

Comments of the Independent Regulatory Review Commission



Pennsylvania Human Relations Commission Regulation #52-13 (IRRC #3339)

Protected Classes Under the PHRA and PFEOA

June 8, 2022

We submit for your consideration the following comments on the proposed rulemaking published in the April 9, 2022 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (RRA)(71 P.S. § 745.5a(a)) directs the Pennsylvania Human Relations Commission (PHRC) to respond to all comments received from us or any other source.

1. Statutory authority; and Legislative Intent.

In determining whether a proposed, final-form, final-omitted or existing regulation is in the public interest, the commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intent of the General Assembly in the enactment of the statute upon which the regulation is based. In making its determination, IRRC shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania’s courts and formal opinions of the Attorney General. 71.P.S. § 745.5b.

The PHRC proposes to amend 16 Pa. Code Chapter 41, by creating a new subchapter, Subchapter D, entitled “Protected Classes.” It is publishing these amendments under the authority of the Pennsylvania Human Relations Act (PHRA) as amended (43 P.S. §§ 957 and 959(g)) and the Pennsylvania Fair Educational Opportunities Act (PFEOA), as amended (24 P.S. §§ 5006(6) and 5007).

The PHRA and the PFEOA prohibit discrimination on the basis of religious creed, sex and race. 43 P.S. § 955, 24 P.S. § 5004. However, neither of these statutes provide a definition for those terms, nor do the existing regulations of the PHRC. Therefore, the PHRC proposes to adopt regulations that define those terms to explain the manner in which the terms religious creed, sex and race, as used in the PHRA and the PFEOA should be interpreted. The Preamble explains that the PHRA and the PFEOA explicitly authorize the PHRC to adopt, promulgate, amend and rescind rules and regulations to effectuate the policies, the purpose and provisions of these acts. 43 P.S. § 957(d) and § 24 P.S. § 5006(6). The PHRA and the PFEOA also require the PHRC to “establish rules of practice to govern, expedite and effectuate the foregoing procedure and its own actions thereunder.” 43 P.S. § 959(g) and 24 P.S. § 5007.

Members of Pennsylvania’s General Assembly, along with several organizations and citizens submitted numerous comments in both the support of and opposition to this proposal. Generally

speaking, those supportive of the proposal remarked on the efforts of the PHRC to clarify these essential terms and the public's support of these protections against discrimination. Those opposed to it raised questions and concerns with regard to the PHRC's statutory authority to promulgate the rulemaking, whether the regulation conforms to the intent of the legislature, and whether or not the amendments conflict with existing federal and state laws.

In formulating the definitions of the terms "religious creed," "sex" and "race," the PHRC explains that it relied on federal statutes, federal regulations, federal case law, opinions of Pennsylvania courts, and other states' laws. In instances where the courts have not had an opportunity to rule on an issue, the PHRC states that it relied on its powers and duties under the PHRA and PFEOA and its understanding of a term.

Those writing to express opposition to the proposed rulemaking, including Representative Seth Grove, Chairman, Pennsylvania House of Representatives State Government Committee, Representative Curt Sonney, Chairman, Pennsylvania House of Representatives Education Committee, Representatives Brian Smith, Barbara Gleim, and Paul Schemel, eleven Senators, numerous individuals, and the Pennsylvania Catholic Conference and the Independence Law Center, assert that the PHRC have exceeded their statutory authority to promulgate these regulations. These legislators state that neither the PHRC's authority to "effectuate policies and provisions" nor "establish rules of practice" allows it to expand the law through regulation.

Representative Sonney, in support of his fellow lawmakers' position on the proposal, states in a separate letter that "[t]here is no dispute that the Commission has the authority to address confusion and gaps in clarity in the PHRA and PFEOA; however, the definitions proposed by the Commission are overly broad interpretations. For example, the definitions for religious creed, sex, and race discrimination explicitly state that they are not exhaustive-meaning they are open-ended and do not provide guidance or consistency in the interpretation. The Commission has no statutory authority to predict the General Assembly's intent or meaning of these terms."

