

PWFA v. ADA Accommodations

Presented by:

Bill Duda & Michael Nail, Ogletree Deakins

with special guest:

Cliff Bourke, Vice-President, Legal Services,
Southeastern Freight Lines, Inc.



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Agenda

- Quick PWFA Overview
- Differences in PWFA v. ADA
 - Related Medical Conditions
 - Alternative Definition of “Qualified Individual”
 - Use of Leave as an Accommodation
 - Access to Light Duty/Light Duty Programs
 - “Predictable Assessment” Accommodations
 - Limits on Supporting Documentation
- Addressing the Differences

Quick Questions

- Has your company implemented a new policy based on the Pregnant Workers Fairness Act (PWFA)?
- Has your company created new forms to administer to PWFA accommodation requests?
- Are you getting challenging PWFA accommodation requests?

PWFA Overview



The Pregnant Workers Fairness Act (PWFA)

- Bipartisan initiative
- Signed in December 2022 and became effective on June 27, 2023
- Applies to employers with 15 or more employees
- Fills in the gaps left by Title VII and ADA
- Stated purpose is to ensure pregnant and postpartum employees can retain their jobs with dealing with temporary limitations

PWFA Accommodations

- Covered employers must provide reasonable accommodations to a qualified employee's or applicant's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, absent undue hardship.

PWFA Regulations

- August 7, 2023: EEOC issues NPRM
- August 11, 2023: EEOC publishes proposed regulations
 - *September 14, 2023: ACC-SC presentation on the then-proposed regulations*
- October 10, 2023: 60-day comment period closes
- December 29, 2023: deadline for EEOC to implement final regulations
- **April 15, 2024: final regulations issued – effective June 18, 2024.**

PWFA v. ADA Accommodations & More

- So, what are the differences?
 - Types of “related medical conditions”
 - Alternative definition of “qualified” and temporary suspension of essential functions
 - Use of leave as an accommodation
 - Access to light duty programs
 - “Predictable assessment” accommodations
 - Limits on documentation requests
 - Leave – how/when leave is used



Related Medical Conditions

- Broad list requiring PWFA accommodations includes not only pregnancy-related and childbirth-related limitations, but also:
 - Infertility and fertility treatments
 - Past pregnancy
 - Endometriosis
 - Birth control use
 - Miscarriage and stillbirth
 - Postpartum depression
 - Menstruation
 - Having or choosing not to have an abortion (*but enforcement currently enjoined by preliminary injunction in Louisiana & Mississippi*)
 - Lactation and conditions related to lactation, such as low milk supply, mastitis



Alternative Definition of “Qualified” Individual

- Unlike the ADA, employees/applicants are “qualified” even if they cannot perform one or more essential functions of the job, provided:
 - The inability to perform the essential function(s) is temporary;
 - The essential function(s) could be performed *in the near future*; and
 - The inability to perform the essential function(s) can be reasonably accommodated.
- Upon returning from leave as an accommodation, a covered employee need not be able to perform all the essential function if there is other work they can do

Alternative Definition of “Qualified” Individual

- “In the near future” = within 40 weeks of inability
 - Can be triggered more than once
 - Does not count time where the employee is on leave for a covered condition
- A covered employee is not required to accept an accommodation but is no longer qualified if: (1) the employee rejects an accommodation necessary to enable the employee to perform the essential functions of the job and therefore cannot perform the essential function, or (2) rejects the temporary suspension of an essential function.

Leave as an Accommodation

- When should it be considered:
 - When the employee requests it; or
 - When there is no other reasonable accommodation that does not cause undue hardship.
- Unlike the *ADA*, temporary inability to perform one or more essential functions does not trigger leave as the next logical accommodation to consider.
 - Employer must first consider whether suspending essential function(s), providing light duty or other accommodations will cause an undue hardship.
- Entitled to return to same position absent undue hardship



Light Duty Program Access

- A topic of much debate under the ADA and under Title VII pregnancy discrimination
- Hand in hand with requirement that suspension of essential functions can be a reasonable accommodation
- In no uncertain terms, the regulations say covered employees are entitled to placement in light duty programs, even if offered only for on-the-job injuries
- What if light duty is not offered to anyone or there is no “light duty program?”

“Predictable Assessment” Accommodations

- Employers expected to grant these in virtually all cases.
- Will rarely (ever?) be an undue hardship.
- No supporting documentation or extensive individualized assessment permitted.
- Types of “predictable assessment” accommodations:
 - Allowing employee to carry water and drink in the work area
 - Allowing additional restroom breaks
 - Allowing sitting in jobs that require standing, and standing in jobs that require sitting
 - Allowing breaks as needed to eat and drink

Limits on Supporting Documentation

- Reasonable documentation defined as describing or confirming:
 - The physical or mental condition;
 - Is affected by pregnancy, childbirth, or related condition(s); and
 - That a change or adjustment at work is needed for that reason
 - What about requesting or proposing alternative leaves?
- Unreasonable request examples
 - Where pregnancy or accommodation is obvious
 - Where the employer already has the information
 - “Predictable assessments”
 - Certain lactation-related accommodations
- Regulations strongly encourage interim accommodations pending receipt of documentation
- New forms?



