



Work**Smarts** Virtual Seminar

Triple Threat: Understanding Reasonable Accommodations Under Three Laws

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Agenda

- Pregnant Worker's Fairness Act
 - *Overview*
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- Religious Accommodations under *Groff v. DeJoy*
 - *Overview*
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- Recent Trends in ADA Accommodations
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Pregnant Worker's Fairness Act



An Overview of the PWFA

- Coverage: Employers with 15 or more employees (dx than PUMP Act)
- Requires Employers to make:
 1. “reasonable accommodations”
 2. “for a worker’s known limitations”
 3. “related to pregnancy, childbirth, or related medical conditions”
 4. “Unless the accommodation will cause the employer an undue hardship.”
- Regardless of whether employer provides similar accommodations to other employees
- Also prohibits discrimination on the account of their requesting a reasonable accommodation

An Overview of the PWFA

- Law became effective on June 27, 2023.
- EEOC proposed implementation rules issued August 11, 2023.
- Interim procedural final rule issued Feb. 14, 2024.
 - Comment period ends on April 15, 2024.
 - Rule is effective in the meantime.
- Does not replace federal, state, or local laws that are **more protective**.
- May allow for leave where employee does not qualify for FMLA.
- Texas judge issued a decision permanently enjoining the EEOC from enforcing the PWFA against the State of Texas and its agencies on Feb. 27, 2024.

Prior to the PWFA, did federal law*

...Provide mothers with workplace breastfeeding rights?

- Yes! Under the PUMP Act, Employees are entitled to reasonable break time, and a place other than a bathroom to express breast milk.

...Require an employer to provide reasonable accommodations for pregnancy as a disability?

- No. Pregnancy is not a disability under the Americans with Disabilities Act. However, impairments related to pregnancy could qualify for ADA accommodations.

...Provide protection against pregnancy discrimination?

- Yes! Title VII protects employees from discrimination based on pregnancy, childbirth, or related medical conditions.

*Note that State Law may have provided more coverage than federal law, and may still require more than is required by the PWFA.

Implication of Changes

- *Young v. United Parcel Service*, U.S. Supreme Court, 2015.
 - required employers to provide accommodations to pregnant employees to the same extent they provide accommodations to other employees similar in their ability or inability to work.
- PWFA: requires employers to provide accommodations to pregnant workers, regardless of whether they provide similar accommodations to other employees
- Includes pregnancy, childbirth and related medical conditions
- Requires interactive process (similar to the ADA)

“Qualified” – Different from ADA

- Both the ADA and the PWFA require an employee to be “qualified” before reasonable accommodations are required.
- Under ADA, this means an employee must be able to perform all essential job functions with or without accommodation.
- PWFA recognizes an employee can still be “qualified” even if **temporarily unable** to perform all essential job functions.
- How temporary? Up to 40 weeks unless undue hardship shown!

Accommodation Examples

- Water during workday
- Closer parking
- Flexible hours
- Appropriately sized uniforms and apparel
- Time off
 - For appointments
 - For bedrest
 - To recover from childbirth
- Be excused from strenuous activities
- Frequent bathroom breaks
- Assistance with lifting
- Light duty
- Remote work
- Temporary reassignment or transfer

Accommodations for Breastfeeding

- PWFA may apply for extended period (more than one year)
- Additional accommodations may be sought
 - Access to a sink or refrigeration
 - Proximity to location for pumping
 - Regular reasonable break time
 - Private space, other than a bathroom, shielded from view and free from intrusion
 - If no space, consider alternatives, such as allowing use of a manager's office, partnering with neighboring businesses, or a "do not disturb" sign on a private, shielded area.

Regulation Examples

- A pregnant employee tells her supervisor, “I’m having trouble getting to work at my scheduled starting time because of morning sickness.”
- An employee who gave birth three months ago tells the person who assigns her work at the employment agency, “I need an hour off once a week for treatments to help with my back problem that started during my pregnancy.”
- An employee verbally informs a manager of her need for more frequent bathroom breaks, explains that the breaks are needed because the employee is pregnant, but does not complete the employer’s online form for requesting accommodation.

Regulation Examples

- Celia is a factory worker whose job requires her to move boxes that weigh 50 pounds regularly. Prior to her pregnancy, Celia occasionally felt pain in her knee when she walked for extended periods of time. After returning to work after having a cesarean section, Celia's health care provider says she should limit the tasks that require moving boxes to no more than 30 pounds for three months because heavier lifting could increase the risk to her health and recovery.
- What accommodation is required?

Case Study

- Employer is a proud woman-owned company who has a longstanding history of going above and beyond to provide parental rights.
- Existing policy provides for 12 weeks of paid parental leave (runs concurrent with FMLA). Afterwards, employees are offered a reduced work schedule upon return, gradually increasing to a 5-day workweek schedule after no more than 6 months of reduced schedule.