These legislators also observed that while the PHRC looked to Federal law, recent court cases, and other states in developing the proposal, the RAF and Preamble imply that some definitions are not necessarily comparable with the proposed rulemaking or courts have not had the opportunity to consider the issue. Lawmakers reject this explanation and describe it as nothing more than an attempt to alter the statute through regulation. They go on to explain, that "[w]ithout clear direction in either Act that these terms should be defined in this manner," they are concerned that the PHRC does not have the statutory authority to promulgate this regulation.

Eleven members of the Senate, undersigned in a separate comment, assert that any statutory changes to definitions, in this case altering the definition of "sex discrimination," is a policy choice with deep legal ramifications. They further contend that "[w]hile the General Assembly has yet to make these policy decisions, that should not be interpreted as an abdication of responsibility, thus a signal to a bureaucratic agency to pick up the task." The policymakers recognize the role agencies play regarding regulation and the need to address complexities that are unable to be handled at the time of passage. However, they believe that what has been proposed by the PHRC is simply "too broad and comprehensive to be considered another regulation not subject to the strict and scrupulous legislative process that changes of this magnitude are historically tested against." Additionally, they echo Representative Seth Grove's statement previously provided to the Commission that ". . . the PHRC may not only be acting

without statutory authority or sufficient legislative intent, but also promulgating regulations that would disrupt the proper separation of powers between the branches of Pennsylvania's government."

In addition to sharing the viewpoints expressed by lawmakers on the matters of statutory authority and legislative intent, the Pennsylvania Catholic Conference and the Independence Law Center, advocating on behalf of religious entities, raise the following objections:

- They assert that the proposed "expanded forms of discrimination" have not been specifically authorized by the legislature, but instead formulated through the PHRC's selective reliance on federal case law, and open the door for a basis for discrimination the legislature never imagined;
- The PHRC, through its reliance on federal case law and the Equal Employment Opportunity Commission's (EEOC) position that discrimination based on sexual orientation and gender identity is equivalent to sex discrimination, is justifying intrusions on public accommodations;
- The PHRC's explanation in the Regulatory Analysis Form (RAF) and Preamble ignores the PHRA's exemption of religious entities from sex discrimination prohibitions when "sex" is a bona fide occupational qualification (Section 5 of the PHRA and 16 Pa. Code § 41.71);
- The PHRC's proposal jeopardizes the ability of religious organizations to adhere to the principles of their own faith. They believe that "forcing religious groups to hire non-ministerial employees irrespective of sexual orientation and gender identity and expression would take away religious organizations' ability to hire according to their faith; and
- The PHRC's discussion in the Preamble on the Religious Freedom Protection Act (RFPA) (71 P.S. 2401-2408) is an acknowledgment by the PHRC, they say, that the rulemaking could have an adverse impact on small businesses and religious entities. They reject the PHRC's assertion that "no adverse impact on small businesses is anticipated." (RAF #24 and #27) Adopting a regulation without clear exemptions for religiously motivated conduct, they predict, will give rise to additional litigations and added expenses for religious entities.

A letter from Senator Christine Tartaglione, Minority Chair, Senate of Pennsylvania Labor and Industry Committee, signed by nineteen Senators and a separate letter from Representative Dan Frankel expressed a differing viewpoint of the PHRC's role in defining these terms. In their letter, the Senators state that "[u]nder Section 7(d) of the PHRA, the Pennsylvania Human Relations Commission (PHRC) has the power and duties "to adopt, promulgate, amend, and rescind the rules and regulations to effectuate the policies and provisions of the PHRA. The legislature understood when it passed PHRA that PHRC would actively develop policy that addresses evolving issues." It is their belief that "[t]he legislature provided the Commission with the flexibility to institute policies and to develop regulations based on the input of the community it serves to devise terms most relevant at the time of administration."

