WEBINAR

Key Federal Law Developments
Including Religious Accommodations and the Pregnant Workers Fairness Act

Tuesday, November 28, 2023

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2023 Key Federal Law Developments

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Religious Accommodations: *Groff v. DeJoy*, 143 S. Ct. 2279 (2023)

- In its June 29, 2023 decision of *Groff v. DeJoy*, the US Supreme Court held that an employer seeking to deny a request for a religious accommodation must establish that the requested accommodation would cause the business an "undue hardship."
- Previously, courts had interpreted language in *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977) as requiring an employer to only show more than a "de minimus" cost or burden to establish undue hardship to avoid the obligation to provide an accommodation.

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Religious Accommodations: *Groff v. DeJoy*

- In *Groff*, the Supreme Court rejected the "de minimus" standard and instead found that an employer must show a substantial burden to its business in order to avoid accommodating a religious belief.
- Employer must show "that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."
- Courts are to review "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."

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Religious Accommodations: *Groff v. DeJoy*

- In *Groff*, the plaintiff, a mail carrier, requested a religious accommodation to not have to work on Sundays in violation of his Evangelical Christian beliefs.
- The employer, the United States Postal Service (USPS), argued that it would be subject to an undue hardship if it had to require other employees to handle additional Sunday shifts in order to accommodate the request.
- The district court dismissed the case, holding that the employer showed that the accommodations would impose more than a de minimis cost. On appeal, the Third Circuit affirmed.

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Religious Accommodations: *Groff v. DeJoy*

- The Supreme Court reversed and remanded the case, concluding that the employer had to consider other options that would enable it to provide the requested accommodation.
- Improper application by the Third Circuit of the 'more than a de minimis cost' test, may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees.

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Religious Accommodations: *Groff v. DeJoy*

- Post-*Groff*, to establish "undue hardship," an employer must demonstrate that the cost rises to an "excessive or unjustifiable level."
- The employer has the burden to prove undue hardship.
- Limited guidance provided about what "substantial burden" means: *Groff* states that the "context specific" application of the test is left to the district courts in the first instance.

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Religious Accommodations: *Groff v. DeJoy*

- *Groff* did provide some guidance as to what an undue hardship is not.
- Because the hardship must affect "the conduct of the employer's business," evidence of "impacts on coworkers is off the table for consideration" unless such impacts place a substantial strain on the employer's business.
- Even if an impact on an employee's coworkers places such a substantial strain, that impact "cannot be considered 'undue'" if it is attributable to religious bias or animosity.

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Religious Accommodations: *Groff v. DeJoy*

- If a requested accommodation poses an undue hardship, the employer must *sua sponte* consider other possible accommodations, before the employee's request for accommodation is properly denied.

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Religious Accommodations: Other Defenses

- The employer can raise other defenses to a claim for failure to provide a religious accommodation, including:
  - Not a sincerely held religious belief.
  - That the belief, while perhaps sincerely held, is not religious in nature.

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Post-*Groff*- EEOC

- The Supreme Court declined to adopt ADA case law and interpretation to the "undue hardship" analysis in a religious accommodation case. Noted that undue hardship is to be interpreted consistent with "ordinary speech."
- Noted that much of the EEOC's guidance in this area is reasonable and would not likely be implicated by its opinion, but is not being ratified in its entirety as prepared absent the guidance in *Groff*.

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Post-*Groff* Case: Hebrew *v. Texas Department of Criminal Justice* (5th Cir. Sept. 15, 2023).

- Fifth Circuit reversed summary judgment granted by District Court that found that the Texas Department of Criminal Justice was not required to accommodate the religious beliefs of correctional officer and follower of the Hebrew Nation religion who was fired after he refused to cut his hair and beard.
- Appeals court found that the more than "*de minimis*" burden the employer asserted in rejecting his accommodation request did not meet the "undue hardship" test post-*Groff*, and that his religious practice was more than a motivating factor in the department's decision to fire him.

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Post-*Groff* Case-*Hebrew v. Texas Department of Criminal Justice.*

- The plaintiff, a devout follower of the Hebrew Nation religion, had taken a Nazarite vow to keep his hair and beard long.
- At the time, TDCJ's grooming policy prohibited male officers from having beards unless they had a medical skin condition. The policy also prohibited male officers (but not female officers) from having long hair.

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Post-*Groff* Case-*Hebrew v. Texas Department of Criminal Justice.*

- TDCJ denied the request to keep his long hair and beard, noting "Beards are prohibited for safety reasons as security staff must be able to properly wear a gas mask when chemical agents are being utilized throughout the unit. Long locks of hair could be used against you by an offender overpowering you especially from behind. Also, with this amount of hair contraband items cannot be easily detected during search procedures of the unit. Additionally, beards and hair of this length are prohibited per PD-28 Dress and Grooming Standards."

