2022 Federal Employment Law Updates

SEAN M. MCGIVERN

Sean M. McGivern is with Graybill & Hazlewood, LLC and represents employees in state courts and federal courts on issues ranging from wage and hour, illegal terminations, FMLA, ADA, restrictive covenants, to whistleblower matters. Additionally, Sean regularly practices before the U.S. Department of Labor Office of Administrative Law Judges, a federal administrative court that adjudicates whistleblower retaliation claims in the transportation, financial, and consumer product sectors. Sean is a KTLA Eagle Advocate.

2022 brought exciting developments to the realm of federal employment law. We saw breakthrough legislation concerning the rights of pregnant employees. Second, Congress decided that employees who are the victims of sexual assault and sexual harassment should not be bound by predispute confidentiality, nondisparagement, arbitration, and class waiver agreements. Last, the U.S. Equal Employment Opportunity Commission addressed the new issue of artificial intelligence and its potential impact on workers with disabilities.

New Law: The Pregnant Workers Fairness Act

In December 2022, President Biden signed the Pregnancy Workers Fairness Act ("PWFA") and the Providing Urgent Maternal Protections for Nursing Mothers Act (the "PUMP Act") into law. These laws were part of the budget bill passed at the end of 2022. PWFA and the PUMP Act help to close certain narrow loopholes in the existing laws barring discrimination against pregnant women, specifically the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). The latter statute expands the definition of "because of sex" or "on the basis of sex" under Title VII of the Civil Rights Act of 1964, 2000e et seq., by including pregnancy, childbirth, and related medical conditions into the definition, 42 U.S.C. § 2000e(k). Further, the PDA states "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work…." *Id.*

In the past, a pregnant woman was entitled to accommodations under the ADA only where she could show she qualified as having a "disability" under the ADA. Many courts had held that pregnancy, alone, did not qualify as a disability. For example, in *Wiseman v. Wal-Mart Stores*, Inc., No. 08-1244, 2009 WL 10706901 (D. Kan. July 23, 2009), the plaintiff was fired for carrying a water bottle while working on the floor at Walmart. She provided doctor's notes to her employer making this point, but Walmart refused to accommodate her. Walmart fired the plaintiff for insubordination after she continued carrying the water bottle on the store floor.

The Court sided with Walmart because the Pregnancy Discrimination Act (which makes it unlawful to discriminate on the basis of pregnancy, as a form of sex discrimination), does not require that reasonable accommodations be provided to pregnant workers. 2009 WL 10706901, at *4. "Pregnancy … is not a disability within the meaning of the ADA," the Court stated. *Id.* "Plaintiff would not be entitled to reasonable accommodations for a disability under the ADA if she is not disabled as defined by the ADA." *Id.*

Accommodations under PDA may be available under PDA's "equal treatment" provision. 42 U.S.C. § 2000e(k). In *Young v. United Parcel Service*, *Inc.*, the Supreme Court clarified that the plaintiff in a PDA action can create a genuine issue of material fact as to whether an employer's policies impose a significant burden on pregnant employees by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. 575 U.S. 206 (2005). Stated another way, the PDA only requires accommodations to pregnant workers when a large percentage of nonpregnant workers are accommodated for restrictions.

The PWFA, which takes effect June 29, 2023, directly addresses these issues. PWFA requires employers to make reasonable accommodations to pregnant employees – without regard to whether they can establish a "disability" under the ADA. PWFA, H.R. 1065, § 2(1). The limitation on this duty to provide reasonable accommodations is that an employer need not make accommodations that would impose an "undue hardship" on the employer.[1] *Id.* Thus, a pregnant employee may obtain accommodations based upon her own situation and not by reference to accommodations provided to a large majority of nonpregnant employees.

PWFA expressly requires employers to engage in an interactive process with pregnant employees who seek accommodations; and employers cannot simply impose an accommodation on pregnant employees without engaging in a good-faith dialogue over the issue. PWFA, H.R. 1065, § 2(2). Reasonable accommodations for pregnant employees may include additional bathroom or water breaks, rearrangement of work tasks, relief from heavy lifting or dangerous tasks, and changes to work schedules.

Significantly, PWFA prohibits employers from requiring a pregnant employee "to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee." PWFA, H.R. 1065, § 2(4). This prohibition addresses a very common situation where employers place pregnant employees on unpaid leave until after they have delivered their child, often long after an employee can afford to be out of work. Instead, employers now must have real discussion with pregnant employees about temporary accommodations.

