

JacksonLewis

Let's Catch Up! Disability & Leave Update

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Let's Catch Up:

An Update on the Latest Cases and Trends in the
ADA, FMLA and Related Laws

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Leave

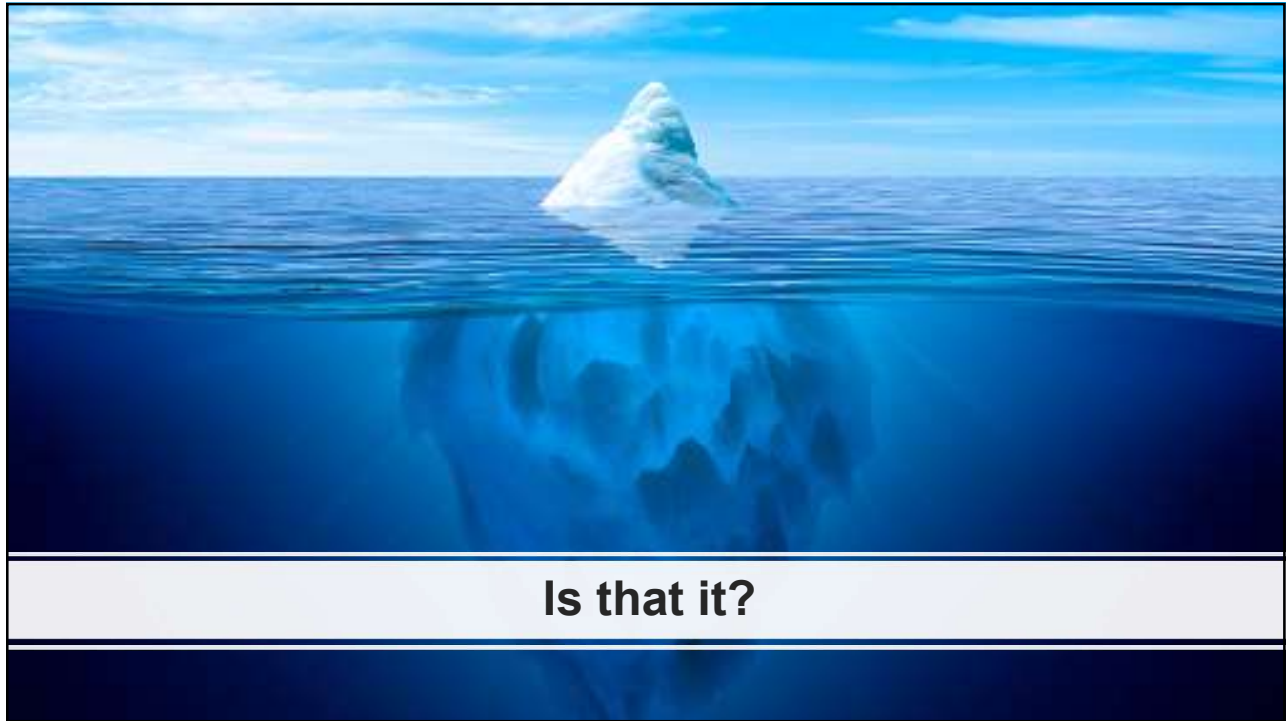


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Continuing Expansion of Leave Laws


- | | | | |
|----------|--------------------------|----------|--------------------------------------|
| 1 | COVID-19 leave | 5 | Family Leave and "like family" leave |
| 2 | Paid sick leave | 6 | Bereavement leave |
| 3 | Family and medical leave | 7 | Military leave |
| 4 | Parental leave | 8 | Election/voting leave |


