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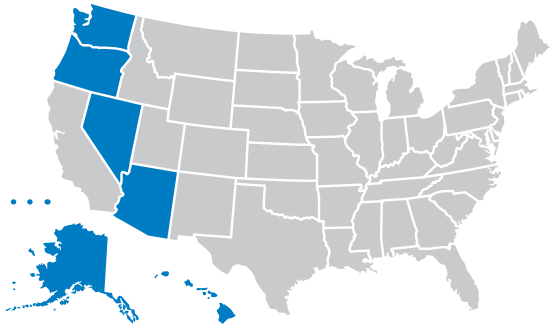

REGULATIONS

EEOC issues draft regulations on Pregnant Workers Fairness Act

AK | AZ | HI | NV | OR | WA

by Angela Vogel, Meg A. Burnham, and Arielle Spinner, Davis Wright Tremaine LLP

Employers should take note: The Equal Employment Opportunity Commission (EEOC) unveiled draft regulations and guidance on the new federal Pregnant Workers Fairness Act (PWFA), and there are numerous noteworthy inclusions you may wish to weigh in on. The draft regulations and guidance were published on August 11, 2023, and employers will have 60 days to submit comments to the EEOC for consideration.

Intro to the PWFA

While the new PWFA doesn't replace the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, the Family and Medical Leave Act (FMLA), or state and local laws that may provide protections for pregnant employees, it does apply to employers throughout the country and has an expanded coverage of qualifying employees with pregnancy- and childbirth-related limitations.

In addition, the draft regulations and guidance appear to expand protections even further, providing broad coverage for pre- and postpartum conditions and explicitly allowing the temporary suspension of essential functions as a reasonable accommodation if the employees may be able to perform essential functions "in the near future," which is currently defined as a 40-week period.

The draft regulations also set forth an extensive framework for evaluating reasonable accommodations and undue hardship that appears to diverge from the established accommodation framework under current federal and state laws. Below is an overview of the PWFA draft regulations and guidance, as well as key takeaways for employers.

The gap the PWFA is trying to fill

On June 27, 2023, the PWFA went into effect. The Act, which received bipartisan support in the House and the Senate, responds to the gaps in reasonable accommodation access for pregnant and nursing workers under existing federal laws, including the ADA, Title VII, and FMLA.

For example, pregnancy generally hasn't been covered by the ADA because of its temporary nature. And while the FMLA provides leave for employees who are eligible, it doesn't contemplate any other accommodations. This is where the PWFA comes in. It requires private and public sector employers with at least 15 employees to provide reasonable accommodations to an employee's known limitations resulting from pregnancy, childbirth, or related medical conditions, unless the accommodation will impose an undue hardship on the employer.

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- **Elizabeth (Liz) Hodes,** Davis Wright Tremaine LLP, Anchorage
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- **Jodi R. Bohr,** Tiffany & Bosco, P.A., Phoenix

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- **David F.E. Banks,** Cades Schutte LLP, Honolulu
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- **Emily A. Bushaw,** Perkins Coie LLP, Seattle

The PWFA also prohibits employers from denying job and employment opportunities to qualified employees and applicants, requires them to engage in the interactive process, and prohibits them from taking adverse action or retaliating because employees have requested accommodations or opposed unlawful practices.

In addition, the PWFA requires that leave be provided as an accommodation only if there are no other options available that would allow employees to keep working. By providing broader access to reasonable accommodations, the PWFA helps pregnant and nursing workers continue to participate in the workforce without having to sacrifice their and their children's health and safety.

Broad coverage for known limitations

One of the main differences between the PWFA and the ADA is that the new law provides broad coverage for "known limitations" that don't necessarily rise to the level of a "disability" under the ADA.

The PWFA defines "known limitations" as physical or mental conditions related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that have been communicated to the employer. The EEOC's draft regulations provide additional operative definitions, including:

- "Known" means that the employee or applicant, or a representative of the employee or applicant, has communicated the limitation to the employer.

- "Limitation" means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The limitation may be modest, minor, and/or episodic and broadly includes health care for issues related to pregnancy, childbirth, or related medical conditions, including maintaining the health of an employee or applicant or their pregnancy. Notably, the draft regulations clarify that the standard for whether a worker has a "known limitation" will be construed broadly to the maximum extent permitted by the Act.

- "Pregnancy" and "childbirth" are also defined broadly and include, but are not limited to, current pregnancy, past pregnancy, potential/intended pregnancy, labor, and childbirth (including vaginal and cesarean delivery).

- "Related medical conditions" are also defined broadly and include conditions that relate to, are affected by, or arise out of pregnancy or childbirth. The draft regulations set forth an extensive list, including termination of pregnancy; infertility and fertility treatment; anxiety, depression, psychosis, or postpartum depression; menstrual cycles; use of birth control; and lactation and conditions related to lactation. "Related medical conditions" also include conditions that existed before pregnancy or childbirth but that may be or have been exacerbated by pregnancy or childbirth.

Who qualifies and for how long?

The PWFA extends protections to "qualified employees" who, with or without reasonable accommodation, can perform essential job functions. In addition, employees and applicants who can't perform essential job functions may also be qualified if the inability to perform the function is for a "temporary period" and the essential function can be resumed "in the near future."

