



Risky Business: The Most Challenging Workforce Issues Facing Health Care Employers Today

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Agenda

1. Wage & Hour and Worker Classification
2. Remote and Multi-State Workforces
3. Class Actions and Mass Arbitration
4. Accommodations
5. NLRB Risks



WAGE AND HOUR CHALLENGES



Regular Rate



FLSA Regular Rate Calculation



$$\begin{aligned} \text{Regular Rate} = & \\ & \text{Total compensation in the workweek} \\ & \text{(except statutory exclusions)} \\ & \div \text{Total hours worked in the workweek} \end{aligned}$$

29 C.F.R. § 778.109

Regular Rate - General Principles



- “All compensation for hours worked, services rendered, or performance must be included in the regular rate.”
- “When a payment is a wage supplement, even if not directly related to employee performance or hours worked, it is still compensation for “hours of employment” and must be included in the regular rate.”
- “The determination of whether a particular payment, perk, or benefit may be excluded from the regular rate is made on a case-by-case basis applying the requirements set out in the statute to the specific circumstances.”

DOL Fact Sheet #56A: Overview of the Regular Rate of Pay Under the Fair Labor Standards Act (FLSA)

Included in Regular Rate



Things that may be required to be included:

- Non-discretionary bonuses/incentive compensation
- Per diems/stipends
- Shift differentials
- *And more*

Bonuses



- Discretionary bonuses are not included in the regular rate.
- Non-discretionary bonuses are included in the regular rate.
- To qualify as discretionary “the employer must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid.”
 - No prior promise or agreement
 - Employee has no contract right, express or implied, to any amount

29 C.F.R. § 778.211

Referral, Retention, and Sign-On Bonuses



- **Referral Bonuses:** not included in regular rate if all of the following conditions are met: “(1) participation is strictly voluntary; (2) recruitment efforts do not involve significant time; and (3) the activity is limited to after-hours solicitation done only among friends, relatives, neighbors and acquaintances as part of the employees’ social affairs.” WHD Fact Sheet #54
- **Retention Bonuses:** must be included in the regular rate, for the period covered by the bonus. WHD Fact Sheet #54
- **Sign-On Bonuses:** might be included in the regular rate, if required to be paid back if employee leaves before certain time (functions as a retention bonus). WHD Fact Sheet #56C

Retention Bonus – Regular Rate Calculations



- General Principles: Identify the time period for which the bonus was earned. For example, if the bonus was for work performed during a particular workweek, the period would be that workweek. If the bonus was for working on a special project over the last quarter, the period would be that quarter, with the bonus amount divided evenly either per week or per hour worked. 29 C.F.R. § 778.209
- Example:
 - Employee's offer letter promises a bonus of \$500 upon completing 90 days of employment; \$1,000 at one year; and \$5,000 at two years.
 - Potential apportionment:
 - \$500 - earned Day 1 to Day 90
 - \$1,000 - earned Day 91 to One Year only OR earned Day 1 to One Year
 - \$5,000 - earned across Year Two only OR earned Day 1 to Two Years
 - May depend on how described in the offer letter.
 - What if the employee has to pay all of it back if they do not stay for the whole two years?

Completion Bonus



Kneuss v. Advanced Clinical Emp. Staffing
564 F. Supp. 3d 1150 (N.D. Ala. 2021)

- \$500 **completion bonus** was tied to when and how nurses worked, and thus *not* excludable from nurses' regular rate as a "travel option payment" for non-work under the FLSA.
- Completion bonus was only available to nurses who extended their original contracts by four weeks or longer and never missed any payroll (i.e. the completion bonus incentivized nurses to not miss work or take breaks between contract terms).
- Completion bonus was paid at end of a nurse's contract extension, and a nurse earned the completion bonus by working for the entire term of their contract extension.

