Legal Update Article

Accommodations Developments Add Scheduling Challenges for Retailers

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September 13, 2023

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For retail establishments, developments involving religious accommodation and the new Pregnant Workers Fairness Act (PWFA) make scheduling employees more challenging.

Religious Accommodation

The U.S. Supreme Court "clarified" and changed the religious accommodation standard under Title VII of the Civil Rights Act that employers have relied upon for more than 46 years. ***Groff v. DeJoy***, No. 22-174 (June 29, 2023). Under the new standard, "'undue hardship' is shown when a burden is substantial in the overall context of an employer's business."

Under Title VII, employers are required to reasonably accommodate employees whose sincerely held religious beliefs or observances conflict with work requirements, unless doing so would create an undue hardship for the employer. Prior to this ruling, requiring an employer to incur more than a de minimis cost was considered an undue hardship.

In remanding the case to the district court, the Court did not explain what facts would meet the new test, but it also declined to incorporate the Americans With Disabilities Act (ADA) undue hardship test, which requires significant difficulty and expense. According to the Court, when applying the new standard, lower courts must "take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer."

This Supreme Court decision likely sets up years of legal battles, with courts attempting to interpret and apply the new standard, but the practical implications for retailers are immediate. No longer can retailers rely on the de minimis cost test when considering an employee's request for days off or shift changes for religious reasons. Instead, with the new standard, retail employers across the country will do well to analyze carefully all requests for religious accommodation to determine whether the accommodation would cause a substantial burden on their business overall.

Pregnant Workers Fairness Act

Another development that could affect schedule coverage and shift changes for retailers is the PWFA, which went into effect on June 27, 2023.

The PWFA prohibits employers from:

1. Failing to make a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of a

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qualified employee, unless doing so would create an undue hardship;

2. Requiring an employee to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;

3. Denying employment opportunities based on the need to make reasonable accommodations;

4. Requiring an employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the employee; and

5. Taking an adverse action against an employee because the employee requested or is using a reasonable accommodation.

Unlike the ADA, an employee does not have to show that a limitation meets a specific level of severity to be covered under the PWFA. Rather, the PWFA is intended to cover even uncomplicated and healthy pregnancies. In addition, under the PWFA, an employee can be "qualified" and therefore eligible for accommodations when the employee has a temporary inability to perform the essential job functions.

The U.S. Equal Employment Opportunity Commission (EEOC) is required to issue final regulations for the PWFA by December 29, 2023. In its proposed regulations, the EEOC outlined its interpretation of this new statute. Highlights of how the PWFA could affect scheduling include:

- Related medical conditions under the PWFA are defined as conditions that "relate to, are affected by, or arise out of pregnancy or childbirth." Listed examples include termination of pregnancy, including by miscarriage, stillbirth, or abortion; infertility; fertility treatment; lactation and conditions related to lactation; use of birth control; menstrual cycles; postpartum depression, anxiety or psychosis; vaginal bleeding; preeclampsia; pelvic prolapse; preterm labor; ectopic pregnancy; gestational diabetes; cesarean or perineal wound infection; maternal cardiometabolic disease; endometriosis; changes in hormone levels; and many other conditions.

- Related medical conditions also can include conditions not unique to pregnancy or childbirth, but for an employee, they are related to or exacerbated by pregnancy or childbirth, such as chronic migraine headaches, nausea or vomiting, high blood pressure, incontinence, carpal tunnel syndrome, and many other medical conditions.

- With respect to a "temporary" inability to perform the essential functions of a position, employers bear the burdens of excusing essential job functions for, generally, up to 40 weeks for each accommodation request, unless it would impose an undue hardship on the employer.

- The issue of whether a limitation is temporary is relevant only when an employee or applicant cannot perform one or more essential functions of the job. In other words, if an employee can perform the essential functions

with a reasonable accommodation, the employer may be required to provide the accommodation on a long-term basis (like the ADA), subject to undue hardship.

- There are four accommodations "in virtually all cases" will be reasonable accommodations that do not impose undue hardship: (1) allowing an employee to carry water and drink, as needed, in the employee's work area; (2) allowing an employee additional restroom breaks; (3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and (4) allowing an employee breaks, as needed, to eat and drink. An individualized assessment in these situations should be "simple and straightforward" and requesting documentation, beyond a self-attestation, is not reasonable. According to the proposed regulations, employers may not request documentation to support a request for accommodation related to lactation.

- Employees who need leave as a PWFA accommodation must be permitted to choose whether to use paid leave or unpaid leave to the same extent that other employees using leave for other reasons are allowed to choose.

While these regulations are proposed and could change before finalized, there can be no doubt that certain requests for additional breaks, changes to work hours, or time off are covered under the PWFA. When handling these protected scheduling requests, retailers should keep in mind that if another federal, state, or local law provides greater protection or different requirements, those laws will also apply (currently, there are 30 states and five local jurisdictions with their own version of the PWFA or a pregnancy accommodation law). Retailers should also consider revising their existing forms and practices to comply with the statute and training HR professionals, managers, and front-line supervisors on how to recognize and respond to scheduling and other requests that fall under the PWFA.

The *Groff* decision and the PWFA present many new considerations for retailers, for scheduling and beyond. Jackson Lewis attorneys are available to answer questions about the impact of these developments, to help design and deliver effective relevant training, and to provide advice and counsel on updates to accommodation policies and processes.