In addition, the draft regulations set forth a separate analysis to determine whether an individual who can't perform essential functions is qualified, including:

- Whether the inability to perform the essential functions is for a temporary period—where "temporary" means "lasting for limited time, not permanent, and may extend beyond 'in the near future'";
- The essential functions could be performed in the near future—where "in the near future" means "the ability to perform the function will generally resume within [40] weeks of its suspension"; and
- The employee can be reasonably accommodated.

The draft regulations note that this could be accomplished with the temporary suspension of essential functions, including reassignment of duties, a temporary transfer, or participation in a modified light-duty program.

Significantly, the EEOC's draft guidance indicates the determination of "in the near future" would need to be made each time an employee requests an accommodation related to the suspension of an essential function and that the period could be considerably longer than 40 weeks.

The EEOC is seeking comments on the defined period of "in the near future," including whether a one-year period should be implemented and whether the periods of suspension of temporary functions during pregnancy and post-pregnancy should be combined.

Evaluating undue hardship

The draft regulations also provide a two-tiered framework for evaluating undue hardship, including a secondary test if a qualified employee requests the suspension of one or more essential functions.

First, the draft regulations include a list of factors to consider when determining whether an accommodation would impose an "undue hardship" for an employer. These factors include:

- The nature and cost of the accommodation;
- The financial resources of the facility involved in providing the reasonable accommodation;
- The size of the business with respect to the number of its employees and the number, type, and location of its facilities;
- The employer's operations, including the composition, structure, and functions of the workforce; and
- The impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Second, if a qualified employee requests the suspension of one or more essential functions, the employer must consider additional factors in determining whether the accommodation imposes undue hardship, including:

- The length of time the employee or applicant will be unable to perform the essential function;
- Whether there is work for the employee or applicant to accomplish;
- The nature of the essential function, including its frequency;
- Whether the employer has provided other employees or applicants in similar positions who are unable to perform their essential functions with temporary suspensions of essential functions;
- If necessary, whether there are other employees, temporary employees, or third parties who can perform or be hired to perform the essential function; and
- Whether the essential function can be postponed or remain unperformed for any length of time and, if so, for how long.

Notably, while employers are expected to conduct an individualized assessment of each accommodation request—i.e., assess each potential accommodation on a case-by-case basis—the draft regulations also include a list of accommodations that should virtually always be considered reasonable and not to impose an undue hardship, including allowing an employee or applicant to:

- Carry water and drink as needed during the workday;
- Take breaks as needed to eat, drink, and use the restroom; and
- Sit if their work requires standing or stand if their work requires sitting.

Road map for the interactive process

The draft regulations confirm that once an employer learns or becomes aware of an employee's "known limitation," it must take affirmative steps to respond. If the "known limitation" can be easily accommodated, the employer should provide the accommodation as soon as possible. If there are any questions about the "known limitation," or if the employer or the employee wants to explore potential reasonable accommodations, they should promptly engage in the interactive process.

Like the ADA, the PWFA's interactive process is an informal conversation between the employer and the worker about the scope of the limitation and potential accommodations. It also provides the following suggested steps for employers to take in the interactive process:

- **Step 1:** Analyze the job's purpose and essential functions.
- **Step 2:** Consult with the employee to determine what kind of accommodation is necessary given the known limitation.
- **Step 3:** In consultation with the employee, identify potential accommodations and assess the effectiveness each would have in enabling the employee to perform the essential functions. If the limitation means they're temporarily unable to perform one or more essential functions, the parties must also consider whether suspending the function's performance may be a part of the reasonable accommodation.
- **Step 4:** Consider the employee's reasonable accommodation preference, and implement the accommodation that is most appropriate for both the employee and the employer.

In addition to the steps outlined above, the draft regulations note employers are permitted to seek medical documentation so long as the request is "reasonable." Importantly, if a request for supporting documentation is determined to be unreasonable, the employer can't defend against a failure-to-accommodate claim based on the lack of documentation provided by the worker.

Cutting-Edge HR

Report says Gen X retirement savings look bleak. The National Institute on Retirement Security (NIRS) released a report in July showing an alarming retirement outlook for Generation X, the first generation to enter the labor market after the shift from defined benefit pension plans to 401(k)-style defined contribution accounts. When looking at median retirement savings levels for Generation X, the bottom half of earners have only a few thousand dollars saved for retirement, and the typical household has just $40,000 in retirement savings. Retirement savings for Gen X are highly concentrated among the highest earners, while black and Hispanic workers have substantially lower savings and access to retirement plans than white workers, according to the report titled "The Forgotten Generation: Generation X Approaches Retirement." The report examines a range of metrics for assessing retirement preparedness and assesses current rates of plan coverage, coverage by industry, and retirement account balances.