Case Study

- Employee, a new mother, is expected to return to 5 day schedule at the end of the month. She approaches you and says she would like to remain on a reduced work schedule. What are your obligations if she says the leave is needed because:
 1. She is suffering from post-partum depression and needs the extra day each week to meet with a counselor?
 2. Her parents, who she has been relying on to provide childcare, are unable to assist with childcare for 5 days per week?
 3. Her anxiety, for which she was already receiving accommodations prior to taking parental leave, is being exacerbated by the struggles of finding reliable childcare?

Common Issues

- Increased breaks for pumping, rest, and bathrooms: Paid or unpaid?
- Commencing maternity leave prior to delivery date.
- Extending leave beyond 12 weeks.
- Requiring documentation: How much is too much?
- Requiring concurrent leave under other laws / paid leave programs.

Best Practices: PWFA

- Review and update Employee Handbooks
- Update your EEO poster
- Have a plan to provide a private location for pumping
- Communicate with new mothers about their needs
- Train supervisors and managers to recognize and respond to accommodation requests relating to pregnancy, childbirth, or related medical conditions.
- Do not be afraid to ask for advice! This is a new area of the law.



Religious Accommodations under *Groff v. DeJoy*



What is *Groff v. DeJoy*?

- On June 29, 2023, Supreme Court issued an opinion that changed the standard for when an employer must make a religious accommodation.
- Under Title VII, employers with at least 15 employees are prohibited from discriminating against employees and applicants on the basis of religion. This includes the failure to reasonably accommodate an employee's religious observance or practice unless it imposes an undue hardship.

Comparing Standards

Before *Groff*

Requiring an employer to “bear more than a *de minimis* cost” when making a religious accommodation would create an undue hardship.

After *Groff*

Requiring an employer to bear a “substantial burden in the overall context of the employer’s business” when making a religious accommodation would create an undue hardship.

Note: The Court did not adopt the “significant difficulty or expense” definition of undue hardship as it is used under the ADA.

Case Study: B. Braun Medical, Inc.

- B. Braun Medical, Inc. is a supplier of “IV Therapy products,” which they market and sell to hospitals and medical providers. Employee was a Senior Hospital Account Manager.
- Sales position, so most job duties were in-person / on-site.
- Hospitals began requiring sales representatives to get vaccinated against Covid-19. Employer subsequently issued its own mandatory vaccination policy.
- Employee applied for exemption. Desired accommodation was to “continue performing her current job without the requirement to get vaccinated.”

Case Study: B. Braun Medical, Inc.

- Employee indicated they were concerned about efficacy and safety of COVID vaccine. Exemption was denied. After declining offer to transfer roles, employee said she wanted a new position created to accommodate her vaccination status. Employer indicated that it was untenable to keep her in customer-facing position, and reconfiguring territory due to client vaccination requirements would have been costly.
 - She was subsequently terminated, and sued for religious discrimination.
 - Is there an Undue Hardship?
 - *Maybe*. Under new *Groff* standard, Court allowed the case to go to jury, because “there is testimony that Braun did not do any analysis to determine the costs of reconfiguring . . . Territory if any hospitals had denied her admission.”
- Scafidi v. B. Braun Medical, Inc.*, --- F.Supp.3d ----, 2024 WL 184258 (M.D. Fl. Jan. 17, 2024).

Case Study: Atlantic City Firefighter

- Employee, a firefighter who worked as an air mask technician, brought suit based on a grooming policy which prohibited firefighters from responding to emergencies while having a beard, which the employee grew for religious reasons.
- Facial hair inhibits or interferes with a SCBA seal. Only policy exception is “emergency call-back,” but no more than a “five o’clock shadow.” Employee wanted a religious accommodation to wear a three-inch beard.
- There is no SCBA mask that can be safely worn with facial hair.
- Did court require City to provide accommodation?
 - *No.* Even though employee did not frequently wear a SCBA, Plaintiff’s accommodation would create “substantial risk to himself and, by extension, his fellow firefighters,” causing a “substantial non-economic cost.”

Smith v. City of Atlantic City, --- F.Supp.3d ----, 2023 WL 8253025 (D.N.J. 2023) (currently on appeal).



Recent Accommodation Trends in the Americans with Disabilities Act.



Who is covered by ADA?

- Protection from discrimination for individuals with a disability
 - Physical or mental impairment that substantially limits major life activity
 - May be transient or temporary impairment
- Protection extends to those with a record of disability
- Protection also includes those who may be perceived as having a disability

Who is eligible under ADA?

- Has a disability
 - Qualified to perform the essential functions of the position with or without a reasonable accommodation
- * Applies to both employees and applicants

What is a “reasonable” accommodation?

