

EEOC ISSUES NEW RULE ON ACCOMMODATIONS FOR PREGNANT WORKERS

INSIGHT

The U.S. Equal Employment Opportunity Commission (EEOC) recently finalized a rule regarding implementation of the Pregnant Workers Fairness Act (PWFA). The PWFA, which went into effect on June 27, 2023, requires employers with 15 or more employees to provide reasonable accommodations to employees and applicants with limitations related to or arising out of pregnancy, childbirth, or related medical conditions. This mandate led to confusion about the scope of the PWFA's protections, which the EEOC's new rule is intended to address. The new rule was formally published on April 19 and will take effect 60 days later.

The PWFA requires covered employers to alter job duties or provide time off for "limitations related to ... pregnancy, childbirth, or related medical conditions" unless the accommodation would result in an undue hardship for the employer. The EEOC's new rule further explains the scope of these protections, and states employers must make accommodations for contraception, menstruation, endometriosis, infertility and fertility treatments, abortions, miscarriages and lactation, along with potential, current and past pregnancies. The list of potential accommodations includes part time work, remote work, paid or unpaid leave, temporary relief from certain duties, additional breaks, sitting or standing, limits on lifting and modified equipment, reserved parking, light duty, job restructuring and adjusting policies.

EEOC OFFERS EXPANSIVE INTERPRETATION OF PWFA

This final rule broadly interprets the protections included in the law approved by Congress. The liberal interpretation of the Act includes the following provisions:

- The EEOC rule explains that the phrase “related medical conditions” can include minor or episodic physical and mental conditions arising from pregnancy and pre-existing conditions exacerbated by pregnancy or birth. The rule does not include a level of severity required for qualification.
- The rule includes four “predictable” accommodations which employers should approve nearly every time because they do not impose undue hardship. Those accommodations include allowing employees to:
 - Carry or keep water and drink nearby
 - Take needed restroom breaks
 - Sit or stand as needed
 - Eat and drink as needed
- The rule requires employers to make accommodations for any employee who is temporarily unable to perform an essential function because of pregnancy or a related condition if it is reasonable to believe the employee could return to perform that function “in the near future.” The rule leaves interpretation of “in the near future” in the case of other pregnancy-related conditions, as well as childbirth, to be determined on a case-by-case basis, but stipulates it cannot be indefinite. This is a notable difference from the framework under the Americans with Disabilities Act that most employers are accustomed to, where an inability to perform essential functions of a job (with or without reasonable accommodation) is disqualifying.
- If the employer grants a request for temporary accommodation for 40 weeks during a pregnancy, those weeks do not count for a subsequent request related to childbirth or another medical condition. The clock starts again.
- Employers must provide a quick and simple process for employees to request an accommodation. This can be similar to the interactive process required by the Americans with Disabilities Act. The verbal or written request can come from the employee or a representative of the employee and only needs to identify their need for an accommodation.
- Employers cannot require an employee to be examined by an independent health care provider, can only require reasonable medical documentation to determine if the employee has a qualifying condition, and, in many cases, should accept a self-attestation of the employee’s condition and need for accommodations.
- Reasonable documentation is considered that which confirms the condition, attests it is related to pregnancy, and states a job adjustment is needed. Employers may ask for a timeline on the accommodation.
- Several conditions are exempt from required documentation. They include when the need for reasonable accommodation is obvious or the employer already has sufficient information on the condition; when the request is for one of the minor accommodations the EEOC has stipulated should be granted in nearly all requests (water, breaks, sitting/standing, eating/drinking); and when the accommodation is lactation-related, unless it is a request for full-time remote work.