Survey finds a quarter of employers suffering a skills gap and more are worried. Data from Salary.com shows almost a quarter of U.S. employers are suffering from a skills gap and another 42% believe such a gap will hit them within the next two years. The Salary.com 2023 Workforce Skills Gap Survey, released in July, also found the labor shortage continuing to affect hiring, with almost three-quarters of employers stating it is more difficult today to find qualified candidates. Even though employers are experiencing a skills gap, most survey respondents aren't prepared to address it. Just 14% had conducted a skills audit, and only a quarter had a skills and competency framework to support their efforts. Advancing technology, including artificial intelligence, is cited as the biggest contributor to the skills gap.

Research explores how unprepared new managers threaten business. Research from a company offering workplace learning programs finds that the performance of unprepared first-time managers is negatively affecting employees and organizations. The research, conducted with 2,066 American adults in June, found that four in 10 employees felt "stress or anxiety about going to work" because of a first-time manager, more than a third lacked motivation, and one in five had trouble sleeping as a result. Those factors and others resulted in more than a third wanting to leave their companies. Four in 10 workers rated their first-time managers as being weak at "reducing conflict," "handling difficult situations," "providing quality feedback," "running a productive meeting," and "making decisions." Older employees were especially likely to rate first-time managers negatively. ■

The draft regulations and guidance note that an unnecessary delay in responding to a request for a reasonable accommodation may result in a violation of the PWFA. They also list the factors it will consider in determining whether there has been an unnecessary delay, including reason for and length of the delay, who contributed to the delay, and what actions the employer took to provide accommodation during the delay.

Takeaways

The PWFA draft regulations and guidance are only proposed regulations—they aren't in effect and have just been released for public comment. Employers that seek to provide comments to the EEOC should be sure to do so during the 60-day comment period. You can do so by referencing RIN number 3046-AB30 at https://www.regulations.gov.

Although the draft regulations and guidance aren't final yet, you can use them as guidance in navigating pregnancy- and childbirth-related accommodation requests while awaiting final regulations and guidance. Be mindful in navigating the accommodation process with employees, keeping in mind that the PWFA has a broad definition of "qualified employee" and protects employees who can't perform an essential job function if the limitation is temporary and they can resume it "in the near future."

In addition, you should anticipate broad coverage of pregnancy- and childbirth-related conditions and of underlying conditions exacerbated by pregnancy and childbirth. Notably, the proposed regulations identify mental health conditions, fertility treatment, terminations of pregnancy, menstrual cycles, use of birth control, and lactation as pregnancy- and childbirth-related conditions.

Carefully review your current policies and practices to ensure compliance with the PWFA. Additionally, you should train your managers and supervisors to recognize pregnancy- and childbirth-related requests to ensure they are promptly addressed, including providing interim accommodations while waiting for reasonable supporting documentation.

Angela Vogel, Meg A. Burnham, and Arielle Spinner are attorneys with Davis Wright Tremaine LLP. They can be reached at angelavogel@dwt.com, megburnham@dwt.com, and ariellespinner@dwt.com. ■

IMMIGRATION

I-9 verification just got easier

AK AZ HI NV OR WA

by Benjamin A. Nucci, Snell & Wilmer LLP

On August 1, 2023, the Department of Homeland Security (DHS) published a revamped and streamlined Form I-9, which must be used starting November 1. The biggest change, however, is DHS's creation of an "alternate procedure" that will make it easier for employers to inspect an employee's work authorization documents. In lieu of a physical document examination, the alternative procedure allows certain employers to inspect documents by live video link, provided the employers use E-Verify and satisfy other criteria.

New Form I-9

In what appears to be an attempt to simplify the I-9 Form, DHS has consolidated section 1 (employee information and attestation) and section 2 (employer review and verification) onto a single page. Notably absent is the often overlooked preparer and/or translator box that used to appear below section 1.

Previously, employees were required to check "Yes" or "No" to indicate whether the employees received assistance from a preparer or translator to complete the Form I-9. If so, the preparer or translator had to provide their details.

In many instances, however, employees who didn't use a preparer or translator simply skipped the section entirely after only reading the section header. Therefore, the employees failed to check "No," resulting in a technical violation upon an audit by U.S. Immigration and Customs Enforcement (ICE).

DHS has now relegated the preparer and/or translator portion to a separate stand-alone document identified as "Supplement A." Supplement A needs to be completed only if the employee used a preparer or translator. This adjustment should reduce instances of non-substantive errors that could be attributed to the prior form's formatting.

Another big change is moving section 3 to a separate stand-alone document identified as "Supplement B." Reverification and rehire must be completed when the employee requires reverification. The portion may be completed when the employee is rehired within three years of the date the original Form I-9 was completed or provides proof of a legal name change. DHS's shifting of section 3 to a supplemental document allowed it to reduce the Form I-9 to a single page for ease of use, thereby cutting down on the amount of unnecessary paper employers would need to retain.

There are several other subtle, yet important, differences to the new Form I-9. Starting November 1, employers that fail to use the 08/01/23 edition Form I-9 may be subject to penalties under section 274A of the INA, 8 U.S.C. 1324a, as enforced by ICE. Therefore, you should consider thoroughly reviewing the new form ahead of that deadline to ensure staff are prepared for the switch.