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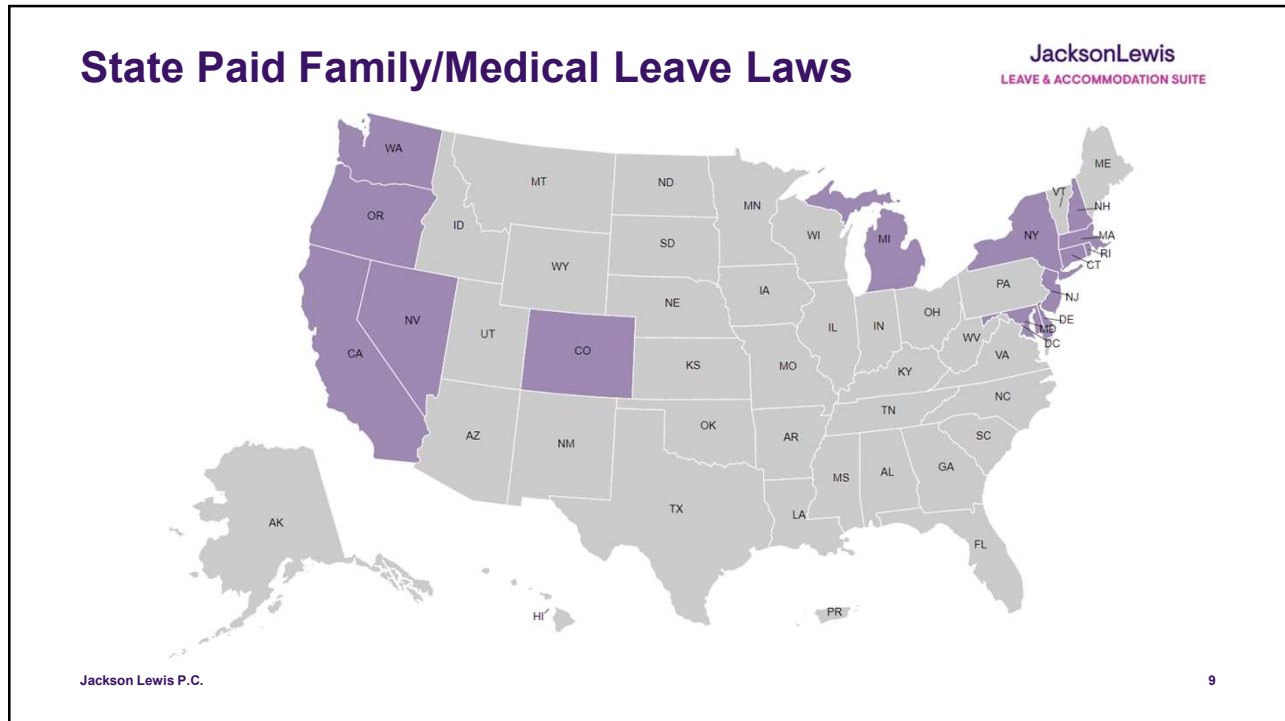
Depending upon your jurisdiction...

 Pawternity leave?

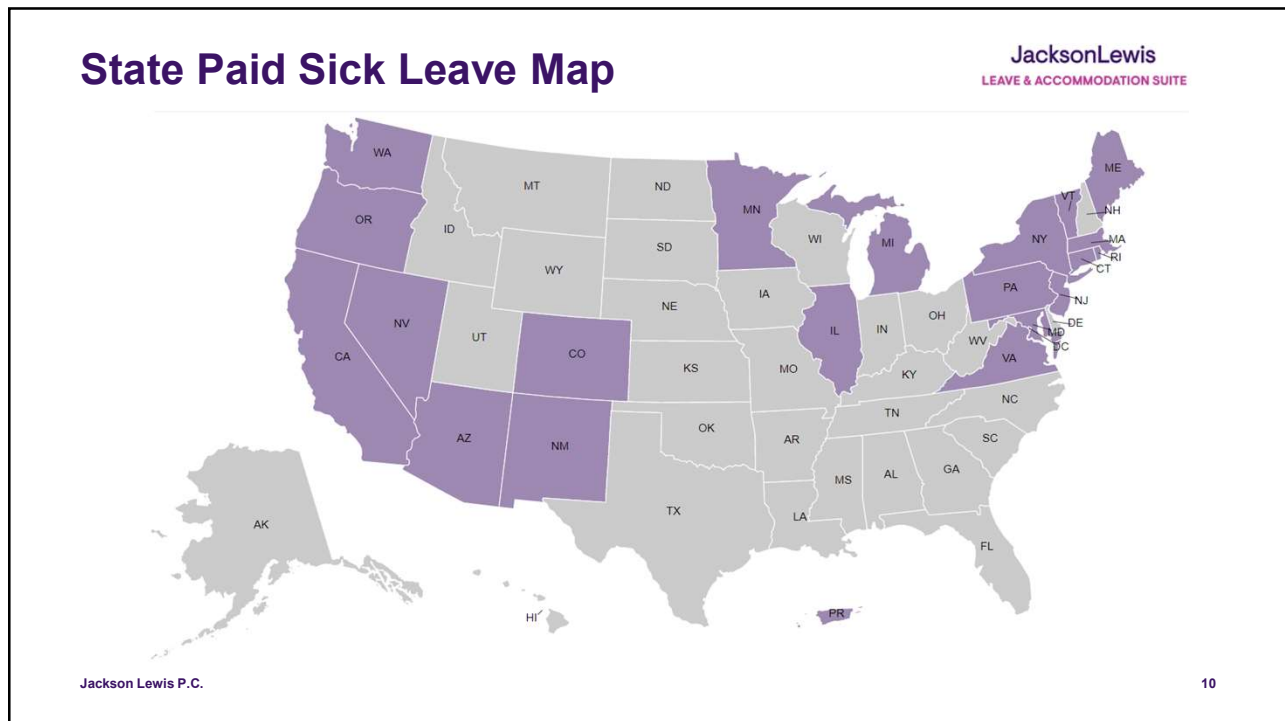
 Menstrual leave?