Finally, the rule prohibits employers from:

- Failing to provide reasonable accommodations unless it will create an undue hardship
- Requiring an employee to accept accommodations that aren't negotiated through the interactive process
- Denying a job or promotion based on the need for a reasonable accommodation
- Requiring leave when another reasonable accommodation would allow the employee to keep working
- Punishing or coercing an employee, or their representative, for requesting a reasonable accommodation

Employers should familiarize themselves with the rule and guidance and make policy changes as needed. Additionally, employers should ensure that all human resources employees and others who have supervisory authority are aware of the employer obligations under the PWFA. If you have questions or concerns, please reach out to Harris Beach’s [Labor and Employment attorneys](#). Please contact attorney [Roy R. Galewski](#) at (585) 419-8661 and rgalewski@harrisbeach.com; attorney [Daniel J. Moore](#) at (585) 419-8626 and dmoore@harrisbeach.com; attorney [Daniel J. Palermo](#) at (585) 419-8946 and dpalermo@harrisbeach.com; or the Harris Beach attorney with whom you most frequently work.

This alert does not purport to be a substitute for advice of counsel on specific matters.

Harris Beach has offices throughout New York state, including Albany, Buffalo, Ithaca, Long Island, New York City, Rochester, Saratoga Springs, Syracuse and White Plains, as well as Washington D.C., New Haven, Connecticut and Newark, New Jersey.

■ AUTHORS

Roy R. Galewski

Member

(585) 419-8661

rgalewski@harrisbeach.com

Daniel J. Moore

Member

(585) 419-8626

dmoore@harrisbeach.com

Daniel J. Palermo

Associate

(585) 419-8946

dpalermo@harrisbeach.com

Attorney Advertising. Prior results do not guarantee a similar outcome.
© 2022 Harris Beach PLLC
Content current as of April 23, 2024 2:40 pm

FEDERAL TRADE COMMISSION VOTES TO BAN NON-COMPETE AGREEMENTS

INSIGHT

The Federal Trade Commission (FTC) voted Tuesday to ban non-compete agreements between employers and employees, a move that is sure to face a legal challenge. The rule is slated to take effect 120 days after it is published in the Federal Register.

In general, non-compete agreements temporarily bar employees from working with their current company's competitors after they leave their current company's employ. Business groups call the agreements critical to protecting their proprietary information and intellectual property. The FTC disagreed in a [statement about noncompete clauses being unfair to workers](#).

The FTC advanced the [much-anticipated Final Rule during a Special Open Commission Meeting](#), approving the Rule in a 3-2 vote along party lines.

The Final Rule closely resembles the FTC's original Proposed Rule banning non-compete agreements, with a notable exception that existing non-compete agreements with senior executives will not be invalidated by the new rule. The Final Rule defines "senior executives" as leadership-level employees earning more than \$151,164 annually, and, in policy-making positions. As with the Proposed Rule however, the Final Rule generally prohibits non-compete agreements going forward, and further, invalidates most existing non-competes.

"Noncompete clauses keep wages low, suppress new ideas, and rob the American economy of dynamism, including from the more than 8,500 new startups that would be created a year once noncompetes are banned," said FTC Chair Lina M. Khan. "The FTC's final rule to ban noncompetes will ensure Americans have the freedom to pursue a new job, start a new business, or bring a new idea to market."

The FTC estimates about 30 million people are under noncompete agreements.

LAWSUITS EXPECTED TO CHALLENGE FTC DECISION

Business groups have already indicated they will sue to block the ban as early as this week. Legal challengers will argue that the FTC lacks the authority to prohibit non-compete agreements across all employers, and that such action can only be taken by Congress. Sean Heather, U.S. Chamber senior vice president for International Regulatory Affairs and Antitrust, [said the following](#):

"Today's actions by the Federal Trade Commission to outright ban noncompete clauses in all employer contracts is blatantly unlawful. Since the agency's creation over 100 years ago, Congress has never delegated the FTC anything close to the authority it would need to promulgate such a competition rule. The Chamber is confident that this unlawful action will not stand."