Alternative procedure

Perhaps the most welcome change yet in the Form I-9 world is DHS's announcement that E-Verify employers "in good standing" may remotely examine work authorization documents, effective August 1, 2023. To use this alternative procedure, a qualified employer must:

- Examine copies (front and back if the document is two-sided) of Form I-9 documents or an acceptable receipt to ensure the documentation presented reasonably appears to be genuine.
- Conduct a live video interaction with the individual presenting the document(s) to ensure the documentation reasonably appears to be genuine and related to the individual. The employee must first transmit a copy of the document(s) to the employer (per step 1 above) and then present the same document(s) during the live video interaction.
- Indicate on the Form I-9, by completing the corresponding box, that an alternative procedure was used to examine documentation to complete section 2 or for reverification, as applicable.
- Retain, consistent with applicable regulations, a clear and legible copy of the documentation (front and back if the documentation is two-sided).
- In the event of a Form I-9 audit or investigation by a relevant federal government official, make available clear and legible copies of the identity and employment authorization documentation presented by the employee for document examination in connection with the employment eligibility verification process.

Other notable points include:

- Qualified employers using the alternative procedure must do so consistently for all employees at that site.
- Qualified employers may choose to offer the alternative procedure to remote hires only and still retain the ability to conduct physical inspections for on-site hires.
- Those qualified employers that were enrolled in E-Verify during the COVID-19 temporary flexibilities and created an E-Verify case for an employee (except for reverification) whose documents were inspected remotely can use the alternative procedure to satisfy the requirement to physically examine documentation by August 30.

Benjamin A. Nucci is an attorney with Snell & Wilmer LLP in Phoenix. You can reach him at bnucci@swlaw.com. ■

EMPLOYEE RIGHTS

Employee fired for violating policy advances FMLA interference claim

AK | AZ | HI | NV | OR | WA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

The Family and Medical Leave Act (FMLA) creates two substantive employee rights. First, an eligible employee may take up to 12 weeks of protected leave as needed. Second, the employee has the right to return to the same or equivalent job following the protected leave.

To protect those rights, the FMLA makes it unlawful for an employer to interfere with an employee's right to take medical leave. What happens if an employer believes it has discovered employee misconduct while the employee is on FMLA leave? Or, can an employer fire an employee while on leave based on perceived misconduct? When faced with this situation, employers should proceed with caution.

Setting the scene

Staci Martin worked for companies that provided services to clients with special needs, oftentimes working for multiple companies at a time. In 2021, Martin worked as a Day Time Activities (DTA) Coordinator for Arise, Inc., where she provided DTA, habilitation, and respite services to an adult client, whom we will call C.B. She also provided habilitation, respite, and attendant care services to C.B. through a competitor of Arise, which was known by Arise.

In late 2020, Martin notified her supervisor that she needed to take leave to care for her ill father. In the first six weeks of 2021, she took her 40 hours of Arizona protected paid sick leave to care for her father. Then, Martin notified Arise that she intended to take FMLA leave to care for her father. Her FMLA leave was granted from February 23 through May 1, 2021.

According to Arise, on March 3, it received notice from the Division of Developmental Disabilities (DDD), the Arizona contracted entity that funds respite services, that C.B. requested to move DTA hours from Arise to its competitor so that she could provide C.B. more care through this competitor. Based on this information, Arise fired Martin on March 5.

FMLA interference

Martin sued Arise for, among other things, FMLA interference. Arise asked the court to enter judgment in its favor.

A claim of FMLA interference requires employees to establish that:

- They are eligible for FMLA protections.
- Their employer is covered by the FMLA.
- They are entitled to leave under the FMLA (i.e., suffer from a serious health condition).
- They provided sufficient notice of their need to take leave.
- Their employer denied them of the FMLA benefits to which they were entitled.

Once these elements are established, Arise must demonstrate that it had a legitimate reason to deny Martin's reinstatement.

While Arise was able to show it had a legitimate reason (i.e., its "honest and reasonable belief" that Martin violated her nonsolicitation agreement with Arise), Martin was able to set forth contradicting evidence. Based on the disputed facts, the court declined to issue judgment in favor of Arise. Barring settlement, the case will be determined following a jury trial.

Takeaways

The jury is still out (pun intended) on whether Arise interfered with Martin's rights. This article highlights that employers should take additional steps in similar circumstances to avoid a similar claim. To start, a follow-up inquiry with DDD may have either resulted in Martin's retention or provided sufficient additional evidence for Arise to win at this juncture.

Martin also sued under the retaliation provision of the Arizona Fair Wages and Healthy Families Act, alleging that her termination was in retaliation for taking state-protected paid sick leave.

I mention this merely to highlight that employees are increasingly pursuing retaliation claims under this Act because of the harsh penalties imposed by the statute if retaliation is found.

While at the time of this printing, I am unaware of any state case providing guidance on this provision within the Act, it requires that the employer be able to rebut the presumption of retaliation if an employee took state-protected paid sick time within 90 days of the termination.

Seeing how this is likely to be the case, employers should be prepared with documentation to demonstrate a legitimate nonretaliatory reason for the termination that is unrelated to the use of paid sick time.

