

## Accommodations Galore! Employer's Guide to Understanding Obligations to Accommodate Religion, Pregnancy and Disability



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## *Groff v. DeJoy* - New Standard for Religious Accommodation Requests

- Background:
  - Title VII requires employers to make reasonable accommodations for religious needs of employees so long as doing so does not cause undue hardship on conduct of employer's business
  - Since 1977, "undue hardship" has been often construed to mean anything more than a "*de minimus cost*"
  - NO MORE...

## New undue hardship standard

- *Groff*:
  - Rejects *de minimus* standard saying that it was taken out of context from a single line in the 1977 case and that subsequent courts ignored other language regarding “substantial” costs
  - “[U]ndue hardship is shown when a burden is substantial in the overall context of the employer’s business”
  - Clarified that Title VII requires an employer to show that the burden of religious accommodation would result in **“substantial increased costs in relation to the conduct of its particular business”**

## “Substantial increased costs”

- Fact-specific, case by case inquiry
- All relevant factors must be considered:
  - Particular accommodations requested
  - Practical impact in light of employer’s:
    - Nature
    - Size
    - Operating cost

## “Substantial increased costs”

- No undue hardship imposed by:
  - Infrequent/temporary costs of premium wages for substitutes
  - Voluntary shift swapping
  - Occasional shift swapping
  - Administrative costs involved in reworking schedules
  - Employee animosity

## What does it mean?

- Time will tell...
- NOT the ADA undue hardship standard (significant difficulty and expense), but also not literally *de minimus*
- Focus should be on the ***impact to the business***
  - Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business
  - Bias/hostility to a religious practice or accommodation CANNOT be considered “undue”

## What to do now?

- Review policies and procedures and update language as needed to delete any “*de minimus*” language
- Consider whether pending/recently denied requests are defensible under new standard
- Prepare for increase in requests and train HR and management
- Consider whether DEI initiatives take religious differences into account

## Common Religious Accommodations

- Vaccine mandate exemptions
- Schedule changes
- Voluntary shift substitutions/swaps
- Lateral transfers or changes in tasks
- Modifying practices/policies (dress, grooming, use of facilities)
- Permitting prayer/religious expression

## Requests for Religious Accommodation

- Employee responsibilities
  - Give notice of conflict between religion and work
  - Discuss request/provide documentation
- Employer responsibilities
  - Consider request by engaging in interactive process
  - Provide reasonable accommodation (unless it would cause undue hardship)

## Recognizing and Handling Requests

- No “magic words” required from employee
- Supervisors should involve HR immediately
- Process:
  - Discuss conflict with employee
  - Consider employee’s requested accommodation
  - Consider alternative reasonable accommodations (if necessary)
  - Provide reasonable accommodation (unless it would cause undue hardship under new standard)
- Do not retaliate

## Pregnant Workers Fairness Act (PWFA)

- Effective June 27, 2023
- Applies to public/private employers of 15 or more employees, federal agencies, unions and employment agencies
- Covers gap in federal law for pregnant and postpartum employees and applicants seeking accommodations
  - Before, under then-existing law, to receive accommodation they had to have a disability related to pregnancy or identify similarly situated employees with accommodations
- Deals only with accommodations (other laws cover discrimination against workers on basis of pregnancy, childbirth and related conditions)

## PWFA - resources

- The law: <https://www.eeoc.gov/statutes/pregnant-workers-fairness-act>
- Proposed regulations published August 11, 2023:
  - <https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act>
- Final regulations expected late December 2023
- For EEOC guidance, see <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>

## PWFA - prohibits employers from...

- Failing to make reasonable accommodation to the known limitations related to pregnancy, childbirth or related medical condition of a qualified employee, absent undue hardship on operation of business
- Requiring employee to accept an accommodation other than any reasonable accommodation arrived at through the interactive process

## PWFA - prohibits employers from...

- Denying employment opportunities because of the need to make reasonable accommodations
- Requiring employee to take paid or unpaid leave if another reasonable accommodation can be provided (LEAVE IS A LAST RESORT)
- Taking adverse action because of a request for or use of reasonable accommodation

## PWFA - prohibits employers from...

- Retaliating against applicant or employee for reporting/opposing unlawful discrimination under PWFA, filing charge, etc.
- Interfering with rights under PWFA

## PWFA - key concepts

- “Reasonable accommodation” - same as ADA
- “Undue hardship” - generally same as ADA, but proposed rule adds additional factors to analysis
- “Interactive process” - same as ADA
- BUT, others vary from ADA...