Per Diems



Clarke v. AMN Services, LLC
987 F.3d 848 (9th Cir. 2021)

- Addressed reimbursement in the form of weekly **per diems** for travelling clinicians.
- Court focused on the “**function**” of the payment, and considered: (1) the tie between the payments and the hours worked by an employee (whether they increase/decrease based on time worked); (2) whether payments are made regardless of whether costs are actually incurred; and (3) whether the employer requires any attestation from employee that costs were incurred.
- Excludable payments “do not depend on the hours worked, services rendered [...] or other criteria that depend on the quality or quantity of the employee’s work.”
- Employer reduced per diem when employees missed a shift, even if they were still travelling, and also paid non-travelling clinicians a similar per diem.
- Per diems functioned as **compensation for work** rather than reimbursement for expenses, and should have been included in the regular rate.

Tuition & Training Benefits



- Section 207(e) of FLSA excludes from the regular rate “other similar payments to an employee which are not made as compensation for his hours of employment.”
- Per regulations, “[s]uch [similar] payments do not depend on hours worked, services rendered, job performance, or other criteria that depend on the quality or quantity of the employee’s work.” 29 C.F.R. § 778.224
- Examples of “other similar payment” include “[d]iscounts on employer-provided retail goods and services, and **tuition benefits** (whether paid to an employee, an education provider, or a student loan program).” 29 C.F.R. § 778.224

Innovative Benefits



- Company “implemented a star system for its caregivers. The company’s star system has categories of points that caregivers are able to accumulate weekly. For example, caregivers can earn points for **how many hours they’re working weekly** or **how well they’re adhering to a plan of care.**”
- Company has “an automated AI recognition system, which is combing through our EHR software and pulling all of these data points out and assigning a value, and then communicating that out to our caregivers weekly Those points roll up to a star rating, and that has a financial benefit.”

From *Home Care Providers’ Creative Benefit Packages Are Paying Off*, Home Health Care News, March 26, 2024

Innovative Benefits



Consider regular rate implications:

- What are criteria for earning benefits?
- Do benefits vary based on hours worked?
- Do benefits vary based on performance?

Meal Breaks



Bennett v. Providence Health Services



- Washington Superior Court; April 18, 2024
- Jury awarded **\$89 million** on behalf of 33,000 employees for denial of second meal breaks, plus \$9.3 million for unlawful time rounding
- Total verdict of **\$230 million**, including double damage and interest
- On appeal; oral arguments scheduled for 7/15/2025

Meal and Rest Periods



Not required under federal law. State laws vary.

FLSA

- Short breaks (20 min. or less) are compensable work time. Meal periods (30 min. or more) are not.
- Employees must be completely relieved of duty during meal period. Meal period must be uninterrupted.

State laws

- *Example:* California requires one meal period for every five hours of work, to be provided no later than the end of the fifth hour of work.
- *Example:* Illinois requires at least 20-minute unpaid breaks for employees working 7.5 hours or more (no later than 5 hours after shift starts).

Meal and Rest Periods: Auto-Deductions



Compliance Risks

- When meal period is missed/not taken, employee must be paid.
- Many employers “auto-deduct” meal periods; employees only clock in and out at start/end of shifts.
- Risk that timekeeping system may “auto-deduct” meal periods that were not taken.
- Consider over-ride function/policy: employees can manually adjust to correct the inaccurate auto-deduct or inform supervisor of missed meal period.

Booting Up



Boot-Up Claims



A common class/collective claim among remote healthcare employees

- Rise in lawsuits among call center workers and remote employees seeking pay for time spent booting up computers and required software programs before clocking in.
- Issues:
 - Is the task “integral and indispensable” to the employees’ “principal activities”?
 - Is the time spent *de minimis* (and therefore non-compensable)?
 - State law (e.g. California) analysis may differ
- Circuit court precedent is unfavorable for employers.
 - 9th Cir.: *Cadena v. Customer Connexx LLC*, 51 F.4th 831 (Oct. 24, 2022)
 - 10th Cir.: *Peterson v. Nelnet Diversified Sols. LLC*, 15 F.4th 1033 (Oct. 8, 2021)

Cadena v. Customer Connexx, LLC



- Customer service vendor serves healthcare industry (among others) through call center employees. Their principal activities were answering calls and scheduling.
- Employees clock in/out via timekeeping software on their computers. They alleged it took up to 20 minutes for the computer would boot-up so they could clock in, and that it took 5-8 minutes to log off and boot down at end of day.
- Ninth Circuit (2022) held booting up time may be compensable because it “bears such a close relationship to the employees’ principal duties that employees cannot eliminate the required activity and still perform their principal duties.”
- Ninth Circuit (2024) affirmed that de minimis doctrine remains good law, but denied summary judgment for employer because of factual questions regarding whether time at issue was de minimis.