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Post-*Groff* Cases-*Hebrew v. Texas Department of Criminal Justice.*

- Here, the district court agreed that TDCJ would have to bear more than a *de minimis* cost because the plaintiff's coworkers would have to "perform extra work to accommodate" his religious practice. The district court thus granted summary judgment in favor of the defendants.

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Post-*Groff* Case-*Hebrew v. Texas Department of Criminal Justice.*

- The Fifth Circuit found that TDCJ did not meet burden to show undue hardship under *Groff*.
- TDCJ failed to identify any actual costs it would face—much less "substantial increased costs" affecting its entire business—if it were to grant this one accommodation to the correctional officer.
- Further, reference to possible additional work for the officer's coworkers was insufficient under *Groff* to show an undue hardship
- Finally, no evidence presented that it considered other possible accommodations.

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Post-*Groff*- Employer Best Practices

- Policies- religious accommodation policies should be reviewed and revised as appropriate to reflect the new standard.
- If there are current employees whose religious accommodation requests were previously denied, consider reevaluating.
- HR and leadership employees receiving requests for religious accommodations should be trained in the new legal standards.
- Decisions to deny a reasonable accommodation must be documented and supported by objective facts demonstrating the undue hardship.

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Pregnant Workers Fairness Act

- The Pregnant Workers Fairness Act (PWFA), went into effect on June 27, 2023.
- The PWFA requires covered employers to make “reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical condition of a qualified employee” unless the employer can demonstrate undue hardship.
- Applies to applicants as well as employees.

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Pregnant Workers Fairness Act

- The PWFA statute is modeled largely on the Americans with Disabilities Act, including the ADA's interactive process.
- It applies to private and public sector employers with at least 15 employees, employment agencies, and labor organizations.
- It is enforced in the same manner as other federal employment discrimination laws, so claims against private employers are initiated by filing a charge with the Equal Employment Opportunity Commission and can lead to court action and damages subject to the same caps applicable to ADA claims.

EEOC Proposed Regulations under PWFA

- EEOC issued proposed regulations on August 11, 2023.
- The PWFA requires the EEOC to issue final regulations by December 29, 2023.
- Greater than 250 pages of proposed regulations.

EEOC Proposed Regulations under PWFA

- An employee with a “known limitation” due to pregnancy, childbirth, or related medical condition may request a reasonable accommodation.
- As long as the employee is “qualified,” the employer must grant the requested accommodation or an equally effective accommodation, unless doing so imposes an undue hardship.

EEOC Proposed Regulations under PWFA

- Coverage for Prenatal and Postpartum Conditions

  The proposed regulations provide that the phrase "pregnancy, childbirth, or related medical conditions" has the same meaning as that used in Title VII. The terms pregnancy, childbirth, and related medical conditions are not defined in the PWFA. EEOC construes these terms broadly and offers non-exhaustive examples of conditions that may be covered by the PWFA:

EEOC Proposed Regulations under PWFA

- "Pregnancy" and "childbirth" include a current pregnancy, past pregnancy, potential or intended pregnancy, labor, and childbirth — including vaginal and cesarean delivery.
- Examples of "related medical conditions" include termination of pregnancy (miscarriage, stillbirth, or abortion); infertility; fertility treatment; lactation and related conditions; 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.

EEOC Proposed Regulations under PWFA

- Under the proposed regulations, it is not necessary that an employee or applicant be or have been pregnant, or have given birth to be entitled to a reasonable accommodation under the PWFA.
- Existing health conditions that are exacerbated by pregnancy or childbirth, such as carpal tunnel syndrome, anxiety or high blood pressure, would also be covered conditions.

EEOC Proposed Regulations under PWFA

Definition of "known limitation"

- A physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical condition that the employee or employee's representative has communicated to the employer, regardless of whether the condition is defined as a disability under the ADA.
- May include common or minor conditions that have been communicated to the employer (such as need for a chair or water breaks).

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EEOC Proposed Regulations under PWFA

- The proposed regulation states that a "limitation" includes when the employee is seeking healthcare for a covered condition.
- According to the EEOC, an employee can also request accommodation to reduce increased pain or increased risk to the employee's health that is related to pregnancy, childbirth, or a related medical condition.

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EEOC Proposed Regulations under PWFA

- Employers are only responsible for accommodating "*known* limitations."
- The employee is not required to use specific language to request accommodation.
- A request for accommodation requires only the employee (or their representative) to communicate that they have a limitation that is related to pregnancy, childbirth, or related medical conditions and they need an adjustment or change at work.