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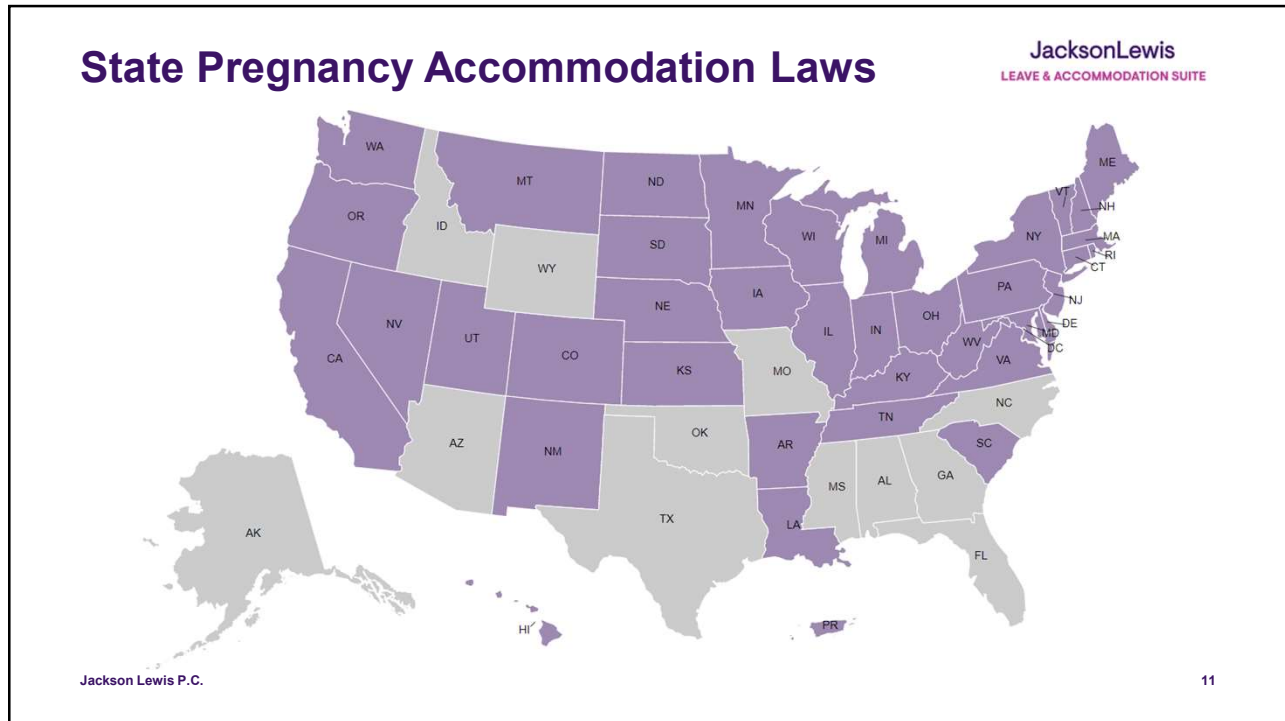
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FMLA

PAID FAMILY LEAVE

Benefits are also available for a new child entering their placement.

provides benefits to individuals who are seriously ill

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FMLA Interference

- An employee used FMLA multiple times over her long career. She called the FMLA manager to discuss the possibility of using a combination of FMLA leave, sick leave, and annual leave for an 8-week PTSD treatment program. The employee alleged that the FMLA manager told her that she had already taken serious amounts of FMLA and directed her not to take any more. She says that she feared she would be fired so instead retired.
- Employee claims – Manager’s comments interfered with her FMLA leave.
- Employer claims - Employee was not officially denied leave so there can’t be an FMLA claim and it was unreasonable of her to just resign.
- What did the court say?