Furthermore, they claim that clarifying terms, "left open by the legislature," is a core function of executive agencies. The Senators also point out that by following the formal rulemaking process, the PHRC is "establishing a standard, substantive rule that will govern policy and reduce the need to continually revisit the issue with each individual case." They applaud the PHRC for using its statutory authority to address gaps in protection for millions of Pennsylvanians facing sex discrimination, along with its efforts to safeguard religious practice and expression and provide much-needed protection for individuals facing racial discrimination based on their hair. Extending the protections to the PFEOA so that Pennsylvanians attending certain secondary and post-secondary educational institutions will not face discrimination based on the proposed definitions of sex, race or religious creed were also lauded.

Representative Frankel, although supportive of the proposed regulation as a whole, limits his comments to a strong endorsement of the proposal's definition of "sex" as it is currently used by the PHRC in its 2018 guidance document. The lawmaker states that nondiscrimination protections are overwhelmingly supported by Pennsylvanians, the business community, and elected leaders. The opponents' chief argument against the definition of "sex", which is that it would be used unfairly to harm small businesses or religious institutions, he claims, has been proven untrue. Finally, Representative Frankel believes that the proposed regulation retains religious protections. He states that the definition of "sex" in no way diminishes existing religious rights or protections for individuals of faith. The regulation, in his view, makes explicit that protections in employment, housing and accommodations based on religion include both "religious observance and practice," as well as "sincerely held moral or ethical beliefs." Religious organizations or individuals acting as institutions in the marketplace, whether as employers, educators or landlords, are addressed by the RFPA. The RFPA provides the opportunity for adjudication of competing rights claims. The proposed regulation, in his opinion, maintains the structure of existing protections for privacy rights for individuals and institutional rights.

It is clear that there are divergent views regarding this proposal. Most significant are whether the PHRC has the authority to define the aforementioned terms in such a way that arguably creates new substantive rights not provided for in the PHRA and PFEOA, and whether such definitions conform to the intent of the General Assembly. We will review the PHRC's response to each of the concerns raised by commentators in our determination of whether the regulation is in the public interest.

2. Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.

Representatives Smith, Gleim, Schemel and Grove state that "Pennsylvania employers and employees are of course bound or protected by the provisions of Title VII, as it was interpreted in *Bostock* [v. Clayton County, 140 S. Ct. 1731] (2020)]. However, to the extent that 'sex discrimination' may be defined and applied to other non-discrimination contexts contained within the PHRA, neither the PHRC nor the General Assembly are subject to any particular interpretation of that term under the holding in *Bostock*." The policy choice of whether the Commonwealth should extend the definition of "sex discrimination" in such a manner, they contend, is "squarely and exclusively the prerogative of the General Assembly to pursue." The expanded definitions of "race discrimination," and "religious creed discrimination" are likewise

policy decisions to be made by the legislature and “are not related to the *Bostock* decision or any other new, binding court precedent.” We ask the PHRC to explain why it is appropriate to adopt these provisions through the rulemaking process instead of the legislative process.

3. Possible conflict with or duplication of statutes or existing regulations; and Clarity and lack of ambiguity.

The Pennsylvania Chamber of Business and Industry, which identifies itself as Pennsylvania’s largest broad-based business advocacy association, shares that employers frequently report that they are often frustrated attempting to simultaneously administer federal and state laws that share similar purposes but deviate in details which complicates compliance efforts. These types of situations, it claims, are particularly challenging for smaller employers and nonprofits with limited resources and a small or, often nonexistent, Human Relations department. Inconsistent laws are also difficult for multi-state employers who must deal with a patchwork of rules. It notes that even though the rulemaking acknowledges the Federal law, the proposal appears to broaden the definition of “religious creed” to mirror the definition in Title VII of the Civil Rights Act of 1964. That statute, it points out, applies only to employers of fifteen or more employees. The change in the definition, it says, will subject smaller employers to additional obligations without knowing what those may be. We will review the PHRC’s response to this commentator’s concern in our determination of whether the regulation is in the public interest.

4. Communication with the regulated community. - Reasonableness; Compliance with provisions of the Regulatory Review Act.

Governor's Executive Order 1996-1

RAF question #14 asks the PHRC to describe the communications with the regulated community and list the specific groups involved. The PHRC responded:

The PHRC consulted with stakeholders in the LGBTQ community regarding the proposed regulation for sex discrimination. The PHRC incorporated the feedback received into the language of the proposed regulation. The PHRC also consulted with the Governor’s Office regarding the proposed regulation for sex discrimination and incorporated the feedback received into the proposed regulation.