EEOC Proposed Regulations under PWFA

- The Statute provides that an employee is qualified and therefore eligible for accommodations when the employee has a temporary inability to perform the essential job functions.
- The proposed regulations require employers excuse essential job functions for generally up to 40 weeks for each accommodation request, unless it would impose an undue hardship on the employer.

EEOC Proposed Regulations under PWFA

- The PWFA requires employers to reasonably accommodate "qualified employees."
- The proposed regulations explain that the PWFA has two definitions of "qualified." The first definition tracks the ADA: "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position" is qualified.

EEOC Proposed Regulations under PWFA

- Under the second definition, however, even if an employee cannot perform one or more essential functions of their job, they are still qualified if: (1) the inability to perform an essential job function is for a temporary period; (2) the essential job function(s) could be performed in the near future; and (3) the inability to perform the essential function(s) can be reasonably accommodated.
- The EEOC's proposed rules define "temporary" as "lasting for a limited time, not permanent, and may extend beyond 'in the near future.'" "In the near future" is generally defined as 40 weeks from the start of the temporary suspension of an essential function.

EEOC Proposed Regulations under PWFA

- As with any other accommodation, employers are not required under the PWFA to remove essential job functions or otherwise accommodate an employee who is unable to perform essential job functions if the employer can show that doing so would impose an undue hardship on the operations of the employer.

EEOC Proposed Regulations under PWFA

- **Undue hardship:**
- An employer may be able to demonstrate an undue hardship when removing an essential function would impose significant difficulty or expense. The proposed regulations identify factors for employers to consider.
- Undue hardship has the same meaning as under the ADA and generally means significant difficulty or expense for the operation of the employer.

EEOC Proposed Regulations under PWFA

- The proposed regulations do not allow an employer to compel use of paid leave to run concurrently with time off as a reasonable accommodation under the PWFA.
- However, as under the ADA, an employer is not required to provide additional *paid* leave under the PWFA beyond the amount to which the employee is otherwise entitled.

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PWFA Actions for Employers to Take Now

- Covered employers are required to post notices describing the PWFA.
- EEOC enforces the PWFA and began accepting charges on June 27, 2023.
- Training HR and managers to identify and respond to requests for PWFA accommodations.
- Final regulations are to be issued by December 29, 2023.

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Updated EEOC Proposed Enforcement Guidance on Harassment in the Workplace

- The Equal Employment Opportunity Commission (EEOC) released its Proposed Enforcement Guidance on Harassment in the Workplace on Sept. 29, 2023 (144 pages). Public comments closed on Nov. 1, 2023.
- The guidance would be the EEOC's first update on harassment since 1999. It has been 37 years since the Supreme Court first held in *Meritor Savings Bank, FSB v. Vinson* that workplace harassment can constitute unlawful discrimination under Title VII of the Civil Rights Act of 1964.

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Updated EEOC Proposed Enforcement Guidance on Harassment in the Workplace

- Addresses changes in the law, including the effect of new Supreme Court decision *Bostock v. Clayton County,* holding that Title VII of the Civil Rights Act's prohibition on sex discrimination includes discrimination based on gender orientation and sexual identity.
- The new EEOC document provides guidance for employer liability in harassment claims involving discrimination on the basis of race, color, religion, sex, national origin, disability, age, or genetic information.

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Updated EEOC Proposed Enforcement Guidance on Harassment in the Workplace: Transgender Individuals

- The guidelines include specific guidance and scenarios addressing the proper enforcement of workplace harassment laws when discriminatory harassment on the basis of sex occurs against transgender individuals.
- EEOC notes that the repeated, intentional misuse of a transgender employee's name or pronouns ("misgendering") and refusal to allow the employee to use the restroom consistent with gender identity could be sufficiently severe and pervasive to support a hostile work environment claim based on sex.

Updated EEOC Proposed Enforcement Guidance on Harassment in the Workplace: Reproductive Rights Issues

- Similar to the proposed PWFA regulations which require accommodations for abortion related care, the EEOC in its harassment guidance opines that unlawful sex-based harassment includes hostility that arises out of a person's reproductive decisions, including abortions or contraceptives.
- Extensive comments have been submitted both in favor and in opposition to the EEOC's position. Also raises free speech and religious rights issues.

Updated EEOC Proposed Enforcement Guidance on Harassment in the Workplace: Virtual Work Environment/Electronic Media Issues

- The enforcement guidelines also specify that harassment that occurs within the working environment over social media, videoconferencing platforms (such as Zoom), instant messaging boards, or employer-affiliated email system is workplace harassment, even if it occurs online.
- Examples include offensive comments made over email, instant message, or videoconference, inappropriate images in an employee workspace over videoconference, or any other form of harassment that takes place over a virtual platform.