Jodi R. Bohr is a shareholder with Tiffany & Bosco, P.A., and a contributor to Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on counseling employers on HR matters, litigation, and workplace investigations. She may be reached at jrb@tblaw.com or 602-255-6082. ■

DIVERSITY

Dissecting challenges to employers' diversity programs

AK AZ HI NV OR WA

by Thomas K. Johnson II, Lynne Anne Anderson, A. Scott Chinn, Brian M. Hayes, Marc-Joseph Gansah, and John R. Przypyszny, Faegre Drinker

The U.S. Supreme Court issued a decision in June known as Students for Fair Admissions, which ruled college admission programs can't consider race. Although the ruling was specifically about educational institutions, expect challenges to corporate diversity, equity, and inclusion (DEI) programs to increase.

Ongoing campaigns against DEI

As higher education institutions, state and local governments, private employers, and federal contractors grapple with understanding the impacts of the Supreme Court's decision in *Students for Fair Admissions*, it isn't surprising that elected officials have markedly different views about the philosophy and effects of affirmative action and other race-conscious policies. Members of Congress, governors, and President Joe Biden have all issued statements ranging from press releases expressing general views of support or opposition to legal memoranda extrapolating the Court's holding to a variety of contexts.

Of particular note is the July 13, 2023, letter from 13 Republican state attorneys general (AGs) to the executives of the Fortune 100 companies warning them about DEI programs in contracting and employment. The AGs admonish the companies "to refrain from discriminating on the basis of race, whether under the label of 'diversity, equity, and inclusion' or otherwise."

One group that has been active in suing private companies is the America First Legal Foundation (AFL).

The AFL takes the view that "all DEI programs, and all 'balancing' in employment, training, scholarships, and promotions based on race, national origin, or sex are illegal." It's engaged in an ongoing campaign to challenge what it calls "woke corporations" for "illegally engaging in discriminatory employment practices that penalize Americans based on race and sex." To date, it has filed complaints against many large U.S. companies covering a range of industries and sectors.

Pattern recognition

The challenges to DEI programs have a pattern.

First, groups such as the AFL use companies' public statements, policies, and programs about DEI—as highlighted in those companies' Securities and Exchange Commission (SEC) filings, annual reports, DEI reports, CEO statements, press releases, and other publicly available information—as alleged evidence of unlawful discrimination against whites, Asians, and men in violation of Title VII of the Civil Rights Act of 1964 and state/local civil rights laws. The policies and programs that are often targeted include:

- Goals for the placement of people of color and women in leadership and leadership pipeline positions to match community demographics by a certain year (e.g., by 2025);
- Employee training and apprenticeship programs focused on underrepresented groups; and
- Quantitative representation metrics for leadership incorporated into annual incentive compensation awards for senior leadership.

Relying on the Equal Employment Opportunity Commission (EEOC) regulations' provision that "any person or organization may request the issuance of a Commissioner charge for an inquiry into individual or systemic discrimination," the AFL has sent letters to the EEOC claiming various companies' employment policies and programs are facially illegal under Title VII and provide a basis for the agency to initiate investigations and issue commissioner charges.

One EEOC commissioner, Andrea R. Lucas, has expressed the view that the agency does "not impose 'equitable' outcomes" and stressed that "the [Supreme] Court never has blessed employers taking race-conscious employment actions based on interests in workplace diversity." The number of signed EEOC commissioner charges rose dramatically to 29 in fiscal year (FY) 2022, with Lucas leading with 12 signed charges (41%).

Second, challenges have involved writing letters to the targeted companies' CEOs and boards claiming mismanagement and waste of company assets, violations of federal and state/local antidiscrimination laws, and breaches of fiduciary duty. The letters generally include one or more of the following demands:

- Cease and desist from all employment practices that allegedly discriminate based on race, color, sex, or national origin and/or that are designed to impose racial parity or balancing.
- Disclose publicly (a) contemporaneous email and other communications regarding company programs, (b) evidence management relied on in determining the programs would create shareholder value, and (c) legal justification for the programs.
- Retain independent counsel to conduct a comprehensive compliance audit of the company's employment and contracting practices, and then make the report available to investors and shareholders.
- Identify and remove individuals who determined the company's best interests weren't served by nondiscriminatory employment practices.
- Preserve all records in anticipation of litigation.

Supreme inspiration

The *Students for Fair Admissions* decision is having a noticeable impact on tactics in these challenges. For instance, the AFL filed a request to the EEOC for a commissioner charge against a consulting firm citing *Students for Fair Admissions* as a leading authority for the contention that "decades of case law have held that—no matter how well intentioned—quotas and employment practices aimed to achieve 'balancing' are strictly prohibited." Its letter to the consulting firm referred to DEI efforts as "cartoonish racism and rambling incoherence."

That characterization seems to be partly inspired by the *Students for Fair Admissions* decision, where the majority favorably cites Justice Neil Gorsuch's concurrence regarding "the 'incoherent' and 'irrational stereotypes' that these racial categories further." The AFL's statement also seems to derive inspiration from Justice Clarence Thomas's concurrence, where he says, "The solution to our Nation's racial problems thus cannot come from policies grounded in affirmative action or some other conception of equity. Racialism simply cannot be undone by different or more racialism."