The PHRC also consulted with the New York City Commission on Human Rights regarding the proposed regulation for race discrimination. The PHRC received information from the New York City Commission regarding their definition of race and incorporated that information into the proposed regulation.

Governor's Executive Order 1996-1 requires that "regulations shall be drafted and promulgated with early and meaningful input from the regulated community." In addition, this order states in Section 3 (Pre-Drafting and Drafting Guidelines) that "agencies, where practical, shall undertake extensive public outreach to those who are likely to be affected by the regulation." *See* Governor's Executive Order 1996-1, Sections 1.h. and 3.a.

Many commentators raised the issue that Pennsylvania employers and other key stakeholders

were not consulted in the development of this rulemaking. For instance, one commentator remarked that local fair employment practice agencies, which are recognized by the EEOC as deferral agencies that enforce similar or overlapping anti-discrimination laws, should have been consulted as this proposal was formulated. We understand commentators' viewpoint that not including Pennsylvania employers and other key stakeholders in the development of the regulation was a missed opportunity. We recommend that the PHRC meet with the regulated community, from all sectors of employment, prior to submitting a final-form regulation to discuss their concerns and build consensus where possible.

5. Implementation procedures and timetables for compliance by the public and private sectors.

The Pennsylvania Chamber of Business and Industry suggests that the final version of this rulemaking's effective date be extended to at least 60 days from the date of publication as a final-form regulation. The commentator believes that extending the time period for compliance would allow the PHRC to launch an awareness campaign to educate employers about the changes and give them sufficient time to review existing policies to ensure none inadvertently violate the new definitions. It also asks that the PHRC work with the employer community to develop and execute this educational campaign. Extending the effective date would appear to be beneficial to employers' and entities' compliance. We will wait for the PHRC's response to this suggestion.

6. Compliance with the RRA and the regulations of IRRC.

Section 5.2 of the RRA (71 P.S. § 745.5b) directs IRRC to determine whether a regulation is in the public interest. When making this determination, IRRC considers criteria such as economic or fiscal impact and reasonableness. To make that determination, IRRC must analyze the text of the proposed regulation and the reasons for the new or amended language. IRRC also considers the information a promulgating agency is required to provide under Section 5 of the RRA in the RAF (71 P.S. § 745.5(a)).

There are several instances where the PHRA's responses to RAF questions are incomplete. We ask the PHRA to provide additional information as directed below.

- RAF question #15 asks the promulgating agency to identify the types and numbers of persons, businesses and organizations which will be affected by the regulation. The PHRC does not identify the number of employers, housing providers, public accommodations and schools that will be affected by the rulemaking. The PHRC should identify the number of persons, businesses and organizations that will be affected by the regulation;
- RAF question #16 asks the agency to list the person, groups or entities, including small businesses, and to approximate the number that will be required to comply with the regulation. The PHRC does not estimate the number that will be required to comply with the regulation. The PHRC should approximate the number of persons, groups, and entities, including small businesses that will be required to comply with the regulation;

- RAF question #17 asks the agency to identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations and to evaluate the benefits expected as a result of the regulation. The PHRC reports that it anticipates no adverse financial, economic, or social impact on individuals, small businesses and labor communities or other public and private organizations. Based on the public input regarding the discussion on the RFP, we ask the PHRC to review its response, and if appropriate, amend its answer to provide greater detail regarding the regulation’s impact on these entities;
- The PHRC should review, and if appropriate, revise its response to RAF question #18 regarding an explanation as to how the benefits of the regulation outweigh any cost and adverse effects; and
- RAF question #24 requires the agency, for any regulation that may have an adverse impact on small businesses, to provide an economic impact statement. This statement includes among other items, a statement of probable effect on impacted small businesses. Based on commentators’ concerns, we ask the PHRC to review, and if appropriate, submit a revised RAF to the final-form regulation that includes an economic impact statement; and
- RAF question #27 requires the agency, in conducting a regulatory flexibility analysis, to explain whether regulatory methods were considered that will minimize any impact on small businesses. This explanation should include, among other items, the exemption of small businesses from all or any part of the requirements contained in the regulation. In light of the concerns regarding religious entities and whether the protections in Section 41.71 (relating to Bona fide occupational qualification definition) (16 Pa. Code § 41.71) are preserved in the rulemaking, we ask the PHRA to revisit this question, and if appropriate, amend its response.