Addressing the Differences

- Consider a stand-alone PWFA/Pregnancy Accommodation Policy or revise accommodation policies to refer to pregnancy explicitly.
- Consider stand-alone PWFA reasonable accommodation and interactive process forms or revise current ADA forms to reflect PWFA limitations.

Addressing the Differences

- Consider training appropriate personnel regarding pregnancy accommodations and obligations.
- Consider state and local pregnancy accommodation law and ordinances.
- Make sure your company is using an up-to-date EEO poster that includes information about the PWFA.

Navigating Pre and Post Election Tensions in the Workplace

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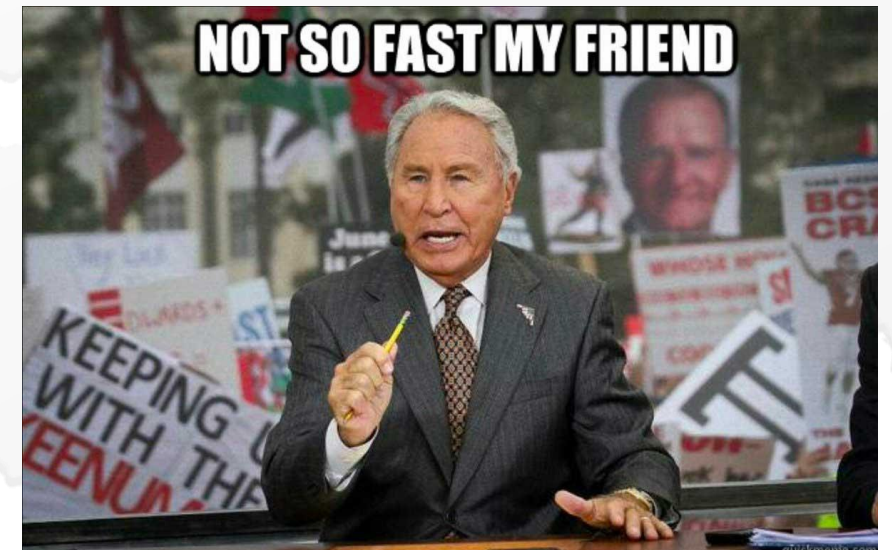
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Roadmap

- Relevant First Amendment Overview
- Risks of Workplace Political Speech
- Legal Considerations
- Interactive Scenario
- Employer Strategies to Prevent Political Tension in the Workplace

Relevant First Amendment Overview

- Common misconception: First Amendment generally applies to government actions; not to private employers
- “Political discrimination” often not unlawful under federal law; but must consider state/local employee protections



Risks of Workplace Political Speech

- Workplace Conflict and Tension
 - Maintain balance!
- Discrimination and Harassment
- Workplace Violence
- Reputation and Public Relations



Legal Considerations

- Does the Speech “Cross the Line?”
 - Discrimination
 - Harassment
 - “Concerted Activity” that Relates to Working Conditions
 - “Vote Blue” v. “Vote Blue for Higher Wages”



Legal Considerations, Cont.

- State Law Protections
 - Interference with the Right to Vote or Hold Political Position
 - Protection from Workplace Discrimination Based on Political Activities
 - i.e., California (protects private employees' political activities)
 - i.e., South Carolina (free speech provision applies without regard to state action)
 - i.e., Colorado (“off-duty” protection statute)

Legal Considerations, Cont.

- Voting Leave
 - Required?
 - Paid or Unpaid?
 - How Much Time?
 - Whether Employee Notice is Required
 - Whether Employer Notice is Required



Interactive Scenario

- Bob and Nancy's cubicle space is side by side
- A week before the election, Bob displays a "MAGA" poster in his cubicle, which is visible to all employees, including Nancy
- Nancy expresses to Bob her displeasure with the poster and asks Bob to remove it
- Bob refuses, and the two engage in a heated conversation, which is observed by other employees
- During the course of the conversation, Bob cited his political views on abortion

Interactive Scenario, cont.

- The next day, Nancy texts her supervisor, John, indicating that she was anxious to come into work until Bob removed the MAGA poster, citing possible medical care
- In response, John instructed Nancy to return to work at the other side of the building on a temporary basis to avoid interacting with Bob
- The other side of the building is undergoing construction for renovations and, as a result, does not have a break area or working restrooms
- Bob was not disciplined

Preventing Political Tension in the Workplace

- Develop Clear Policies
- Dress Code Enforcement
- Training and Education
- Support Resources
- Promote Unity and Inclusion
- Encourage Respectful Dialogue
- Monitor and Address Issues Promptly

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About the Firm

Ogletree Deakins is one of the largest labor and employment law firms representing management in all types of employment-related legal matters.

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