Seven steps

So, what should potentially affected organizations do in response to this legal uncertainty? We suggest taking a breath and bringing method to the madness. Here's a methodical way to start:

- Work to pinpoint the relationship between what you are or what you do and how the Court's decision might apply to you.
- Think through with legal counsel the specific bases of potential legal jurisdiction over you and claims against you—e.g., 14th Amendment Equal Protection Clause, Title VI (federal funds recipient), Title VII (employer status), state laws, and provisions of government contracts.
- Identify the specifics of the programs or policies that could be argued to be race-conscious (being objective but expansive in potential scrutiny).
- Review the rationale, language, and reach of the policies and programs, looking for easy ways to tighten or alter those things that could be challenged or misunderstood.
- Evaluate the profile of the policies and programs, the risk of legal challenge, and the consequences and costs of legal process and liability.
- Measure the risks against other potentially important interests, such as the mission and values of the organization, the views of valued constituencies, and your long-term goals.
- Determine whether and how change is required in those policies and programs.

There's no question we are in a change environment. But as always, the first, best step is to cut through the noise and start to cope with that change in measured ways.

Bottom line

It remains lawful for employers to develop programs and policies aimed at providing equal employment opportunities. The Democratic Attorneys General Association took that position in its response to the letter sent by the 13 Republican AGs.

In light of the *Students for Fair Admissions* decision and increased attacks by interest groups, however, you must be careful when developing, communicating about, and implementing DEI programs. For instance, goals that really look like quotas, set-asides, and racial balancing are problematic, could draw challenges, and could find a sympathetic ear with the EEOC and judges.

Consider the steps outlined above to take stock after the *Students for Fair Admissions* decision. Understanding what and how DEI programs are being challenged is useful in this review process. In addition, you should train employees involved in the hiring, retention, and promotion processes to ensure that practical implementation of your policies is aligned with your mission and policy directives and is consistent with the law.

For more information on reviewing your DEI programs, please contact Brian Garrison, an attorney with Faegre Drinker in Indianapolis and editor for the Indiana Employment Law Letter, at brian.garrison@faegredrinker.com. ■

WORKPLACE POLICIES

Following new decision, your handbook may be unlawful and need revision

AK | AZ | HI | NV | OR | WA

by Kristin Simpsen, McAfee & Taft

Two years ago, in a memo issued by the National Labor Relations Board (NLRB), the agency's general counsel signaled that one of the Board's main priorities would be to scrutinize whether certain workplace policies unlawfully infringed on employees' rights to engage in protected activity under Section 7 of the National Labor Relations Act (NLRA).

Common examples of protected activity include organizing and joining a union, as well as discussing the terms and conditions of one's employment. On August 2, the Board made good on that promise, reversing the more employer-friendly standard that had been in place since 2017 and adopting a new standard that potentially calls into question the lawfulness of many employer policies.

What's in, what's out

Last week's decision in *Stericycle, Inc. and Teamsters Local 628*, which will be applied retroactively, potentially affects all workplaces, unionized or not, and will require employers to review their existing work rules, policies, and procedures to ensure compliance with the new standard.

Stericycle overruled prior standards regarding a categorical approach to work rules under which certain types of rules were always considered lawful. It also overruled prior standards that permitted employers to adopt overbroad work rules that chilled employees' exercise of their Section 7 NLRA rights.

Under the new standard, the NLRB considered whether an employee "would reasonably construe" the work rule or policy in question as chilling protected conduct. Work rules and policies are to be interpreted from the perspective of an employee who could potentially engage in protected Section 7 activity. If an employee could reasonably interpret an employer's policy to be coercive and chill the desire to discuss the terms and conditions of employment (even if there's also a reasonable, noncoercive interpretation), the employer must show the policy is justified.

To avoid a violation, employers must now show that workplace conduct rules are narrowly tailored to advance a legitimate and substantial business interest and that it isn't possible to have a more limited rule.

The NLRB stated that it will look at future policies on a "case-by-case" basis and examine the specific language of a particular rule and the employer interest invoked to justify it. In making its case-by-case analysis, the Board will examine:

- The specific wording of the rule,
- The specific industry and workplace context in which it is maintained,
- The specific employer interests it advances, and
- The specific statutory rights it may infringe.

Federal Watch

OSHA launches program to reduce warehouse hazards. In July, the U.S. Occupational Safety and Health Administration (OSHA) launched a National Emphasis Program to prevent workplace hazards in warehouses, processing facilities, distribution centers, and high-risk retail establishments. Under the three-year emphasis program, OSHA will conduct comprehensive safety inspections focused on hazards related to powered industrial vehicle operations, material handling and storage, walking and working surfaces, means of egress, and fire protection. The program also will include inspections of retail establishments with high injury rates, with a focus on storage and loading areas. OSHA may expand an inspection's scope when evidence shows that violations may exist in other areas of the establishment.

