing employer engagement was intentional, not simply an oversight, since IRRC specifically asks about consultation with employers.

Besides the employer community, the PHRC should consider consulting with other stakeholders as well as this process proceeds. For example, local fair employment practice agencies, which are recognized by the Equal Employment Opportunity Commission as deferral agencies and enforce similar or overlapping antidiscrimination laws should be able to provide the Commission with insights from the administration of their local laws on the same subject.

Disregarding Pennsylvania employers and other key stakeholders was a missed opportunity that we hope the PHRC will remedy.

We, on the other hand, have indeed heard from employers and PA Chamber members with reactions to this proposal. They generally agree with the intent of the proposed regulation but still offer feedback and suggestions. Among the concerns raised was that the proposed rule could create inconsistencies with federal law, despite assurances to the contrary from the PHRC.

Employers frequently report frustration attempting to simultaneously administer federal and state laws that are similar in purpose but deviate in details, which complicates compliance efforts. These 'compliance trap' scenarios are particularly challenging for smaller employers and nonprofits with limited resources and a small, or often nonexistent, Human Resources department. Inconsistent laws are also difficult for multi-state employers who must contend with a patchwork of rules. Congruence between federal and state laws allows employers to establish more clear policies, which ultimately benefits employees and employers.

The proposed rule acknowledges the interplay with federal law but would still complicate compliance. By way of example, the proposed rule appears to broaden

the definition of "religious creed" to mirror the definition in Title VII of the Civil Rights Act of 1964. That statute applies only to employers of fifteen or more employees. The change in the definition proposed by the PHRC will now subject smaller employers to additional obligations with no indication by the PHRC what those may be. Even the expansive definition in Title VII may not provide clarity. For example, on September 13, 2002, the California Court of Appeal rendered its decision in *Friedman v. Southern California Permanente Medical Group*, holding that veganism (a creed that proscribes the ingestion or use of any products derived from animals) did not qualify as a "religious creed" under the Fair Employment and Housing Act, where it is specifically defined to include "all aspects of religious observance and practice as well as belief." The opposite result was reached in *Chenzira v. Cincinnati Children's Hosp. Med. Ctr.* (S.D. Ohio 2012), a Title VII case where the court forced the employer to defend a veganism discrimination claim without deciding whether veganism is a sincerely held religious belief versus a moral or secular philosophy or lifestyle. Accordingly, while the definition in the proposed rule might not change the obligations of large employers, it would certainly impact employers with four to fifteen employees.

We urge the PHRC to help ensure employer compliance by emphasizing clarity and congruence with comparable federal law and providing additional guidance where necessary and appropriate.

In addition to engaging the employer community in development of the proposal, we also urge the PHRC to more carefully plan the potential post-approval phase, including working with the business community on education and awareness and establishing an implementation timeframe.

It is important to recognize that this area of employment law is complicated; as are, often times, the workplace situations that may trigger a claim of discrimination – certainly more complicated than public discourse on the subject often suggests. For example, public policy and perception are often inspired by the notion of intentional discrimination – i.e. claims based on disparate treatment in which an individual is *treated* differently because they belong to a particular class.

Other claims, however, are based on unintentional discrimination – i.e., a perceived adverse impact in which an individual alleges that a facially-neutral workplace policy or practice somehow disproportionately *impacts* them because they belong to a particular class. An oft-cited example in the context of LGBTQ

discrimination is veterans-preference hiring policies that may inadvertently impact members of the LGBTQ community who were discouraged in the past from joining the Armed Services when the "Don't Ask, Don't Tell" policy was in effect.

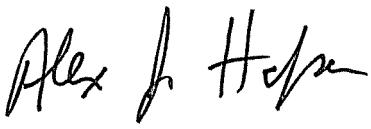
Other anti-discrimination laws and proposals have made a distinction between so-called "disparate treatment" claims and "adverse impact" claims and that may be worth considering in this proposal as well. At a minimum, PHRA regulations and PHRC's approach to enforcement should reflect the reality that honest, well-meaning employers may still be accused of discrimination.

Should the proposed regulation be approved, we would urge the PHRC to work with the employer community to develop and execute an educational campaign to ensure employers are aware of the changes. Additionally, we would suggest an effective date of at least 60 days to allow the PHRC to launch the awareness campaign and provide employers time to review existing policies and ensure none inadvertently violate the new definitions.

The PA Chamber supports the intent of the proposal but also believes effective public policy can and should prohibit discrimination while acknowledging and attempting to limit unintended consequences.

Thank you for considering our views on this important matter.

Sincerely,



Alex Halper
Director, Government Affairs

cc: Samuel Rivera, Chief Counsel, Pennsylvania Human Relations Commission