While a legal challenge to enjoin the FTC from enforcing the Final Rule might be imminent, the Commission's approval of the measure is likely to spur additional conversation among state-level legislators and regulators. Numerous states, including New York, are still actively considering their own prohibitions on non-compete agreements.

VOTE COMES AFTER MUCH DISCUSSION

The FTC's vote comes more than one year after issuing its [notice of the proposed rule](#) on January 5, 2023. As [we previously noted](#), the FTC's proposed rule argues that most non-compete agreements are an unfair method of competition under Section 5 of the FTC Act (15 U.S.C. § 45).

The FTC held the proposed rule open for public comments through April 19, 2023 and reviewed the nearly 27,000 comments received during this period in preparation for voting on the finalized non-compete rule.

Harris Beach will continue to provide updates and information as it becomes available, and will provide more detailed analysis of the Final Rule in the coming days. Businesses should closely monitor the FTC's and other government regulators' non-compete initiatives.

Should you have questions about any of these developments or navigating changes to non-competes, please feel free to reach out to attorney [Daniel J. Moore](#) at (585) 419-8626 and dmoore@harrisbeach.com; attorney [Scott D. Piper](#) at (585) 419-8621 and spiper@harrisbeach.com; attorney [Ibrahim Tariq](#) at (585) 419-8556 and itariq@harrisbeach.com; or the Harris Beach attorney with whom you most frequently work.

This alert does not purport to be a substitute for advice of counsel on specific matters.

Harris Beach has offices throughout New York state, including Albany, Buffalo, Ithaca, Long Island, New York City, Rochester, Saratoga Springs, Syracuse and White Plains, as well as Washington D.C., New Haven, Connecticut and Newark, New Jersey.

■ AUTHORS

Daniel J. Moore

Member

(585) 419-8626

dmoore@harrisbeach.com

Scott D. Piper

Member

(585) 419-8621

spiper@harrisbeach.com

Ibrahim Tariq

Member

(585) 419-8556

itariq@harrisbeach.com

U.S. SUPREME COURT EASES STANDARD FOR EMPLOYEES CLAIMING DISCRIMINATORY JOB TRANSFERS

INSIGHT

A recent decision by the U.S. Supreme Court eases the standard for plaintiffs claiming their employer discriminated against them by moving them into a different position.

Specifically: on April 17, 2024, a unanimous Court held in *Muldrow v. City of St. Louis* that employees need only show “some” harm to advance a discrimination claim under Title VII of the Civil Rights Act of 1964, rather than “significant” harm.

The ruling is poised to affect how employers evaluate employee transfers and position changes. While employers could previously expect that a transfer — even involuntary transfers — would not be taken as “adverse employment actions,” the *Muldrow* ruling opens the door to discrimination claims asserting the employee suffered just “some” harm to their working conditions by virtue of the transfer.

THE MULDROW CASE AND TITLE VII RULINGS ON UNLAWFUL TRANSFERS

The *Muldrow* case itself revolved around a sergeant’s involuntary transfer within the St. Louis Police Department. Plaintiff Jatonya Muldrow worked for nine years in the police department’s specialized intelligence division. Working in that division gave her access to certain “prestige,” such as an unmarked vehicle, heightened security clearance, and authority to investigate more high-profile crimes, such as gang violence and public corruption.

In 2017, the police department transferred Sgt. Muldrow to a more traditional “uniformed” position, assigning her with oversight of neighborhood patrol officers. The police department filled her position in the intelligence division with a male counterpart. The transfer deprived her of many of the perks she enjoyed in the intelligence division. Her rank, pay, and benefits, however, remained unchanged.

Muldrow subsequently sued the St. Louis Police Department under Title VII, alleging the unilateral transfer out of the specialized intelligence division was made unlawfully on the basis of her sex.

The U.S. District Court for the Eastern District of Missouri granted summary judgment against her discrimination claim, holding that the transfer did not result in any tangible “harm” to her career or working conditions. The U.S. Court of Appeals for the Eighth Circuit affirmed, stating in part: “This Court has repeatedly found that an employee’s reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action.”