Shifting Tides With A New Administration



Independent Contractors



- New DOL standard went into effect in March 2024
 - Essentially adopts the economic reality test
 - Opportunity for profit or loss depending on managerial skill;
 - Investments by the worker and the employer;
 - Degree of permanence of the work relationship;
 - Nature and degree of control;
 - Extent to which the work performed is an integral part of the employer's business; and
 - Skill and initiative of the worker.
 - “Additional factors may be relevant”

Independent Contractors



- Effective May 1, 2025, DOL will enforce independent contractor classification under the FLSA in accordance with *Fact Sheet #13* (from July 2008, not March 2024) as further informed by the reinstated *Opinion Letter FLSA2019-6*, which addresses classification in the context of virtual marketplace platforms.
- New guidance applies only to litigation/investigations by DOL
- 2024 Rule still in place (for now) for private claims and litigation
- Employees should continue to follow 2024 Rule

DOL White-Collar Exemption Rule



What is the status and future of 2024 Biden Administration rule?

- Biden DOL issued new white collar exemption rule in 2024, with significant increases to minimum salary thresholds and automatic increases every 3 years.
- Texas district court invalidated the rule.
- Biden Administration appealed to Fifth Circuit.
- Trump DOL recently asked Fifth Circuit to hold case in abeyance.
- Indication that Trump Administration will abandon the 2024 rule.
- DOL is also defending the 2024 rule in D.C. district court, but DOL has not yet sought stay in that case.

California



California Issues



- Expense reimbursement (including remote work expenses)
- Daily overtime
- Alternative workweek schedules (AWS)
- Differences in eligibility for and calculation of overtime
- Meal and rest period requirements
- Wage statements
- Private Attorneys General Act (PAGA)

REMOTE AND MULTI-STATE WORKFORCES



Benefits and Challenges



Benefits

- Reduced overhead/operational costs
- Recruiting tool to attract new employees
- Nationwide hiring opportunities (and the ability to pay lower market rates).
- Reduced commuting costs and stress.
- Increased retention, productivity, loyalty, and morale.
- Improved work/life balance.
- Societal benefits, such as reductions in traffic congestion and pollution.

Challenges

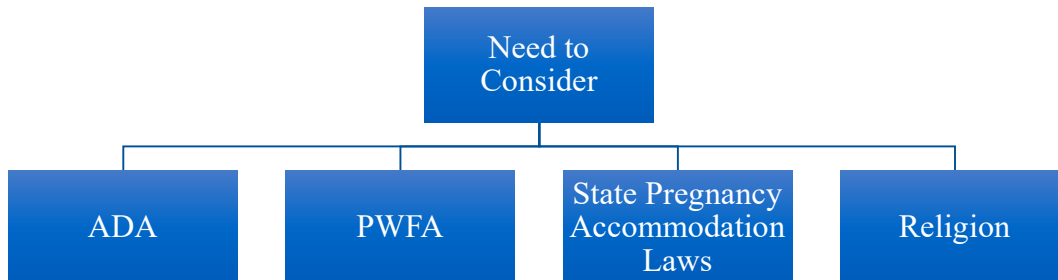
- Difficulties with onboarding and training remote employees
- Wage and hour compliance under the Fair Labor Standards Act (FLSA), including ensuring employees' hours are accurately tracked and compensated.
- Questions on whether remote work qualifies as a reasonable accommodation under the Americans with Disabilities Act (ADA).
- Less control over where a remote employee stores confidential information and trade secrets and other information security issues.
- Workplace health and safety issues, including recording and providing workers' compensation for on-the-job injuries and occupational illnesses.
- Potential discrimination claims if employers do not treat all employees' remote work requests the same.
- Determining which state and local laws apply when the employee and employer are located in different jurisdictions.
- General challenges associated with remotely managing employee performance and other aspects of the employment relationship, including productivity levels.