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FMLA Interference

“We hope this opinion will help clarify that an employer can violate the FMLA by discouraging an employee from exercising rights under the FMLA without actually denying an FMLA leave request.”

Judge Hamilton, 7th Cir.

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Military Leave

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Military Leave

- Employer provides up to 10 days of paid leave for jury duty, 3 days of paid leave for bereavement leave, and 10 days of paid sick leave. For employees who take military leave, they receive the difference between their full pay and what the military pays them during their service. Joe is a member of the US Army Reserves. Joe took two military leaves of absence of less than 30 days each to attend mandatory military training.
- Joe sues the employer on a class action basis for violating USERRA. Joe claims the employer was required to provide full paid leave to military leave takers similar to how it treats other employees who take time off for jury duty, bereavement leave, and sick leave.
- Employer files a motion to dismiss claiming that USERRA does not require paid leave and even if it did, providing differential pay is not unlawful.
- What did the court say?

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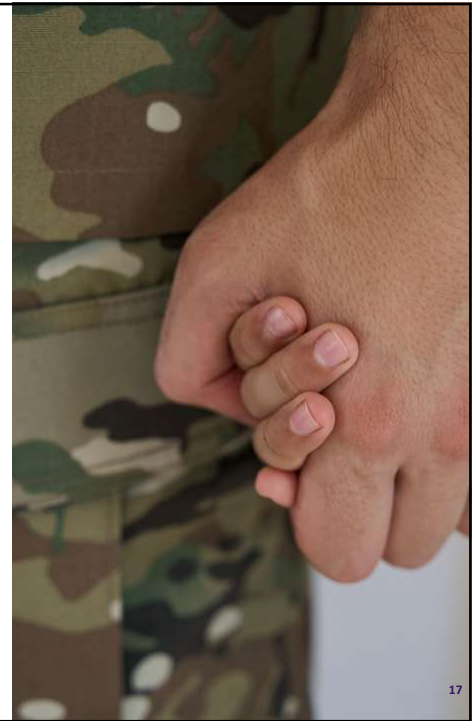
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Military Leave

- Where an employer provides "benefits," including pay, to employees on a leave of absence, USERRA requires that employers offer the "most favorable treatment accorded to any comparable form of leave when [an employee] performs service in the uniformed services."
- The 3rd and 7th Circuits have already found that paid leave is one of the rights and benefits protected by USERRA. Whether this employer's military leave is comparable to the other forms of leave is a fact issue to be determined later in the case.

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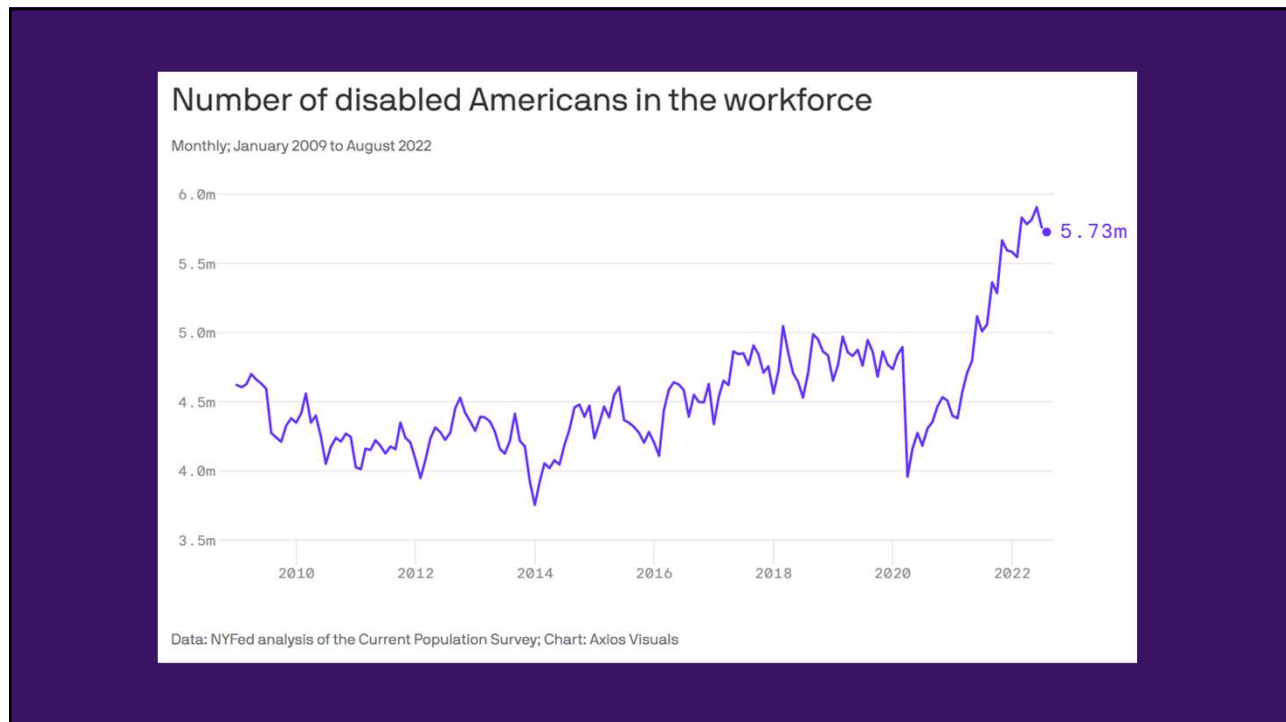
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Accommodation Explosion