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Updated EEOC Proposed Enforcement Guidance on Harassment in the Workplace: Virtual Work Environment/Electronic Media Issues

Post-COVID remote work environment addressed, opining that a worker may have a viable hostile work environment claim for conduct that occurs "in a work-related context" outside their regular workplace.

The EEOC opines that misconduct that occurs outside of the work environment and unrelated to work, such as a person posting racist slurs on a colleague's social media posts can also be unlawful "if it impacts the workplace.“

The EEOC also opines that distribution of real or computer-generated intimate images using social media can contribute to a hostile work environment, if it impacts the workplace.

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Updated EEOC Proposed Enforcement Guidance on Harassment in the Workplace: Employer Action

- Employers should expect the Proposed Guidance to be finalized.
- Training should take place.
- Policies should be reviewed.
- Expect legal challenges on more controversial efforts by the EEOC to expand existing law.

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Disparate Treatment Burden of Proof

- In *Hamilton v. Dallas County*, 2023 U.S. App. Lexis 21780 (5th Cir. Aug. 18, 2023), the court overruled decades of legal precedent restricting discrimination lawsuits to claims only if they were based on "ultimate employment decisions," like those related to hiring, terminations, leave or compensation.
- In order to establish a discrimination claim under Title VII, an employee must show, among other things, that they suffered some "adverse employment action." Traditionally, courts have interpreted that to mean some "ultimate employment decision" (typically involving a direct economic impact, such as a lack of promotion or a termination).

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Disparate Treatment Burden of Proof

- But the recent *Hamilton* ruling from the U.S. Court of Appeals for the Fifth Circuit, as well as other sister Circuits, including the Fourth, Sixth, Ninth, Eleventh and D.C Circuits, has broadened the definition of what constitutes an actionable adverse employment decision, thus expanding the body of employment decisions for which employers may now face greater risk of liability under Title VII.

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Disparate Treatment Burden of Proof

- In *Hamilton v. Dallas County*, the Dallas County Sheriff's Department allows officers to select two days a week to be off; men were allowed to choose two weekend days while women were not.
- A group of female officers sued, alleging that the sex-based scheduling policy violated Title VII.

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Disparate Treatment Burden of Proof

- But because the scheduling policy did not constitute an "ultimate" employment action under prior Circuit law a three-judge panel of the Fifth Circuit upheld the trial court's dismissal of the case.
- In so doing, however, the panel noted that this case was the "ideal vehicle" for the *en banc* Fifth Circuit to reconsider its adherence to the "ultimate employment decision" requirement.

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Disparate Treatment Burden of Proof

- The *en banc* court held a plaintiff plausibly alleges a disparate-treatment claim under Title VII if she pleads discrimination in hiring, firing, compensation, or the "terms, conditions, or privileges" of her employment.
- The Plaintiff is not required to also show an "ultimate employment decision," a phrase that appears nowhere in the statute.
- Here, giving men full weekends off while denying the same to women—a scheduling policy that the County admits is sex-based—states a plausible claim of discrimination under Title VII.

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Disparate Treatment Burden of Proof

- The Fifth Circuit cautioned, however, that the harm must be more than de minimis, as Title VII is not "a general civility code for the American workplace."
- The Fifth Circuit declined to establish at this time the "precise level of minimum workplace harm a plaintiff must allege on top of showing discrimination in one's 'terms, conditions, or privileges of employment.'" Rather it noted that, whether this means the harm must be "tangible," "objective," or "material" (which are standards articulated by other Circuits), the allegations about the sex-based scheduling policy would meet any of these standards.

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Disparate Treatment- Post *Hamilton*

Narayan v. Midwestern State University (5th Cir. Oct. 11, 2023).

- Fifth Circuit reversed and remanded finding by the lower court that wrongly applied the "ultimate employment decision" standard to the professor's allegation that his request for summer teaching assignments was discriminatorily denied.
- Explained that the lower court should have considered the associated lost income from that denial when looking at his discrimination and retaliation claims under Title VII.

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U.S. Supreme Court to Address Alleged Discriminatory Transfer Case

- The U.S. Supreme Court accepted certiorari in *Muldrow v. City of St. Louis* (8th Circuit), and is expected to address circuit split.

  Oral argument on December 6, 2023, has been granted on issue of whether Title VII of the Civil Rights Act of 1964 prohibits discrimination in transfer decisions absent a separate court determination that the transfer decision caused a significant disadvantage.

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