A Primer on the Recent Expansion of Federal Employment Law


The law firm of Tucker Arensberg contributes this quarterly column focused on the legal issues that may impact our readers. Tucker Arensberg is a full-service law firm headquartered in Pittsburgh, Pa., USA. Servicing the legal needs of the iron and steel industry, Tucker Arensberg has also provided legal counsel to the Association for Iron & Steel Technology.

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There were significant changes in employment law in the U.S. in 2023, from federal legislation expanding protections for pregnant and nursing workers to a Supreme Court decision regarding religious liberty and reasonable accommodations under Title VII to federal agencies updating regulations to bolster employees' rights. Many significant changes are already in effect, with some even applying retroactively, so it is imperative that employers remain up to date and adjust where necessary to ensure compliance with the law and avoid costly investigations and litigation. This recap is intended to provide general information about some of the more notable developments.

New Federal Legislation

Given the stalemate in Washington, D.C., USA, in recent times, expansive federal legislation is rare in most areas of the law, but the Consolidated Appropriations Act of 2023 included two pieces of significant employment legislation. The Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protection for Nursing Mothers (PUMP) Act both enhance protections for pregnant and breastfeeding workers. The PWFA, which went into effect in June 2023, requires employers with 15 or more employees to provide reasonable accommodations to job applicants and employees with conditions related to pregnancy or childbirth. The PWFA also prohibits discrimination due to the need for such accommodation. The PWFA is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), and employers are required to engage in the interactive process in response to a covered accommodation request. The PWFA generally adopts the reasonable accommodation requirements and protocols of the Americans with Disabilities Act. The House Committee on Education and Labor's Report on the PWFA provides examples of reasonable accommodations, including the ability to sit or drink water; receive closer parking; have flexible hours; receive appropriately sized uniforms and safety apparel; receive additional break time to use the restroom, eat and rest; take leave or time off to recover from childbirth; and be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy.

The PUMP Act expands protections for breastfeeding employees that were previously provided by the Affordable Care Act (ACA) through the Fair Labor Standards Act. The ACA established the right of new mothers who were non-exempt employees to have reasonable break times and private space to express milk while at work until a child reached one year of age. Under the PUMP Act's expanded protections, salaried employees are now covered, time spent expressing breast milk must be considered hours worked if the employee is also working, and

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the period of time employers are required to provide these rights to new mothers is extended from one year to two years. Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." Employers have ten days after an employee notifies them of their need for nursing breaks to come into compliance with the location requirement, and failure to do so permits an employee to bring a lawsuit against the non-compliant employer.

Groff v. DeJoy: Supreme Court "Clarifies" the Standard for Employers' Response to Religious Accommodation Requests

In a unanimous decision on 29 June 2023, the Supreme Court ruled that employers can only deny an employee's request for a religious accommodation under Title VII if they can show "that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."

The case was brought by former postal worker Gerald Groff, an evangelical Christian who observes a Sunday Sabbath, and therefore requested that he not have to work on Sundays. The U.S. Postal Service (USPS) attempted to accommodate him by seeking other workers to voluntarily cover his shifts, but this proved difficult. Groff was informed he would need to work Sundays, and USPS imposed progressive discipline for his absences until Groff ultimately resigned.

The U.S. District Court for the Eastern District of Pennsylvania held that exempting Groff from Sunday shifts caused undue hardship because it negatively affected Groff's co-workers who had to cover those shifts. The Third Circuit Court of Appeals agreed, stating that the accommodation created an undue hardship by disrupting workflow and diminishing employee morale.

The Supreme Court disagreed. In a departure from its own precedent, the Supreme Court "clarified" that the hardship must be substantial, as opposed to minimal, in order to justify denying the request, and that the employer must be able to identify and prove an economic cost to the employer as a result of granting the accommodation. More specifically, when faced with an accommodation request, employers must consider all possible accommodations and their impact on their business in light of the employer's nature, size and operating costs. The Supreme Court emphasized that certain employer hardships cannot be considered "undue," including any hardship rooted in animosity toward a particular religion. There must be more than a *de minimus* impact, which was the standard previously utilized. Employers operating under the previous interpretation of the law should familiarize themselves with the new standard and reevaluate their process for considering and eventually granting or denying accommodations on religious grounds.

Recent Agency Rules and Regulations

Federal agencies acting under the President's direction are continuing to revise rules and regulations, most often in favor of employees.

For example, the National Labor Relations Board (NLRB) in *McLaren Macomb* determined that several standard severance terms were no longer in line with the National Labor Relations Act (NLRA). In reversing two Trump-era Board decisions that authorized such provisions, the NLRB held that an employer violates Section 7 of the NLRA when they include terms in a severance agreement that (a) prohibit an employee from disclosing the terms of the agreement to any third party (except spouse, attorney or tax preparer/accountant) or (b) prohibit employees from making statements to other employees or the public that could disparage "or harm the image of" the employer. Furthermore, the NLRB held that the mere act of proffering a severance agreement containing such terms, regardless of whether the employee accepts the agreement, is itself an independent unfair labor practice that violates Section 7.

There is still some language employers are permitted to use in severance agreements. The Board noted that non-disparagement agreements seeking to prevent "maliciously untrue" defamatory statements about an employer and narrowly tailored confidentiality provisions, such as those restricting use or disclosure or proprietary or trade secret information "for a period of time," are not prohibited. Furthermore, severance agreements with confidentiality or non-disparagement clauses are not unlawful when presented to those who meet the NLRA's definition of supervisor, manager or independent contractor. Still, this represents a departure from the status quo and employers should be ready to reevaluate their positions on severance agreements. Confidentiality provisions aimed at protecting trade secret and other proprietary information, or the specific financial terms of the severance, may also still be appropriate under the NLRB's new standard.

Another example of the shift toward strengthening employee rights is the Federal Trade Commission's (FTC) proposed rule from January 2023 that would ban most non-competes in the United States. The rule would even invalidate almost all existing non-compete clauses with both current and former workers. The FTC received nearly 27,000 comments on the draft rule it proposed, and a final vote is expected in April. Moreover, the NLRB has issued a memo stating that non-compete provisions in employment contracts violate the law except in limited circumstances. The memo asserts that the NLRA prohibits most non-compete clauses covered by the Act. While the FTC rule has not yet come into effect and all agency rules and regulations are subject to judicial review, the federal government is clearly focused on the rights of employees, and employers must be aware of this trend and remain informed about the landscape of employment law in which they operate, which includes not just the federal changes discussed but also state and local laws and regulation. ✦