Which State Laws Apply?



- Access to personnel files
- Paystub information
- Predictive scheduling
- Protected characteristics
- Advance notice of pay changes requirements
- New hire notices and posters
- Wage-theft notice requirements
- Termination notice requirements
- Pay transparency requirements
- Paid sick leave
- Paid family medical leave
- All other forms of potential leaves of absence
- Harassment/discrimination mandatory employee/manager training
- Post-employment restrictive covenants (ex. non-competition restrictions)
- State/local taxes
- Background checks
- Ban the box laws
- Drug testing
- Minimum wage rate
- Minimum salary threshold for salaried exempt employees
- Different state exemption requirements for determining whether an employer is exempt from overtime
- Additional overtime requirements (daily overtime/Sunday overtime/7th day overtime, etc.)
- *De minimis* rule
- Garnishments
- Required meal and rest breaks
- Business expense reimbursement requirements
- Final pay requirement
- Required frequency of pay
- Privacy and data security mandates
- PTO/vacation forfeiture rules

How do I manage a request for a “remote work accommodation?”



How do I manage a request for a remote work accommodation?



- Case-by-case analysis at the time the request comes in more important than ever.
- Document the request and the interactive process.
- Past WFH was like a trial period.
- “In person” work as an essential function will be scrutinized.
- Job descriptions must be robust.
- Equal treatment important.
- Timely document performance issues.
- Courts largely focus on the nature of the work performed rather than an employer's preference for having workers at the physical workplace site

What should I do to ensure that employees' remote workspaces are safe?

OSHA

- The OSH Act applies to work performed by an employee in any workplace within the United States, including a workplace located in the employee's home.
- Employers are responsible for hazards caused by materials, equipment, or work processes the employer provides or requires to be used in an employee's home
- Employers must ensure that remote employees are aware of their obligation to report any work-related injuries and illness.
- OSHA reporting requirements still apply
 - illnesses and injuries that occur while an employee is working at home, including work in a home office, are considered work-related if the injury or illness both:
 - Occurs while the employee is performing work for pay or compensation in the home.
 - Is directly related to the performance of work rather than to the general home environment or setting.

What should I do to ensure that employees' remote workspaces are safe?

Workers' Compensation

Employees are generally eligible to receive workers' compensation for injuries or occupational illnesses that arise out of and in the course of employment.

- For remote employees, the question of what "arises out of and in the course of employment" can sometimes be unclear.

Remote Work Agreement should:

- Designate specific area of home to be deemed home office
- Establish specific working hours
- Require safe/ergonomic working environment
- Require immediate reporting of accidents/injuries
- Disclaim liability for injuries that occur outside of working hours or outside of the designated home office / third parties

Posting Requirements



- Many state and federal requirements to post information to employees
- Postings can be relied upon in defense of claims
- Need to be able to show employee has seen postings
- Consider including all postings on intranet or in separate handbook for remote workers; at minimum provide via email or mail in a manner that can be tracked and recorded

Tracking Time Worked



- Employers must compensate employees for all hours worked, including work not requested but allowed, and work performed at home – where the employer knows or has reason to believe the employee is working
 - Actual knowledge – employee’s regularly scheduled hours
 - Constructive knowledge – employee reports, off-hours communications or access to electronic devices, etc.
- Reasonable diligence – what the employer *should* have known not what it *could* have known
- Is occasional commuting time to the office compensable?