7. Section 41.202(b). Construction. – Implementation procedures; Clarity and lack of ambiguity; Need.

This section provides that the new definitions “shall be interpreted consistently with other Federal and State laws and regulations except when to do so would result in a narrow interpretation of the PHRA or the PFEOA.” Given that there are differences between federal and state laws as to how some of these issues are analyzed, how would members of the regulated community know which standard and interpretation to apply? For example, in RAF #11, the PHRC cites to the U.S. Supreme Court’s employment decision in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020) in support of the new definition for sex in Section 41.206. It also references a decision from the 4th Circuit Court of Appeals regarding the same term as it pertains to education. Because this proposed rulemaking includes terms not previously defined under Pennsylvania law, we ask the PHRC to explain how members of the regulated community can consistently interpret these provisions in such a way that would ensure that they are in compliance with the law. We also ask the PHRC to explain the need for this section altogether.

8. Non-regulatory language. – Clarity; and Implementation procedures.

A regulation has the full force and effect of law. We have concerns related to the use of nonregulatory language, which does not establish standards that could be predicted by the regulated community, found throughout the proposed regulation. For example:

- Section 41.205(b) states, “Religious beliefs include moral or ethical beliefs as to what is right and wrong which are **sincerely held with the strength of traditional religious views.**” [Emphasis added.]
- Section 41.206(a)(5)(i) states, “Gender identity or expression means having or being perceived as having a gender-related identity, appearance, expression or behavior, which may or may not be **stereotypically associated** with the person’s sex assigned at birth.” [Emphasis added.]
- Section 41.206(a)(5)(ii) states, “Gender identity or expression may be demonstrated by consistent and uniform assertion of the gender identity or any other evidence that the gender identity is **sincerely held as part of person's** core identity. [Emphasis added.]
- Section 41.207 (a)(3) states, “. . . [t]raits **historically associated** with race including but not limited to: (i) Hair texture. (ii) Protective hairstyles, such as braids, locks and twists.” [Emphasis added.]
- Sections 41.205(c), 41.206(c), and 41.207(c) state that “[t]his section **is not intended to be exhaustive.**” [Emphasis added.]

These emphasized phrases do not set binding norms and lack clarity. For that reason, consistent implementation of these provisions by the PHRA and compliance by the regulated community could be difficult. We ask the PHRA to review the final-form regulation to ensure the use of regulatory language, setting clear compliance standards for the regulated community to meet.

TITLE 16. COMMUNITY AFFAIRS
PART II. GOVERNOR’S OFFICE
Subpart A. HUMAN RELATIONS COMMISSION
CHAPTER 41. PRELIMINARY PROVISIONS
Subchapter. D. Protected Classes

9. Section 41.204. Definitions. – Clarity.

The terms “*core identity*,” “*intersex*,” “*interracial marriage or association*,” “*national origin or ethnic characteristics*,” and “*sex assigned at birth*” appear in the body of regulation, but are not defined in this section. We ask the PHRC to define these terms in the final-form regulation or explain why it is unnecessary to do so.

10. Section 41.207. Race discrimination. – Clarity.

Subsections (a) and (b)

These provisions state that the term “race” when used in connection with unlawful discrimination practices and with the unfair educational practices proscribed by PHRA and the PFEOA, respectively, includes, but is not limited to “Ancestry, national origin or **ethnic** characteristics . . .” [Emphasis added.] We recommend that Sections 41.207(a)(4) and (5) and 41.207(b)(4) and (5) be made consistent with Sections 41.207(a)(1) and(b)(1) by including ethnicity or ethnic characteristics.