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ADA Reasonable Accommodation Obligation

- Individual with a disability
- Otherwise qualified for the job
- May require a reasonable accommodation, which is a modification or an adjustment to a job or the work environment that will:
 - Enable the individual to participate in the application process
 - Enable the individual to perform essential job functions
 - Assure that a qualified individual with a disability has rights and privileges in employment equal to those of nondisabled employees.
- So long as it does not create an undue hardship

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Never Have I Ever...

- Taken too long to respond to an accommodation request

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Never Have I Ever...

- Provided an interpreter for an applicant or employee with a hearing impairment

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Never Have I Ever...

- Taken away an accommodation

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Never Have I Ever...

- Assessed attendance points for an absence related to a disability

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Attendance Points

- Employee suffered from kidney stones and a herniated disc. Employer had a “no fault” attendance policy. Employee accrued 31 points between April and July. On all but two of the days he incurred points, he was either hospitalized, seeing a doctor or had a doctor’s note saying he could not work. For the last 2 weeks of his employment, his doctor told him to take 2 weeks off for his back to heal. He was removed from the schedule and when he tried to return, he was terminated.
- EEOC claims that employer failed to accommodate because employer failed to make exceptions to its “no fault” attendance policy
- Employer claimed that employee was not qualified for his full-time job because of unreliable and erratic attendance
- What did the court say?

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Attendance Points

- Jury could find that had the disability-related absences been forgiven, employee could have continued to work for employer
- The court noted that in the 7th Cir., “a brief period of leave to deal with a medical condition could be a reasonable accommodation in some circumstances”
- Court rejected a blanket rule that going over 12 points would render someone unable to perform the essential functions of the job
- Case proceeds to a jury trial

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Never Have I Ever...

- Told an employee that in order to return to work:
 - They have to be 100% healed
 - They have to be able to return to full duty, or
 - They have to be free from restrictions

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Never Have I Ever...

- Refused to accommodate a temporary employee, independent contractor or third party

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Lessons Learned

“The purpose of the ADA’s reasonable accommodation requirement is to require employers to change the way things are customarily done to enable employees with disabilities to work.”

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Otherwise Qualified

- Determination of whether employee is otherwise qualified cannot be made at time of leave request (question is whether qualified when return to work)
 - Employees requesting leave often cannot perform job at time
 - That doesn’t determine whether they are otherwise qualified with an accommodation
 - Medical leave allows them time to recover from illnesses or medical procedures
 - Leave is a temporary accommodation in hopes that able to fulfill attendance requirements once leave is over
- Where medical leave would enable the employee to return to work and perform the essential functions, leave may be a reasonable accommodation
 - Temporary medical leave is an accommodation (even though regular attendance may be an essential function)

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What is “Reasonable”?