WFH Policy/Agreement Considerations



- Eligibility and suitability for remote work + types permitted (full-time, hybrid, etc.)
- Approval requirements
- Employee moving / relocation
- Working time / timekeeping
- Childcare/dependent arrangements
- Meal/rest breaks
- Confidentiality/security
- Internet access/power outages
- Working outside the U.S. / unauthorized locations
- Consider trial period
- Reporting work-related incidents
- Designated workspace with right to inspect during prearranged times
- Obligation to maintain safe workspace free from hazards
- Expense reimbursements
- Responsiveness
- Performance expectations
- Return to office protocol / termination of arrangement
- Reminding employees that they are expected to comply with all employer policies and remote work rules.

Best Practices



- Implement and distribute a remote work policy / agreement
- Understand when remote work may be a reasonable accommodation
- Make online employment applications ADA accessible
- Handle requests to work remotely consistently to minimize risk of discrimination claims
- Review federal/state laws governing the use of electronic signatures
- If management knows or has reason to believe an employee is performing work remotely, count it as time worked.
- Prohibit remote employees from performing any work at home that the employer does not want to be performed.
- Discipline employees for performing unauthorized or off-the-clock work but pay employees for all hours worked.
- Specify the employee's specific job duties, work area, work hours, and break times in the remote employee's job description, remote work agreement, or elsewhere to avoid liability for injuries that are not work-related at a remote employee's home.

Am I required to reimburse my remote employees for some or all expenses?

- **Federal law (FLSA):** In most cases any work-related expense incurred by an employee that would bring the employee's pay below the minimum wage (or cut into overtime pay) must be reimbursed

Expense reimbursement is a state specific issue.

Detailed written policies are more important than ever.

Consider the employee morale implications.

- **State Law:** Many states may mandate:

- Business expenses – CA, IL, IA, MT, NH, ND, SD,
- Travel or commute expenses – CT, D.C., MA, MN

Necessary remote work-related expenses may include:

- Cellphone
- Internet
- Printer
- Shredder
- Office Supplies

Remote Work Expenses

Cochran v. Schwan's Home Service, Inc.
228 Cal.App.4th 1137 (2014)

- California Court of Appeal found that the employer must pay “some reasonable percentage of the employee’s cell phone bill” if employee is **required** to use a **personal cell phone** for work, even if the employee does **not** incur any **extra** expense (e.g. they have an unlimited calling or data plan, or are on a plan paid by someone else)

Remote Work Expenses



- **Expenses to be reimbursed**

- Cell phone
- Internet
- Equipment
- Electricity; utilities (?)
- Use of space (?)

- **Methods of reimbursement**

- Actual expenses
- Stipend

Remote Work Stipends



- **Advantages of stipends**

- Easier to administer
- No need for employees to submit bills, receipts, etc.
- Predictable costs

- **Disadvantages of stipends**

- Might over- or under-reimburse
- May be taxable
- Risk of being treated as wages - and **included in regular rate** - if not reasonably tied to actual expenses (29 C.F.R. § 778.217)

Remote Work Time-Keeping



Must continue to be vigilant:

- Accurately recording time
- Off-the-clock work
 - Paying for actual time worked, not scheduled time
 - Overtime
 - Responding to emails, texts after hours
- Breaks
 - Enforcement
 - Auto-deductions
- Activity monitoring
 - E.g. keystroke monitoring

CLASS ACTIONS AND MASS ARBITRATION



Mitigating Risk Through Arbitration



Class Waivers

- US Supreme Court has found mandatory arbitration agreements and class/collective action waivers to be enforceable.
- Can help protect against risk of wage and hour claims.

Mass Arbitration

- Risk of dozens, hundreds, or even thousands of individual arbitrations being brought simultaneously.
- Modified arbitration rules may help protect against costs.

Mass Arbitration



- Numerous individual arbitration demands filed against a single party, with the same or coordinated representation.
- Plaintiff strategy in response class action waivers that leverages the cost of defense and arbitration fees against the defendant.
- Can involve dozens, hundreds, or thousands of individual claims.