PWFA also prohibits retaliation against individuals who exercise rights under the act. PWFA, H.R. 1065, § 2(5). Aggrieved employees may pursue their rights just as in a Title VII or ADA action, where there is a 15-employee minimum for coverage, and individuals must first exhaust remedies with the U.S. Equal Employment Opportunity Commission before filing in court. PWFA, H.R. 1065, § 3(a). Employees must therefore file a charge with EEOC within 300 days of any alleged discriminatory or retaliatory practice to protect their rights.

New Law: The PUMP Act

The PUMP Act creates Section 218D of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., to provide an employee with reasonable break time to express breast milk for the employee's nursing child for one year after the child's birth, in a private place at work other than a restroom. Prior to the PUMP Act, only employees exempt from the FLSA's overtime requirements could take time to express milk during the workday. 29 U.S.C. § 207(r). Now, employees who are salaried may have the same right. The PUMP Act does not require the breaks to express to be compensated.

Because the PUMP Act is dependent upon the FLSA, it only applies to employers engaged in interstate commerce with an annual gross income exceeding $500,000 and there is no minimum number of employees required for FLSA coverage. 29 U.S.C. § 203(s). Employers with fewer than 50 employees may assert an undue hardship defense to liability, as with the PWFA.

New Law: Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

On March 3, 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (H.R. 4445). The law amends the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and renders unenforceable, at the claimant's option, predispute arbitration agreements and joint-action waivers regarding sexual assault and sexual harassment disputes. 9 U.S.C. §§ 401, 402. Further, the law requires a court, and not an arbitrator, to decide whether the dispute relates to a sexual assault or a sexual harassment dispute. 9 U.S.C. § 402(b); *cf. Torgerson v. LCC Int'l, Inc.*, 227 F. Supp. 3d 1224, 1231 (D. Kan. 2017) (arbitrability is generally an issue for the arbitrator to decide).

New Law: The Speak Out Act

On Dec. 7, 2022, President Biden signed the Speak Out Act (S. 4524) into law. The key provision of this act provides: "With respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal, or State law." S. 4524, § 3(a).

This law was unfortunately necessary because many employers – large and small – now require employees and putative independent contractors to sign ridiculous confidentiality agreements that limit what can be said about their employers. During internal workplace investigations, some deceptive lawyers and investigators insinuate to employees that they cannot discuss the subject matter of their sexual harassment

complaint with anyone else, by pointing to such overbroad confidentiality agreements. This author's only criticism of the Speak Out Act is that it does not provide any penalties or enforcement mechanisms.

Agency Guidance: AI and Discrimination

The U.S. Equal Employment Opportunity Commission (EEOC) has launched an initiative to ensure that artificial intelligence (AI) and other emerging tools used in hiring and other employment decisions comply with federal civil rights laws. As a part of that initiative, the EEOC issued a guidance document on the subject entitled "The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees."[2] At its core, this guidance emphasizes that employers must ensure that the automated AI tools they use comply with federal employment laws. This guidance signals that the EEOC will not be very receptive to an employer's defense of its actions where the employer has relied on automated AI tools and cannot demonstrate due diligence about legal compliance.

The EEOC provided this guidance specific to disability discrimination because it is the most difficult type of discrimination for AI tools to avoid. Vendors who provide AI services related to employment are able to eliminate discrimination on the basis of sex, race or religion, for example, by eliminating all together any references to such categories. Disability discrimination and reasonable accommodations are different in that it is always important to inquire how an applicant would perform the essential job duties. Putting "blinders" on the subject simply does not work and would violate the duty to examine possible accommodations. Thus, employers must exercise particular care to ensure applicants with disabilities are not being unfairly disadvantaged by the use of AI.

Conclusion

As technology and society evolve, so does the law. 2022 congressional action bridged the gap for pregnant workers. Further, new statutes protect victims of sexual assault and harassment by allowing them to go public with their claims and to pursue those claims in court. In 2023, we hope to see additional legislation to help provide workplaces free of discrimination for all workers.

---

1 Undue hardship is an affirmative defense to liability in an ADA failure-to-accommodate case. *Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F.3d 784, 822 (10th Cir. 2020). In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—(i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. 42 U.S.C. § 12111(10)(B).

2 Available at https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence