ILLINOIS STATE BAR ASSOCIATION

SEPTEMBER 2023 VOL 61 NO. 2

Labor & Employment Law

The newsletter of the Illinois State Bar Association's Section on Labor & Employment Law

The Evolving But-For Standard in Employment Law

BY ELISABETH MUSTOE

In general, federal employment discrimination cases are analyzed under two different burdens of proof. Title VII discrimination cases are analyzed under the mixed-motive standard, which requires only that the prohibited discrimination be a factor in the adverse employment action.[1] The Age Discrimination in Employment Act (ADEA) and claims brought under the retaliation provision of Title VII, on the other hand, are analyzed under the higher but-for standard of proof, meaning that the adverse employment action would not have occurred without the employer's unlawful conduct.[2] The Supreme Court has yet to rule on whether claims arising under the Family Medical Leave Act (FMLA) and

Continued on next page

Illinois Amends Day and Temporary Labor Services Act

BY KATHARINE P. LENNOX, DAWN CUTLAN STETTER, & MICHAEL R. PHILLIPS

On Aug. 4, 2023, Illinois Gov. J.B. Pritzker signed House Bill 2862 / Public Act 103-437 (the amendment), making significant changes to Illinois' Day and Temporary Labor Services Act. Illinois' Department of Labor (DOL) followed by filing emergency and proposed rules to implement the amendment. Staffing agencies and businesses that utilize staffing agencies should take note, as the changes yield additional legal requirements and enhanced potential consequences for violation.

Changes as a Result of the Amendment

The amendment alters the Day and Temporary Labor Services Act's notice, pay, civil action, safety, training, documentation, fee and penalty provisions in the following significant ways.

Continued on page 4

The Evolving But-For Standard in Employment Law

CONTINUED FROM PAGE 1

the Americans with Disabilities Act (ADA) should be analyzed under the mixed-motive or but-for framework, but the circuit courts that have considered the question are generally in consensus that ADA claims are subject to the but-for standard[3] and claims arising under the FMLA are subject to the mixed-motive standard.[4] In its most recent ruling on the subject of mixed motive versus but-for causation, *Comcast Corporation v. National Association of African American-Owned Media*,[5] the Supreme Court announced that discrimination claims brought under Section 1981 of the Civil Rights Act of 1866 are subject to the heightened but-for standard in Moreover, *Comcast* places the burden on the plaintiff to show but-for causation as early as the pleading stage.[6]

In Justice Ginsberg's dissent in *Nassar*, the case holding that Title VII retaliation cases must be analyzed differently than Title VII discrimination cases, she pointed out the confusion and complications that arise from having different standards for different types of discrimination and retaliation claims, even those brought under the same statute.[7] This divergence becomes even more problematic when different types of discrimination are alleged in the same lawsuit. For example, an African-American female plaintiff over 40 might allege that she was discriminated against based on her sex, age, and race, and that she was retaliated against for complaining about differential treatment prior to her termination. In this scenario, the plaintiff would have up to eight separate claims arising under three different statutes (Title VII, ADEA, and Section 1981), with some of those claims being subject to a but-for standard and others the mixed-motive standard.

The *Comcast* decision has led to even more questions about how the different standards should be applied, particularly as it relates to Section 1981. The dispute turns on how high the but-for threshold should be, with some advocates arguing that it should be treated as it is in the context of tort law, where an event can have multiple and even many but-for causes, while others have taken the view that such claims are only cognizable when the discriminatory motive is essentially the *only* reason for the adverse employment action. Such a view, if adopted, would preclude a plaintiff from prevailing on more than one theory of discrimination or retaliation, as in the scenario above.[8]

Indeed, at least two district courts have reached this precise conclusion, relying on the Supreme Court's decision in *Comcast*, which reasoned that, because the plaintiff had cited factors besides race for the adverse action, its race discrimination claim under Section 1981 was not cognizable.[9] For example, in *Arora v. NAV Consulting Inc.*,[10] the Northern District of Illinois dismissed the plaintiff's Section 1981 claim for race discrimination on the ground that he had brought it in conjunction with other discrimination claims, stating that "[a]s courts in this Circuit have interpreted *Comcast*, a plaintiff cannot allege multiple discrimination theories as the 'but for' cause for a Section 1981 violation."[11] The D.C. District Court adopted similar reasoning in *Adetoro v. King Abdullah Academy*, dismissing the plaintiffs' Section 1981 discrimination claim where discrimination under Title VII was also alleged because it was "equally plausible that [plaintiffs] were terminated for not being Sunni Muslim, not being from Saudi Arabia, or both."[12]

Such reasoning, if widely adopted, would have serious repercussions for employment discrimination and retaliation cases. Consider the case of the older female worker who has been terminated while a younger female coworker and an older male coworker were kept. Her theory of the case might be that it was the combination of her age and sex that made her undesirable. Assuming the evidence bears this out, that but for her sex *and* age she would not have been terminated, she may still be precluded from any relief despite two unlawful motives for her termination. This type of discrimination has been explicitly

Labor & Employment Law

This is the newsletter of the ISBA's Section on Labor & Employment Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are $30 per year.