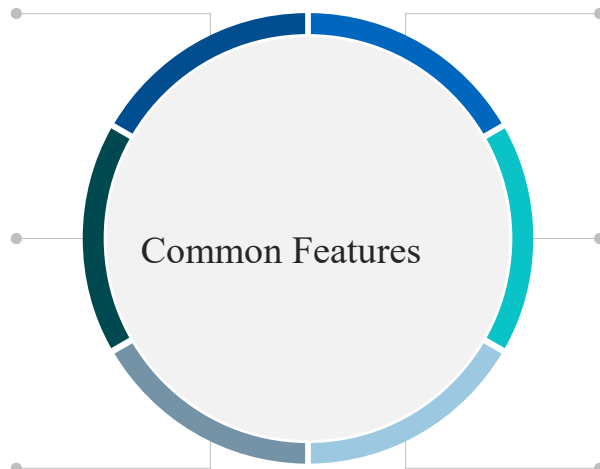
Mass Arbitration Protocols



JAMS, AAA, CPR, and others have mass arbitration protocols

Reduced fee schedules

Streamlined/coordinated procedures across cases



Bellwether or MDL-type procedures

Process arbitrators for deciding procedural issues (e.g. if cases all within mass arbitration)

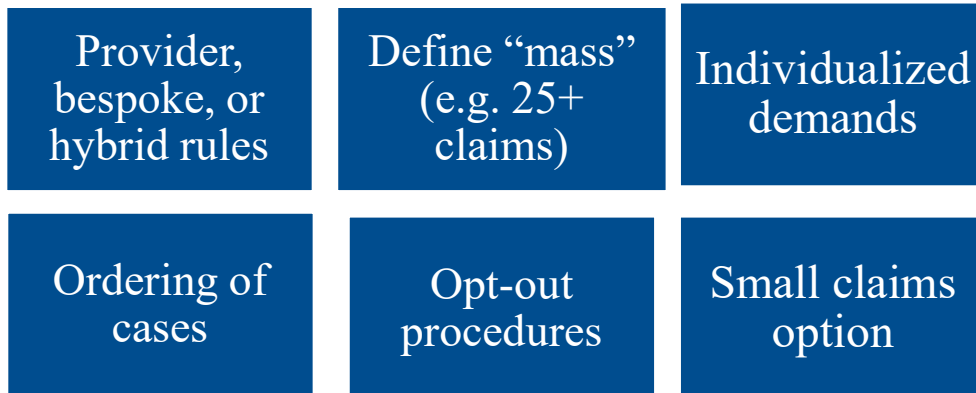
Global mediation process

Key Mass Arbitration Cases



- **McGrath v. DoorDash, Inc.**, 2020 WL 6526129 (N.D. Cal. Nov. 5, 2020) – Upheld CPR Mass-Claims Protocol in case involving 4,000 workers.
- **MacClelland v. Celco P’ship**, 609 F. Supp. 3d 1024 (N.D. Cal. 2022) – Mass arbitration provisions unconscionable where they required claims be arbitrated in batches of 10, and additional claims could not be filed until existing batch resolved; could take 156 years to resolve claims for 2,712 consumers, and claims would be time-barred.
- **Pandolfi v. AviaGames, Inc.**, 2024 WL 4051754 (N.D. Cal. Sept. 4, 2024) – Bellwether procedure allowing for arbitration of 20 claims at a time unconscionable because of unacceptable delay; also unconscionable because it applied to “coordinated” representation.
- **Ruiz v. CarMax Auto Superstores, Inc.**, 2024 WL 1136332 (C.D. Cal. Jan. 18, 2024) - Batching provision, with claims arbitrated in groups of 10, not unconscionable because it did not restrict the number of claims that could be filed at one time, and it provided for the tolling of statutes of limitations.
- **Heckman v. Live Nation Ent., Inc.**, 120 F.4th 670 (9th Cir. 2024) – Found New Era Mass Arbitration Rules unconscionable based on, among other things, (1) bellwether decisions binding on all claimants, (2) batching procedures, (3) lack of discovery, and (3) limitations on evidence and briefing.