DOL announces rule expanding submission requirements for injury data. The U.S. Department of Labor (DOL) has announced a final rule, which will take effect January 1, 2024, that will require certain employers in designated high-hazard industries to electronically submit injury and illness information to the department's Occupational Safety and Health Administration (OSHA). The information is data the employers already are required to keep. Under the new rule, establishments with 100 or more employees in certain high-hazard industries must electronically submit information from their Form 300-Log of Work-Related Injuries and Illnesses, as well as Form 301-Injury and Illness Incident Report, to OSHA once a year. The rule also requires establishments to include their legal company name when making electronic submissions to OSHA from their injury and illness records. OSHA will publish some of the data collected on its website to inform employees, potential employees, and others about a company's workplace safety and health record.

DOL initiative aimed at promoting worker-owned businesses. The U.S. Department of Labor (DOL) has launched a new Employee Ownership Initiative within its Employee Benefits Security Administration (EBSA). The initiative includes the creation of the Division of Employee Ownership, which aims to support the creation and expansion of worker-owned businesses by supporting existing programs designed to promote employee ownership. The initiative also includes developing a clearinghouse of techniques applied by new and existing state programs; providing education, outreach, and training to inform employees and employers about the possibilities and benefits of worker ownership and business ownership succession planning; and providing technical assistance for employee efforts to become business owners and helping employers and employees explore the feasibility of transferring full or partial ownership to employees. ■

Employer action required now

Importantly, the NLRB stated this new standard will be applied retroactively. This means all employers should review their employee handbooks and policies now to make sure that they comply with the NLRB's *Stericycle* decision.

Certain handbook provisions, particularly those related to confidentiality, social media, disciplinary rules, workplace civility rules, loitering rules, restrictions on recording in the workplace, and NLRA disclaimers, need to be reviewed and possibly revised.

Kristin Simpsen is an attorney in the Oklahoma City, Oklahoma, office of McAfee & Taft. She can be reached at kristin.simpsen@mcafeetaft.com. ■

DISABILITIES

Complying with the OFCCP's new disability self-identification form

AK | AZ | HI | NV | OR | WA

by Ryan A. Olson, Felhaber Larson

On July 25, 2023, an updated form from the Office of Federal Contract Compliance Programs (OFCCP) became required for all applicable federal contractors and subcontractors subject to Section 503 of the Rehabilitation Act. The new form lists additional disabilities, expands the possible responses, and provides more descriptive and inclusive language. It also clarifies that completing the form itself is optional or voluntary.

Listing additional disabilities

Specifically, the revised form expands the list of disabilities to include more comprehensive examples. These additions encompass various conditions such as:

- Alcohol or another substance use disorder (not currently using drugs illegally);
- Mobility impairments;
- Neurodivergence (including ADHD, autism spectrum disorder, dyslexia, dyspraxia, and other learning disabilities);
- Partial or complete paralysis;
- Pulmonary or respiratory conditions or short stature (dwarfism); and
- Traumatic brain injury.

Simplified response options

Furthermore, to enhance clarity and streamline the self-identification process, the revised form simplifies and broadens the response options. Individuals completing the form can now select one of the following choices:

- "Yes, I have a disability or have had one in the past."
- "No, I do not have a disability and have not had one in the past."
- "I do not want to answer."

More descriptive and inclusive examples

Lastly, the previous iteration of the form primarily highlighted a few specific disabilities, including cancer, hearing impairment, epilepsy, and intellectual disability.

The revised form, however, has taken a stride toward inclusivity by expanding its scope. The updated version now encompasses a wider array of examples, such as past or present instances of cancer, individuals experiencing deafness or severe hearing difficulties, individuals with epilepsy or other seizure disorders, and those with intellectual or developmental disabilities.

Bottom line

If you're a federal contractor or subcontractor, make sure you're using the updated form to ensure compliance.

Ryan A. Olson is an attorney with Felhaber Larson in Minneapolis. He can be reached at rolson@felhaber.com or 612-373-8514. ■

WORKPLACE ISSUES

The office is back! (Or is it?) Today's workers want more from the workplace

AK | AZ | HI | NV | OR | WA

by Tammy Binford

It's the second half of 2023, and COVID fears have largely eased. But the debate still rages about the best environment for getting work done. Some employers are requiring people to return to the office full time—and they're often getting pushback—and others are embracing a hybrid or even an all-remote model. With so much pandemic-fueled change in the workplace, employers, employees, and designers now are looking at how office design should meet the moment.

Research shows need for change

Even before the pandemic, trends were moving away from so much emphasis on fun at work. Workers were starting to sour on office spaces featuring foosball, video games, etc., and they began to voice an appreciation for quiet spaces suitable for head-down individual work, as well as spaces conducive to collaboration.

Office design giant Gensler noted in its 2023 design forecast that to compete for talent, employers need to offer a mix of spaces to make sure employees are productive. For its 2023 report, the Gensler Research Institute surveyed 14,000 office workers in nine countries in mid- and late 2022. The findings reveal what it calls a "critical divide."

"Employees need the office for their productivity, but the office must adapt to their new expectations—and so far, the workplace isn't cutting it," according to a June 2023 Gensler blog entry explaining the findings from the company's survey.

The research found that just 38% of the surveyed employees work in offices that have been redesigned since the beginning of the pandemic, and that statistic shows a need for employers to understand and address how employees work if they want to entice them back to the office. Key findings of the Gensler research show a change in the relationship employees have with the office. The survey found that the majority of office workers rank "to focus on my work" as the most important reason to be in the office. The survey also found that the workplace "consistently underperforms for critical work activities such as working alone and working with others virtually," the Gensler blog entry says.

