

Practical and Political Tipping Points for Workplace Accommodations

By Joseph J. Lynett & Katharine C. Weber

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Meet the Authors



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“The only thing for sure that we can say about 2025 is that the changes are just going to keep coming. So, make sure that you've really got your eye on the ball, that you're plugged into your different resources so that you can stay ahead of the curve, be compliant and be the employer of choice.”



Transcript

INTRO

Welcome to We get work® and the Year Ahead 2025 podcast series. This year, our special report and corresponding podcast series are created to help you move forward steadily, seamlessly, and successfully in a workplace law environment in persistent flux. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, JacksonLewis.com or listen to the podcast series on whichever platform you turn to for compelling content.

CONTENT

Joseph J. Lynett

Principal, New York City

Hello, my name is Joe Lynette. With me is my partner, Katharine Weber. We co-lead the Disability Leave and Health Management Group here at Jackson Lewis, which really covers all compliance issues related to managing injured and ill workers and workers who have an entitlement to leave under various federal, state, and local laws.

We're pleased to be with you today to give you our insights on what we see as the year ahead in 2025. If 2024 was any indication, 2025 is really shaping up to be somewhat of the same, but an evolution of where we've been the last couple of years. The disability leave and health management space seems to be so active for many years. You ask yourself, well, where do you want to begin when you look at the year ahead? We're in an environment where it's growing increasingly complex on federal, state and local levels in terms of accommodating employees, leave entitlements and so forth.

So, Katharine, what do you see as the top accommodation issues that employers need to be thinking about in 2025?

Katharine C. Weber

Principal, Cincinnati

Well, Joe, I'm going to give you a package right now. Top three: PWFA, PWFA and PWFA. That's where we're going to see all of the action. I shouldn't say all of the action, but we'll see a lot of action with respect to the PWFA. If we look at where we currently are, the PWFA hasn't been around that long. It's only turning two this year. I like to refer to the PWFA as entering its terrible twos, right? You thought that you had a lot to deal with when it first came out. Well, now we're in the litigation.

Now we have a situation where the EEOC has filed a handful of different lawsuits against folks. We're starting to see settlements. We're seeing that litigation continue to unfold. We'll continue to see more litigation in 2025 around this. The common theme that we can see out of the litigation that was filed by the EEOC is that there are so many things that employers can do right now to help themselves so that they don't become the defendant in a PWFA case, whether it's one brought by the EEOC or one brought by a private plaintiff. For employers, it's all about making sure that you've brushed up on those predictable assessments that should be easy to grant, and don't ask for documentation with respect to those predictable assessments and lactation.

Then we get into the issues of your forms and your process. The PWFA really stands the process on its head compared to what we have been used to using under the ADA. The forms are different, the process is different. Although we're still looking for ways to help employees continue to perform their jobs and provide reasonable accommodations that don't create undue hardships, it's a totally different game. To help employers with that, we have created a PWFA toolkit at Jackson Lewis. So, if anybody needs some help with respect to a checklist or a cheat sheet or some forms to make sure that you are doing things properly in your organization, just reach out to the Jackson Lewis attorney with whom you currently work, and they're happy to help you.

So, Joe, what's hot on your list?

Lynett

Well, a few things. Company return-to-work initiatives are certainly high on my list. The use of artificial intelligence in our space in connection with leave, accommodation requests, hiring, and its potential to have a disparate impact on certain groups of employees. Those are certainly two very hot items that I have.

I've been hearing a lot from clients in terms of return-to-work initiatives. In 2024, some major companies announced changes in their Return to Office policies, RTO policies.

It's got to trickle its way down and already has, in many instances, trickled its way down to smaller employers. For every employer's strategy to get employees back to work either full-time or more frequently, there always seems to be an employee

counterstrategy pushing the other way to continue to stay at home.

This is a legacy of COVID-19 for sure. But now COVID is five years ago. It's hard to believe a lot has changed and a good amount of time has passed. A lot of employers and a lot of people are viewing COVID as something in our distant rearview mirror at this point. So, it's taking a look at some of the changes in the workplace that COVID forced, right?