Mass Arbitration Drafting Considerations



CA Private Attorneys General Act (PAGA)



- ***Viking River Cruises, Inc. v. Moriana***, 596 U.S. 639 (2022) - PAGA claims are divisible between individual and representative claims and individual PAGA claims can be compelled to arbitration.
- ***Adolph v. Uber Technologies, Inc.***, 14 Cal.5th 1104 (2023) - Arbitration of individual PAGA claims does not strip plaintiff’s standing to pursue representative PAGA claims; suggested, but did not require, that representative PAGA claims be stayed in court pending individual arbitration.
- Split of authority over “headless” PAGA claims as way to circumvent arbitration.

ACCOMMODATIONS



Religious Accommodations

Religious Protections Under Title VII of the Civil Rights Act of 1964



- Prohibit discrimination on the basis of membership in a protected class, including religion
- Applies to employers, employment agencies, and unions
- Specifically defined “religious organizations” and “religious educational institutions” are exempt from certain religious discrimination provisions
 - The ministerial exception bars EEO claims by employees of religious institutions who “perform vital religious duties at the core mission of the religious institution.”

What is “religion” under Title VII?



- Defined broadly in Title VII as “all aspects of religious observance and practice as well as belief”
- Does not need to be part of a formal church or sect
- Title VII requires employers to accommodate religious beliefs that are “sincerely held”



What is a sincerely held belief?



- Courts will generally not inquire into the sincerity of one's belief
- The sincerity of an employee's religious belief is generally presumed or easily established
- Employers should assume that an employee's request for a religious accommodation is based on a sincerely held belief
- Employers may ask employee to provide supporting documentation if there is an "objective basis for questioning sincerity."



Groff v. DeJoy, 143 S.Ct. 2279 (2023)



- Evangelical Christian U.S. Postal Worker refused to work on Sundays due to his religious beliefs
- Groff did not initially have to work Sundays when hired in 2012, but eventually USPS began delivering on Sundays for Amazon
- USPS scheduled Groff on Sundays but sought volunteers to cover his shifts or redistributed to other carriers
- Groff received progressive discipline for refusing to work on Sundays and ultimately resigned



Groff v. DeJoy



- Groff filed suit, claiming USPS failed to accommodate his religious beliefs
- The district court and Third Circuit found that Groff’s accommodation would pose an undue hardship on USPS
 - Focused on increased burden to coworkers
- The U.S. Supreme Court reversed the decision, modifying the previous undue hardship standard
 - The 1977 decision *Trans World Airline Inc. v. Hardison* created the previous standard, stating that an undue hardship for employers is anything more than a de minimis burden
- Now, an employer denying a religious accommodation must show that the burden of granting the accommodation would result in substantial increased cost in relation to the conduct of its particular business.

Requesting Supporting Documentation



- Must have “objective basis for questioning sincerity”
- Examples:
 - In the context of a COVID-19 vaccination exemption request, if the employee has received, and reported receiving, the yearly flu vaccine before with no objections.
 - In the context of trying to receive an accommodation of a shift change, an employee has been boastful to his colleagues that he is going to lie about being religious to get an exemption.
- Supporting documentation need not be in a particular form
 - Statement from a religious leader, etc.

What is a religious accommodation?



- An adjustment to the work environment that will allow the employee to comply with their religious beliefs
- Accommodation requests often relate to work schedules, dress and grooming, or religious expression or practice while at work
- Examples of religious accommodation requests:
 - Christian pharmacy employee wishes to be excused from filling birth control prescriptions
 - Pentecostal woman seeks exemption from dress code to wear skirts
 - Muslim employee requests breaks to permit daily prayers at prescribed times

Religious Accommodations



- Reasonable requests for accommodation must be granted absent undue hardship to the employer
- A “reasonable accommodation” is one that eliminates the conflict between an employment requirement and a religious practice
- “Reasonable accommodation” does not mean that the employee must be satisfied with the accommodation



Undue Hardship



- Employers must make a reasonable accommodation unless it would create an undue hardship
- Remember, new standard from SCOTUS:
 - Showing more than a “de minimis” cost does not suffice to establish undue hardship
 - The burden of accommodation must be substantial in the “overall context of the employer’s business.”
- “Undue hardship” is not the same as the ADA reasonable accommodation defense of “undue burden”
- Possible examples of undue hardship:
 - Violating a seniority system
 - Causing a lack of necessary staffing
 - Jeopardizing security or health

ADA Disability Accommodations

Americans with Disabilities Act, 42 U.S.C. §12101, et seq., as amended by the ADA Amendments Act of 2008 (ADA);
29 CFR Part 1630.