- Must be effective, in that it provides “an opportunity for a person with a disability to achieve the same level of performance or to enjoy benefits or privileges equal to those of an average, similarly-situated person without a disability.”
 - *Arnulfo T. v. Austin* (DOD), 2023 EEOPUB LEXIS 1192 (EEOC 2023).
- Modification or adjustment is reasonable if it appears to be “feasible” or “plausible.”
- Employees request for “the perfect work atmosphere at every moment,” is “simply unreasonable.”
 - *Complainant v. Bay* (FERC), 2016 EEOPUB LEXIS 711 (EEOC 2016).

ADA Accommodation Trends



Increasingly difficult for employers to comply



Employers should be able to show the interactive process, including consideration of any employee-requested accommodations.



Open Plan Office *and* Remote Work cases



Ongoing Covid-19 Vaccination cases

Case Study 1

- Teacher began experiencing headaches and nausea after school updated wi-fi system. Medical provider diagnosed her with “electromagnetic hypersensitivity.” i.e. Microwave Sickness. Although school initially agreed to accommodate by turning off wi-fi in the teacher’s classroom, the accommodations did not work. School conducted further testing and determined the Wi-Fi was safe, denied further accommodation requests, and revoking prior accommodations. Employee sued. Employer moved to dismiss.
- Result?
 - Court allowed claims to proceed, but not under the ADA. Federal protections did not afford coverage.

Brown v. Los Angeles Unified Sch. Dist., 60 Cal. App. 5th 1092 (2021).

Case Study 2

- Employee became blind during employment and could no longer drive herself to work. She requested a flexible schedule dependent on her ability to secure a ride. Employer allowed temporarily, but the accommodation became an issue because of its unpredictability. Employer did not renew accommodation. Employee sued.
- Employee's commute was 60 miles each way.
- Result?
 - “Employers have no obligation under the ADA to accommodate disabled employees for problems they face outside the workplace unrelated to the essential job functions of their position or privileges of employment merely because they are disabled.”
 - Employer cannot control where the employee lives, whether there is public transportation available, or if friends or family are available to give rides. Employee “alone has the power to eliminate her transportation barrier”

Unrein v. PHC-Fort Mrogan, Inc., 993 F.3d 873 (10th Cir. 2021).

Case Study 2.5

- Employee worked in role requiring travel 3 days/week to generate new business and service existing customers.
- After seizure, employee requested to reduce travel to 2 days/week and for another sales rep. to drive him.
- After one week trial period, employer told employee they could not continue the accommodation.
- Employer never responded to employee's second proposal that father-in-law drive him.
- Trial court granted summary judgment for employer, but appeals court reversed. Not on issue of accommodation, but timing between request and termination (10 days). *Anderson v. KAR Global*, 78 F.4th 1031 (8th Cir. 2023).

Case Study 3

- Employee has mobility restrictions and requests the ability to work remotely.
- Employer offers a parking pass with close proximity to workplace.
- Is this a reasonable accommodation?
 - Yes. The request was consistent with the employee's limitations and the doctor's restrictions.

Smith v. CSRA, 12 F.4th 396 (4th Cir. 2021).

- But what if the employee is bedridden?

Case Study 4

- Office manager for medical group diagnosed with depression and anxiety, and took leave under FMLA for anxiety.
- Upon return to work, requested accommodation of 4 hours per day for 30 days and new location. What information would you want to approve or deny the request?
- Accommodation was approved, then employee was reassigned locations.
- Employee requested new supervisor as an accommodation, which was declined. Employee invited to request additional accommodations.
- Employee provided list of 18 accommodations “to maximize her productivity.”
- Accommodations denied, and employer concluded no accommodation would exist to allow employee to perform essential functions of position.
- Employee terminated.
- Employee sued – Result?

Case Study 4

- Accommodations requested were not reasonable, because they were to allow employee to “maximize productivity,” not to perform essential functions of position.
- Employee failed to show that she requested a reasonable accommodation, and employer had no obligation to initiate an interactive process.
 - *Edwards v. WellStar Med. Group, LLC*, 20-13866, 2022 WL 3012297, at *7 (11th Cir. July 29, 2022) (summary judgment affirmed).

Leave: How long is “reasonable”?

- EEOC’s position: Unpaid leave should be granted as a reasonable accommodation “when it enables an employee to return to work following the period of leave” unless the employer shows undue hardship.
- But “qualified” means able to perform essential functions!
- Recent Example: Indefinite leave still unreasonable. *Ivens v. GK North Childcare Corp.*, 2024 WL 382452 (7th Cir. Feb. 1, 2024).
- Recent Example: Jury should decide whether 90 days’ unpaid leave was reasonable accommodation where provider opined employee could work a four days on, four days off schedule. *Williams v. Delta Bus Lines, Inc.*, 2024 WL 56031 (N.D. Miss. Feb. 12, 2024).



Thank You



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