"The gap between current office utilization and employee need for the office is an opportunity to rethink the workplace," said Janet Pogue McLaurin, a principal at Gensler. "Providing a balanced array of work settings and amenities can not only empower employees to work better but create a better work experience."

Hybrid is here to stay, but the office is still critical

Gensler's findings point out that the move to remote and hybrid work that carried employers through the pandemic has caused office vacancy rates to soar. Despite that fact, the research shows "an optimistic future emerging," according to another June 2023 Gensler blog entry on the study.

Gensler found a gap between office utilization and what employees say they need for maximum productivity. The survey asked workers how much time they ideally need to spend in the office to maximize their individual productivity. They also were asked how much time they ideally need to maximize their team's productivity.

Gensler hypothesized that workers would need the office for team productivity and remote work for individual productivity. But the data showed a surprise. According to the responses, people need the office for individual and team productivity equally.

Globally, workers said they need an average of 63% of the workweek at the office to maximize productivity. What could lure workers back to the office? The research found that a different mix of experiences would make most office workers willing to come to the office more often.

Bottom line, the current utilization of offices compared with what workers say they need shows that work has changed.

"People have a new awareness of how they work best, the types of spaces they need, and the types of experiences that they can't get working remotely," Gensler's analysis says.

The company's message to employers: It's time to invest in spaces that make the office "a compelling destination rather than an obligation." ■

PAID TIME OFF

Employees stressed? Learn how to make a time-off policy work

AK | AZ | HI | NV | OR | WA

by Tammy Binford

As the end of the year nears, employees' memories of summer vacations may be giving way to plans to schedule time off for the holidays. While some workers are diligent about planning the time off they need to avoid burnout, others never get around to it—either because they're all in for hustle culture, they don't want to face the mountain of work that piles up while they're out, or some other reason. Regardless of the reason, employers can take steps to encourage people to take some needed time away.

Unlimited PTO issues

It's understandable that some people are miserly about their time off. If they get just a few days a year, they may be hesitant to plan time off because they don't know what might come up after they've depleted their available days.

Some employers have tried to allay those worries—and offer an attractive perk—by implementing an unlimited paid-time-off (PTO) policy. In a perfect world, such a policy would encourage employees to take the time they need to rest and refresh. Employers also would see a payoff in the form of happy and relaxed employees.

But does unlimited PTO work in an imperfect world? Online resume service Resume Builder tried to find out by commissioning an online survey in June in which 1,351 employees in the U.S. participated. All had to pass through demographic filters and screening questions to ensure they were currently employed full time at a corporate job and had been at the same job for at least one year.

The survey found that 100% of the workers in the survey with unlimited PTO took less than 10 days off over the past year, and 12% said they hadn't taken a single day off in the past 12 months.

For the surveyed workers with a set number of PTO days, just 56% said they had taken less than 10 days off over the past 12 months. And just 4% of those workers said they hadn't taken a single day off in the past year.

Why are workers with unlimited PTO not taking much—or any—time off? The most common reason cited was that work had them too busy. Other reasons: afraid of returning to too much work, not wanting to appear lazy, unsure of how much time off to take, a company culture that discourages vacation, and the fact that the boss didn't take much time off.

Popular policy

Even though an unlimited PTO policy sometimes results in people not taking the time off they need, most workers like the policy, according to the Resume Builder survey, which showed that 75% of workers who have unlimited time off said they prefer that policy over one that provides up to 20 days of set PTO.

Also, half of the surveyed workers who didn't have unlimited PTO said they would prefer an unlimited PTO policy over 20 days of set time off.

Encouraging time off

No matter how a policy is structured, most employers see the benefit of rested employees. Mental Health America—a national nonprofit promoting mental health, well-being, and illness prevention—offers employers tips on how to encourage employees to take time off. Among them:

- **Encourage staff to use a vacation planning tool** to map out when to take time off work. Asking employees to plan ahead encourages them to make sure they don't let busy schedules keep them at work too much.
- **Communicate about PTO.** The company newsletter or regular announcements at staff meetings can remind employees to use their time off.
- **Lead by example.** Management can show a willingness to step away from work and send a signal that time off is important.

Employer liability

Encouraging employees to step away from work occasionally isn't just about avoiding fatigue and burnout. Often, accrued time off must be paid out when an employee quits or retires, and that can add up to a surprising amount.

In a July 2022 report, Replicon—a company that makes software for time tracking and project management—told of a case in which a city executive employee retired and sought payment for unused vacation topping $500,000.

Employers can devise PTO policies to guard against such surprising high-dollar payouts, but they may still face considerable liability if employees push the policy to the brink.

To avoid large payouts, many employers can adopt "use it or lose it" policies requiring employees to either take PTO or lose the time, as well as any payout that would be due. But employers need to be aware that some states have laws prohibiting use-it-or-lose-it policies. ■

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Editorial inquiries should be directed to Content Manager Sean Richardson, srichardson@blr.com.