## PWFA - “Known Limitation”

- Physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth or related medical conditions that the employee (or representative) has communicated to the employer *whether or not such condition meets the ADA definition of disability*

## PWFA - “Known Limitation”

- PWFA intended to cover healthy/uncomplicated pregnancies
- Unlike ADA, employee need not show that limitation meets a specific severity level to be covered
- “Physical or mental condition” may be modest, minor and/or episodic
- EEOC: employers may request additional information sometimes, but not always; should not usually be necessary

## PWFA - “related medical conditions”

- Miscarriage, stillbirth or abortion; infertility; fertility treatment; lactation and conditions related to lactation; use of 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; hormone level changes; and others.
- Also may include conditions not unique to pregnancy/birth, but related to or exacerbated by pregnancy/birth (such as migraines, nausea/vomiting, high BP, incontinence and more)

## PWFA - “Qualified Employee”

- Employee/applicant who, with or without reasonable accommodation, can perform the essential functions of the position
- However, still considered qualified if:
  - Inability to perform essential function is for a temporary period
  - Essential function could be performed in the near future (proposed rule: 40 weeks per request), and
  - Inability to perform essential function can be reasonably accommodated

## PWFA - “Qualified Employee”

- Unlike ADA, employee can still be a “qualified employee” and entitled to reasonable accommodation even if they are temporarily unable to perform the essential functions of the position
  - ADA requires accommodation only to extent employee can perform essential functions of position

## PWFA - typical accommodations

- Ability to sit/drink water
- Closer parking
- Flexible hours, scheduling changes
- Appropriately sized uniforms/apparel
- Additional break time for bathroom, eating, rest
- Leave/time off to recover from childbirth
- Temporary suspension of one or more essential functions

## PWFA - typical accommodations

- Excusal from strenuous activities
- Excusal from activities that involve exposure to compounds not safe for pregnancy
- Light duty
- Modifying work environment for accessibility
- Acquiring/modifying equipment/devices
- Adjusting/modifying exams/policies

## PWFA - not undue hardship...

- Well, typically, and per proposed rule
- “Predictable assessments” (for which no documentation should be requested)
  - Allowing an employee to carry water and drink, as needed, in work area
  - Allowing an employee extra restroom breaks
  - Allowing an employee whose work requires standing to sit and whose work requires sitting to stand
  - Allowing breaks as needed to eat and drink

## PWFA - requesting accommodation

- Per proposed rule:
  - Request does not need to be in writing
  - Request does not need to include any specific words or phrases
  - Request may be made in conversation or other form of communication

## Other laws still apply

- Title VII
  - Protects against discrimination based on pregnancy, childbirth and related medical conditions
  - Requires employers to treat affected workers the same as other workers similar in their ability or inability to work

## Other laws apply

- ADA
  - Protects from discrimination based on disability
  - Requires reasonable accommodation unless undue hardship
  - Pregnancy itself is NOT a disability under ADA, but some pregnancy-related conditions may be disabilities

## Other laws apply

- FMLA
  - Provides covered employees with unpaid, job-protected leave
- PUMP Act
  - Broadens workplace protection for employees who express breast milk
- State/local laws - be sure to check!
  - NC - one of very few states with no statewide laws prohibiting pregnancy discrimination or requiring pregnancy accommodations

## PWFA - what to do now?

- Review/update accommodation policies/processes
- Train HR personnel involved in accommodation process
- Revisit “essential functions” of jobs - can they be restructured/revised on temporary basis if needed?
- Think about types of light duty tasks that may be offered to pregnant employees who request accommodation

## Accommodations for COVID/Long COVID

- EEOC: end of public health emergency does not mean employers can automatically terminate reasonable accommodations that were provided due to pandemic-related circumstances
- Employers may evaluate accommodations made during that time and, in consultation with employee, assess whether there continues to be a need for accommodation
  - May include request for documentation regarding ongoing need and possible alternatives

## Accommodations for COVID/Long COVID

- Long COVID may be disability under ADA
- Examples of possible accommodations for employees with Long COVID:
  - Quiet workspace, use of noise cancelling devices and uninterrupted work time for brain fog
  - Alternative lighting and reducing glare for headaches
  - Rest breaks for joint pain/shortness of breath
  - Flexible schedule or telework for fatigue
  - Removal of “marginal functions” that involve exertion

## Accommodations for COVID/Long COVID

See EEOC’s Update to Covid-19 Technical Assistance (May 15, 2023):

<https://www.eeoc.gov/newsroom/eeoc-releases-update-covid-19-technical-assistance>





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