Other federal appellate courts across the country had similar analyses for evaluating employee transfers — including the First Circuit and Second Circuit Courts of Appeals, spanning all of New York State and the New England region. These analyses held that an employee can almost never show the requisite “serious harm” required for a discrimination claim unless a transfer resulted in a decrease to their pay or benefits.

Still other federal circuits, however, had taken a more employee-friendly approach, ruling that employees need only show some harm to their working conditions, such as a decrease in prestige or rank. The Supreme Court took up the Muldrow case to resolve the dispute.

THE NEW “SOME HARM” REQUIREMENT AND CAUTIONS FOR EMPLOYERS

Writing for the Court, Justice Kagan clarified that an employee alleging their transfer was discriminatory under Title VII need only show that their “transfer brought about some ‘disadvantageous’ change in [their] employment term[s] or condition[s]” —and that Title VII says nothing about “serious” or “significant” harm. Instead, such plaintiffs need allege only “some harm.”

The new standard breaks ground on uncertain territory for employers. Muldrow opens the door for discrimination claims premised on lateral transfers (or other actions) that did not negatively impact employees’ pay or benefits. Thus, employers are well-advised to evaluate whether transfers will negatively impact an employee’s “other” terms-and-conditions of employment, such as their advancement opportunities, authority, assignments, or even stature within the organization.

To be sure, Muldrow does not convert each and every transfer into a potentially-actionable discrimination claim. First, retaliatory transfer claims — as opposed to discriminatory transfer claims — will still require a showing of “serious harm,” as Title VII’s requirements for showing “retaliation” are distinct from showing “discrimination.” Further, within discrimination claims, putative plaintiffs will still need to allege, in good faith, that their transfer was occasioned “because of” a protected characteristic under Title VII, i.e., that their employer transferred them because of their sex, religion, race, or other characteristic. Well-documented reasons that illustrate the legitimate, non-discriminatory need for a transfer remain a viable best practice for employers. And other cases will lend themselves to more obvious need for a transfer, such as where an employee’s performance is clearly better suited for a different role.

Proactive employers should nonetheless consider whether existing policies on transfers and internal opportunities need revision to illustrate the organization’s commitment to nondiscrimination.

Finally, employers with Diversity, Equity, and Inclusion (“DEI”) programs or similar affinity groups should consider whether employees’ membership or activities in these groups triggers any inadvertent liability under Muldrow. The Court did not address DEI programs in Muldrow, but inclusion (or exclusion) from such programs might spark an employee challenge under Title VII, under the theory the programs offer differing benefits or terms-and-conditions of employment if made available for some employees and not others.

If you have questions or concerns regarding this development, please reach out to Harris Beach’s [Labor and Employment](#) or [Appellate](#) attorneys. You may contact attorney [Ibrahim Tariq](#) at (585) 419-8556 and itariq@harrisbeach.com, attorney [Brian Ginsberg](#) at (914) 298-3028 and bginsberg@harrisbeach.com, or the Harris Beach attorney with whom you most frequently work.

This alert does not purport to be a substitute for advice of counsel on specific matters.

Harris Beach has offices throughout New York state, including Albany, Buffalo, Ithaca, Long Island, New York City, Rochester, Saratoga Springs, Syracuse and White Plains, as well as Washington D.C., New Haven, Connecticut and Newark, New Jersey.

■ AUTHORS

Brian D. Ginsberg
Member
(914) 298-3028
bginsberg@harrisbeach.com

Ibrahim Tariq
Member
(585) 419-8556
itariq@harrisbeach.com

DEPARTMENT OF LABOR INCREASES SALARY THRESHOLDS FOR OVERTIME INSIGHT

The U.S. Department of Labor (DOL) recently released a final rule sharply increasing the minimum salary thresholds for the “white-collar” overtime exemptions under the federal Fair Labor Standards Act (FLSA) applicable to administrative, executive, professional and highly compensated employees.