- When assessing reasonableness, Courts can consider:
 1. The amount of leave sought
 2. Whether the requested leave generally complies with the employer’s leave policies
 3. The nature of the employee’s prognosis, treatment and likelihood of recovery
- No bright line rule for maximum amount of leave
 - According to one Circuit, cases have found leave unreasonable when the leave lasted over a year or extended beyond company policies
- Requests for indefinite leave are likely unreasonable
 - Employee’s inability to say how long leave is needed at the start of leave unlikely to be enough evidence of indefiniteness
 - Estimated return date was not enough to establish indefinite
 - If jury could determine that plaintiff could recover and return to work in an acceptable time, it may not be indefinite

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Never Have I Ever...



- Had a TPA approve leave even though we planned to terminate or deny the leave

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What is “Reasonable”?

- Communications from TPA and/or HR indicating leave would be approved or was possible were found to establish reasonableness of request
- Mistaken approval of leave and administrative mistakes lead to a jury trial
- History of attendance issues may make a request less reasonable
- Employee should be made aware that employer does not believe a request is reasonable and that they need to establish ability to return to work in a reasonable period

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Interactive process

Purpose of the process is to identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations

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Interactive process

- Courts have found lack of good faith in interactive process where:
 - TPA violated company's policies
 - TPA rebuffed without discussing accommodation request
 - Company unreasonably stalled accommodation request because of TPA's errors
 - TPA told employee she had to reach out to manager to fix the mistake in her hours
 - Employer required employee to fix the employer's mistakes
 - Company prematurely halted the interactive process by terminating employee while leave request outstanding
 - Employer never talked to employee
 - Employer led employee to believe request would be granted and never told her it was unreasonable
 - Employer determined accommodation it was willing to offer or determined termination before speaking with employee

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Undue Hardship

- If employer's policies provide for kind of leave requested, courts will presume that granting request would not cause undue hardship
- Absences that are not excessive under disciplinary policies may not be an undue hardship
 - Watch out for policies that count a continuous absence as one occurrence
- "Sudden illnesses and episodic flare-ups are, by nature, difficult to plan for and can be quite disruptive to those who fall ill and those around them. But that does not mean that accommodating a sudden flare-up will cause undue hardship merely because handling these situations requires more flexibility."
- Keeping a job open indefinitely may cause undue hardship
 - Keeping a job open long enough to allow the employee to apply for leave does not amount to undue hardship

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Never Have I Ever...

- Handled a religious accommodation request

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Religious Accommodation



PRAYER ROOM

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	ADA	Title VII
What must be accommodated	Disability (or pregnancy)	Sincerely held religious belief, practice or observance
Proof	Doctor's note	Employee's say so
When is reasonable accommodation required	To enable employee to perform the essential functions of a job or enjoy equal benefits and privileges of employment	When sincerely held religious beliefs, practices or observances conflict with work requirements
Undue Hardship	Significant difficulty/expense	De minimis cost or burden (in most jurisdictions)

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Pregnancy



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Employer Risks Responding to *Dobbs v. Jackson*

- Group health plan considerations
- State laws prohibiting aiding and abetting
- Confidentiality/data privacy issues
- Religious harassment/hostile environment claims
- Potential risk of a discrimination claim if benefits are only available to women
- Speech issues in the workplace
- **Compliance with Pregnancy Discrimination Act (PDA)**
 - EEOC – Bans adverse employment action “merely because [an employee] . . . has had an abortion.”
 - Abortion support . . . evidence of pregnancy discrimination?
 - Highlight choice and the benefits that you provide to pregnant employees and parents in communications

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Is Pregnancy a Disability?

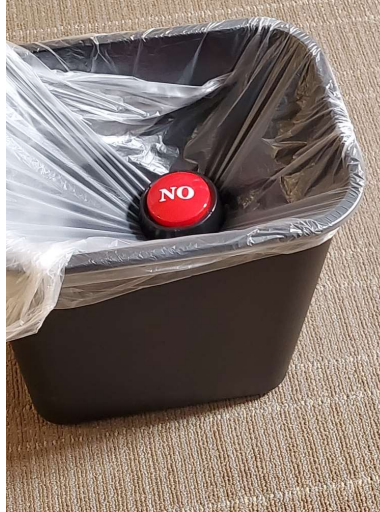
- American Board of Pediatrics refused to let a doctor sit for the certification exam because she failed to meet the hours requirement
- Doctor who was pregnant said hours requirement had a disparate impact on pregnant individuals
- Court said pregnancy alone is not a recognized disability

Does that mean we don't have to accommodate?



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Dispose of your No button!