ADA - Disability



To whom does the ADA apply?

- **Individuals with a physical or mental impairment which substantially limits one or more major life activities**
- A record of an impairment
- *Regarded as* having an impairment
- Associational disability

ADA - Disability



What is the standard?

ADA requires “reasonable accommodation” of “qualified” individuals unless doing so poses an “undue hardship.”



ADA - Disability



What does “reasonable accommodation” mean?

- Depends on the facts/circumstances
- Consider various factors, such as:
 - position
 - job duties
 - work environment

ADA - Disability



What is not considered a “reasonable accommodation”?

- Creating a new job
- Granting indefinite leave
- Removing an essential function*



ADA - Disability



What does “qualified” mean?

- Can the person perform the duties of the job they hold or desire, with or without reasonable accommodation
- Consider: Do they have the experience? The education? The ability?

ADA - Disability



What is an “undue hardship”?

- Action requiring significant difficulty or expense
- Consider:
 - Building a new wing of your Hospital
 - \$200 noise cancelling headphones

- PWFA

Pregnancy Accommodations

Pregnant Workers Fairness Act 42 U.S.C. 2000gg-3(a); 29 CFR Part 1636.

PWFA - Pregnancy



Historically, what laws covered pregnancy-related medical conditions?

- ADA - not pregnancy itself
- Pregnancy Discrimination Act – comparison law
- FMLA – leave and job protection

PWFA - Pregnancy



To whom does the PWFA apply?

- People who are/want to be pregnant
- People who were recently pregnant (miscarriage, abortion, postpartum)



PWFA - Pregnancy



What limitations are covered?

Physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or a related medical condition

Examples:

Fertility treatments (e.g. IVF)

Conditions during pregnancy – urination, gestational diabetes

Lactation

PWFA - Pregnancy



What limitations are covered? (Cont.)

The pregnancy/childbirth/related condition need not be the sole, original, or substantial cause of the condition for which accommodation is requested



PWFA - Pregnancy



What is the standard?

PWFA requires a **reasonable accommodation** for a qualified individual's known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless doing so would cause an **undue hardship**

PWFA - Pregnancy



What does reasonable accommodation mean?

The inability to perform work without accommodation is inherently temporary for pregnancy.

Per EEOC, 2 categories of accommodation requests:

- “Virtually all cases”
- Other cases

PWFA - Pregnancy



What is considered reasonable in “virtually all” cases?

1. Carry/keep water and drink as needed
2. Water/food breaks as needed
3. Restroom breaks as needed
4. Sit/stand as needed



PWFA - Pregnancy



What might also be considered reasonable?

Individualized analysis needed



PWFA - Pregnancy



What if the employee cannot perform an essential function?

- *Unlike the ADA*, an employee is considered qualified even if they cannot perform one or more essential functions of the job temporarily.
- Consider temporary suspension of an essential function where that function can be resumed **in the near future**.

PWFA - Pregnancy



What else should I know about accommodations under the PWFA?

- Cannot require leave (paid or unpaid) if another reasonable accommodation can be provided
- No interference
- Undue delay could amount to denial

PWFA - Pregnancy



What is an undue hardship?

- Same as under ADA
- Action requiring significant difficulty or expense



NLRB RISKS



Major NLRB Issues



- Administration has removed (arguably) the GC and other Board Members
- This is currently under active litigation and SCOTUS has stayed orders mandating reinstatement (Trump v. Wilcox)
- Two out of five positions on the Board are filled (meaning there is no quorum)
 - Unprecedented termination of a member, but not unprecedented to be without a quorum
- Expect the unexpected but certainly a new GC will rescind actions by the former GC (Jennifer Abruzzo)

QUESTIONS?



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