The FLSA [final rule](#) requires that most employees are paid the federal minimum wage and overtime pay for all hours worked over 40 in a workweek. Despite this general premise, the FLSA exempts several categories of employees from the overtime requirements of the Act, including the above-referenced categories of white-collar employees. Generally, in order for employees to qualify for exemption they must meet three tests – (1) the “salary basis” test, (2) the job “duties” test and (3) the “salary threshold” test. In other words, employees must perform certain job duties, be paid on a salary basis, and earn a minimum amount in order for the employer to properly categorize them as exempt from the FLSA’s overtime requirements. The DOL’s final rule impacts the “salary threshold” test, but leaves the “salary basis” and job “duties” tests untouched.

The current FLSA salary threshold for administrative, executive and professional employees is \$684 per week (\$35,568 per year). The threshold for highly compensated employees is currently \$107,432 per year.

Under the DOL’s final rule, the minimum salary threshold for administrative, executive and professional employees will rise to \$844 per week (equivalent of \$43,888 per year) on July 1, 2024. That threshold will go up to \$1,128 per week (equivalent of \$58,656 per year) on January 1, 2025. For highly compensated employees, the minimum annual compensation will rise to \$132,964 per year on July 1, 2024, and then to \$151,164 per year on January 1, 2025.

The final rule reflects an increase from the figures initially previewed in the DOL’s proposed rule published in August of 2023. The rule also imposes a triennial automatic update to these thresholds, which the DOL states is designed to provide employers with a more surefire timeframe in looking for future adjustments. Accordingly, beginning July 1, 2027, and every three years moving forward, these salary thresholds will see changes and very likely, an increase.

The DOL’s rule is likely to face legal challenges in the courts, which could impact whether and when the rule becomes effective. Nevertheless, employers should prepare to comply with the new rule and closely monitor the status of any resulting litigation.

Businesses should also remember that many states impose their own duties tests and/or minimum salary thresholds. Case in point, New York requires a higher salary threshold, as compared to the FLSA, to satisfy its executive and administrative exemptions. The DOL’s rule only impacts the minimum salary thresholds under the FLSA. Employers should keep an eye out for relevant changes in state law that impact exempt status questions.

Harris Beach will continue to provide updates and information as it becomes available. Businesses should closely monitor the status of the DOL's rule in anticipation of the changes set to take effect July 1, 2024.

Should you have questions about any of these developments or navigating these changes, please feel free to reach out to Harris Beach's New York Labor and Employment attorneys. You can contact attorney Daniel J. Moore at (585) 419-8626 and dmoore@harrisbeach.com; attorney Scott D. Piper at (585) 419-8621 and spiper@harrisbeach.com; attorney Daniel J. Palermo at (585) 419-8946 and dpalermo@harrisbeach.com; attorney Jared E. Calderon at (585) 419-8725 and jcalderon@harrisbeach.com; or the Harris Beach attorney with whom you most frequently work.

This alert does not purport to be a substitute for advice of counsel on specific matters.

Harris Beach has offices throughout New York state, including Albany, Buffalo, Ithaca, Long Island, New York City, Rochester, Saratoga Springs, Syracuse and White Plains, as well as Washington D.C., New Haven, Connecticut and Newark, New Jersey.

■ AUTHORS

Jared E. Calderon

Associate

(585) 419-8725

jcalderon@harrisbeach.com

Daniel J. Moore

Member

(585) 419-8626

dmoore@harrisbeach.com

Daniel J. Palermo

Associate

(585) 419-8946

dpalermo@harrisbeach.com

Scott D. Piper

Member

(585) 419-8621

spiper@harrisbeach.com

Attorney Advertising. Prior results do not guarantee a similar outcome.
© 2022 Harris Beach PLLC
Content current as of April 29, 2024 2:06 pm