So, we see an increasing number of requests to continue to work from home on the basis of disability or in that vein. A lot of times, these are mental health disabilities, anxiety issues and problems with commuting to work. So, we are seeing an increasing number of requests to work from home as an accommodation, essentially a modification of a policy. Employers can have a policy that requires employees to work in the office on the fly, full-time or on a hybrid basis. But the black letter law under the ADA is that a modification of a policy can be a reasonable accommodation subject to, of course, the undue hardship. Of course, the employee has to be able to perform the essential functions of their job working from home. So, we are seeing an increase in accommodation requests to work from home as a consequence of more and more employers requiring their employees to work more and more in the office. That's certainly what I'm seeing a lot of these days.

Katharine, turning it back to you, what else do you think employers should have on their watch list for 2025?

Weber

I think the other issue that we're going to continue to see is a lot of requests for accommodations as it relates to mental health. There has already been an incredible uptick in individuals who are suffering from some level of mental health challenges. COVID really exacerbated that. It rocked everyone's world to that extent. If you had a mental health challenge, it became that much more difficult to deal with. If you look at the numbers in terms of the folks in our country who suffer from a mental health challenge, it's pretty staggering. We've certainly started to see already a lot of requests for accommodations related to mental health challenges. Sometimes we see requests for accommodations related to individuals who are neurodiverse. Someone who's neurodiverse may or may not have a disability. If they don't have a disability, the ADA and comparable state law wouldn't require an accommodation. But if that neurodiversity also is a mental health disability, that would be something that would fall under the ADA. We would have to engage in the interactive process and look for a reasonable accommodation that doesn't create an undue hardship for the employer. Employers will have to get more comfortable, if you will, in terms of exploring what types of accommodations might work for different individuals. Everyone is so different, right? We all think differently, we all work differently.

If you have an employee who has a mental health challenge, the investment in the time and the energy that you can make to help that person be able to perform the essential functions of the job- it's well worth it if you can come together and find an accommodation that works. Really, that's the best of both worlds for everyone. That is the goal of the employer community---to make sure that we're giving our

employees the tools to do their jobs without creating undue hardships or problems for the business.

We're still going to see a lot more requests for accommodation in that space. It's just going to require employers to step back and be creative. To think first to themselves, how can I do this rather than, no, I could never change that; that's not the way we do things. If you adopt the correct perspective, the likelihood that you'll find a reasonable accommodation that works for everybody in the end is greatly enhanced.

So, Joe, anything else on the watch list for 2025?

Lynett

You can hardly turn on the TV, watch the news or read a newspaper without hearing the term artificial intelligence. It seems to be ubiquitous. It's all over the news. It's part of the cultural discourse at this point.

What we mean by artificial intelligence is really a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. It's a machine-based system that makes decisions or recommendations much like we have always done through our own analysis as humans and looking at facts and circumstances.

The federal government is concerned about the use of AI, particularly in the workplace. The EEOC, a couple of years ago, announced their AI and algorithmic fairness initiative, alerting the employer community about the benefits of using AI-- but also the potential pitfalls of using AI and its potential for disparate impact based upon particular characteristics. There are certain types of employment activities that can involve AI, like recruiting, screening, hiring job applicants, monitoring employee activities, assessing productivity and deciding whom to promote or fire. The EEOC has recognized that employers are going to be using AI, and there's no stopping that.

The message going forward, and I'll talk a little bit about some DOL guidance that was issued this year also is that the same anti-discrimination rules apply. It's the same rules, but different tools. The tool here is AI, not a manager or an HR employee making decisions or recommendations in connection with an employee's employment or an applicant's employment. So, the same rules apply, but there are different tools.

The risk with AI is that it's a machine-based system, so it is applying the rules given to it through algorithms to make decisions. The likelihood is that the tool is going to make and replicate its decisions over and over and over, given the same or similar set of circumstances--- which means its potential to be efficient is great. But its potential to run afoul of the anti-discrimination laws can also be much greater than when an individual makes that decision because when an individual makes the decision, it typically only affects the one person that they're dealing with or that they're considering. With AI, there's no human involved in decision-making. There is a human involved in setting the algorithm and the parameters, but the potential for a more systemic-based claim or a class-based claim is greater

using AI for that reason.