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Pregnancy Accommodation and Light Duty

- Employer has a policy of offering temporary light duty to workers injured on the job in order to comply with its state workers' compensation law. Employer only provides light duty to employees injured on the job—no one else. Pregnant employee requests accommodation of light duty because her pregnancy related medical condition prevents her from being able to meet lifting requirements of her position. Employer denies the request.
- EEOC claims pregnancy/sex discrimination
- Employer claims the light duty policy is not discriminatory because it is designed to implement a WC program that complies with state WC laws and help employees injured on the job
- What did the court say?

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Pregnancy Accommodation and Light duty

- The 7th Circuit found that there was no evidence that the employer offered light duty to any employees who were not injured on the job and this practice was consistent with the legitimate, nondiscriminatory purpose of its policy – no PDA violation
- Case will likely be appealed to Supreme Court...
- Inconsistent with prior Supreme Court decision?
 - In 2015, SCOTUS held that because the PDA states that women affected by pregnancy should be treated the same as other workers “similar in their ability or inability to work,” employers are obligated to accommodate pregnant employees if they accommodate similarly situated non-pregnant employees

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Continuing COVID Impact

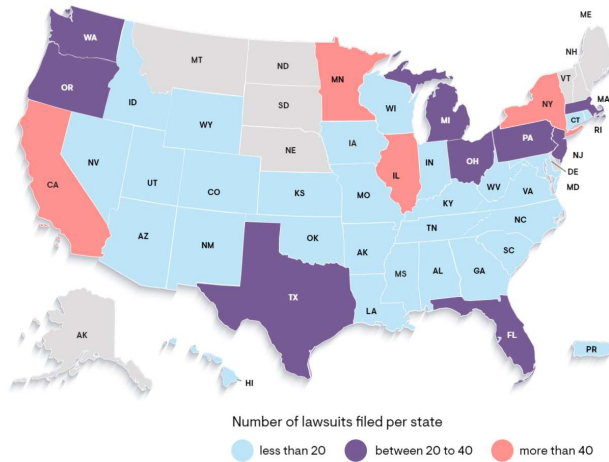
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Employer vaccine mandate cases: **718**

Where are the lawsuits filed?

TOP ↑

The map below provides a state-by-state breakdown of the number of lawsuits filed over employers' mandatory COVID-19 vaccination policies.



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COVID-19 Cases Filed By EEOC

- **Case No. 1:** Denying employee accommodation of less face-to-face customer contact and instead placing employee on leave until vaccines became available
- **Case No. 2:** Denying employee request to continue to work from home 2 days a week after employee had successfully worked from home for 3 months
- **Case No. 3:** Terminating employee with Cancer (and others with health issues) because did not want employee to get COVID
- **Case No. 4:** Harassing employee for wearing a face mask at work

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Is COVID-19 Covered by the ADA or FMLA?

- COVID-19 could be a disability depending on the circumstances
- COVID-19 could be a serious health condition depending on the circumstances



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Gender Dysphoria

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Is Gender Dysphoria Covered by the ADA?

- Plaintiff alleged she was wrongfully incarcerated among male population, denied accommodations and medical treatment in relation to her gender dysphoria, and subjected to other mistreatment
- The 4th Circuit concluded that gender dysphoria is not a “gender identity disorder” that is excluded under the ADA

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Artificial Intelligence

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AI Systems in Employment

...a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy.

OECD, Recommendation of the Council on Artificial Intelligence

<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>

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EEOC

TAD: The ADA and AI: Applicants and Employees

Three ways an algorithmic decision-making tool can violate ADA:

- Lack of **reasonable accommodations** to be rated fairly and accurately by the tool.
- Individual with a disability is **screened out** intentionally or unintentionally, though able to do job with reasonable accommodation
- Violates restrictions on **disability related inquiries or medical examinations**.

Employers cannot avoid liability because tools are designed or administered by another entity!

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EEOC

TAD: The ADA and
AI: Applicants and
Employees

Promising Practices

- Training staff to recognize and process requests for reasonable accommodations as quickly as possible
- Training staff to develop or obtain alternative means of rating job applicants and employees
- Working with outside parties who administer decision-making tools to ensure proper accommodations are provided
- Using algorithmic decision-making tools designed to be accessible to individuals with as many kinds of disabilities as possible
- Ensuring that the algorithmic decision-making tools measure only abilities or qualifications that are “truly necessary” for the job, even for people who have on-the-job reasonable accommodations
- Ensuring that necessary abilities or qualifications are measured directly, rather than indirectly

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Questions?

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Thank you.