In late 2023, the Biden administration issued an Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence. Essentially, it's an order that directed all U.S. government agencies to issue guidance to make clear that employers that deploy AI to monitor employee work must continue to comply with the protections of the law.

Following that, the Department of Labor, in April of 2024, issued a Field Assistance Bulletin on the application of the FLSA and other fair labor standards on employees' increasing use of artificial intelligence. It focused on certain areas like the use of AI and FMLA and processing leaves. It also focused on AI and nursing employee protections.

This one's not so obvious. We're getting an increasing number of inquiries about the Pump Act and how the PWFA coordinates with the Pump Act so that employers can comply or ensure they can comply with the requirement to allow reasonable break space and time for nursing. It's something to think about: how your organization or how employers are using AI to track and make determinations about employee work hours and setting work schedules and assignments, managing break time and so forth, so that you're complying with the requirements of the PUMP Act. Also, there are many state laws that protect the right to pump at work, and some are greater than the PUMP Act itself. It's something that employers need to consider when they're using AI for scheduling purposes, breaks, and tracking productivity. So, it's a new and pioneering area that employers need to get comfortable with.

The main takeaway from all the agencies that have provided guidance on this is same rules, different tools and the need for human oversight of the use and deployment of AI.

That's what I'm seeing ahead in 2025, and probably, this is something that we're going to see every year for the next few years as employers increasingly grapple with how to use AI as a fundamental map.

There are also some paid family medical leave patterns that we're seeing. This year, Alaska, Arkansas and Missouri had voter-initiated laws that have granted the right to paid family medical leave. These are voter initiatives. These are not legislative enactments. We'll see if that continues to be the trend.

It seems to be that the state legislatures don't, for whatever reason, probably political, want to touch that issue and rather leave it up to the voters. What's interesting is these are relatively conservative states, too--- Alaska, Arkansas and Missouri. The electorate in those states pretty overwhelmingly voted in favor of paid family medical leave. So, it is an indication of where we are as a country on paid family and medical leave.

Weber

Which is interesting, right? For years, we've been talking about whether or not we should have national paid family medical leave. It seems like both sides of the House all agree that'd be a great thing, but they all disagree about how are we

going to fund it.

Some people say that they don't think that paid family medical leave will come to us during the upcoming administration. I don't know. Maybe this will be the administration that does it. Just because, for no other reason, we've seen such an increase in the state leave laws that have been adopted in this area. When you think back to when some of the states started adopting paid family medical leave, employers were just losing their minds because they were like, my gosh, how am I ever going to learn how to comply with these three laws? Now we're in a situation where the map is just covered. We also have our employees that are just covering the maps because they work remotely or they're sales folks and they're working out of their homes. You might actually see some paid family medical leave legislation coming out of this next administration. We'll see.

Lynett

Yet, there always seems to be a tipping point with these laws, and it's hard to calibrate where that tipping point is. We saw it with PWFA. There reached a certain historical moment where while this issue of accommodating pregnant employees had been active among various groups and very active in pushing that, it was only when it reached a certain tipping point that it actually happened. Maybe we're seeing this with paid family and medical leave. Enough states are voting in favor of paid family leave, that there may be a tipping point issue.

This is what I see in 2025, and we're probably going to be here next year on what employers should be looking at in 2026. Look back and say, wow, that was a lot for employers. Maybe we'll see more of the same going forward, so it'll be interesting.

Weber

Absolutely. The only thing for sure that we can say about 2025 is that the changes are just going to keep coming. The best advice that we can give folks is to make sure that you've really got your eye on the ball--that you're plugged into your different resources, that you're following our blogs and the different articles that are out there, that you know how things are changing and how things are trending so that you can stay ahead of the curve, be compliant and be the employer of choice.

If you take all of those steps: stay ahead of the curve, watch the trends and how they're unfolding, and stay compliant, you will find yourself better suited to succeed in whatever area your business works in. It sounds complicated, but it's really not. It's just about staying plugged in and staying ahead of the curve.

If you do those two things, you're going to have a great 2025, Joe.

Lynett

Yes.

Weber

Well, we've enjoyed talking to everybody and we'll be back, I'm sure, next year with the next edition of what we're looking for in 2026.

OUTRO

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