To subscribe, visit www.isba.org/sections or call 217-525-1760.

OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITOR
Michael R. Lied

PUBLICATIONS MANAGER
Sara Anderson
✉ sanderson@isba.org

recognized by several circuits as the sex-plus or gender-plus theory under Title VII, and a holding that but-for burdens of proof would preclude this theory would undermine this jurisprudence.[13]

It would also make proving a differential treatment case much more difficult, if not impossible. Often, a discrimination or retaliation claim arises when two employees are accused of or engage in similar types of misconduct, but the protected employee is subjected to much harsher consequences, raising an inference of discrimination. In this scenario, there are two causes for the adverse employment action, both of them "but-for." The employer would have had no reason to terminate the protected employee if he had not engaged in misconduct, but if he had been in the non-protected class and engaged in that same misconduct, he would presumably not have been terminated. If but-for causation means that only one cause for the adverse action can be alleged, it is hard to imagine any such claims surviving summary judgment or even a motion to dismiss.

While this issue has yet to come before a circuit court in the context of Section 1981, there is significant jurisprudence in the context of other anti-discrimination statutes rejecting the notion that a given event can only have one but-for cause, whether discriminatory or not.[14] As the court noted in *Knapp v. Evgeros, Inc*.[15] when it rejected that the plaintiff's ADEA claim was precluded because the plaintiff had also brought a claim under the ADA, such a rule "would undermine every ADEA claim", explaining that "[e]very event (or, at least, every event that is relevant to the ADEA) has multiple but-for causes. A plaintiff's hiring is a but-for cause of her firing; if she had never been hired, she would never have been fired. So is her having been born, and her mother's having been born, and her mother's having been born, and so on."[16] The court concluded that the defendant's proposed rule was "not just wrong, but incoherent."[17]

The Supreme Court has endorsed the principle that there can be multiple but-for causes for a single event. In *Bostock v. Clayton County*, the seminal case making discrimination on the basis of sexual orientation and identity impermissible under Title VII, the Court noted that "[o]ften, events have multiple but-for causes" and a defendant "cannot avoid liability just by citing some other factor" that played a role in its conduct.[18]The Seventh Circuit also recently reaffirmed that an event can have multiple but-for causes, at least in the context of Title VII retaliation claims. In *Xiong v. Board of Regents of the University of Wisconsin,* the plaintiff alleged that he was fired almost immediately after complaining of race discrimination, which is protected by Title VII, and demanding a new supervisor, which is not protected.[19] The Seventh Circuit reversed the district court's grant of summary judgment on the basis that but-for causation "does not mean that the protected activity must have been the only cause of the adverse action. Rather, it means that the adverse action would not have happened without the activity."[20]

The Northern District of Illinois rejected the reasoning of *Bostock* as it relates to Section 1981, citing the limited application of *Bostock* to Title VII claims.[21] But it makes little sense to interpret the same burden of proof differently, especially when the elements of discrimination and retaliation claims are consistent across the various statutes. Indeed, such an approach would essentially create three burdens of proof – the mixed motive, the standard but-for, and a heightened but-for standard applicable only to Section 1981 claims. Not only would this create further confusion for fact finders, but it contravenes well-settled principles of tort law[22] upon which both *Nassar* and *Comcast* relied in creating the but-for standard for Title VII retaliation claims and Section 1981 claims.[23] Indeed, there is nothing in the decisions leading up to *Comcast* to indicate that Section 1981 causation should have its own heightened standard. To the contrary, while the *Comcast* analysis extensively distinguishes the mixed motive standard from Title VII cases, it then draws upon the but-for standard in the previously decided Title VII retaliation ADEA cases, which suggests it meant include the 1981 standard in the same category.

For now, plaintiffs can feel reasonably confident in alleging more than one but-for cause of an adverse employment action, whether permissible or not, but the question remains open, especially in the context of Section 1981 and for ADA and FMLA claims, where the Supreme Court has not definitively ruled on the applicable burden of proof. If the circuit courts continue to diverge in their interpretation of *Comcast* and the but-for standard more generally, the question may come before an increasingly conservative Supreme Court. In that case, the potential adoption of the heightened but-for standard would result in a dramatic shift in the employment law cases and potentially other areas of the law as well.■

---

1. *University of Texas Southwestern Medical Ctr. v. Nassar*, 570 U.S. 338, 349 (2013).
2. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009); *Nassar*, 570 U.S. 338.
3. *See, e.g., Natofsky v. City of New York*, 921 F.3d 337, 348 (2d Cir. 2019); *Gentry v. East West Partners Club Management Co. Inc.*, 816 F.3d 228, 235 (4th Cir. 2016); *Lewis v. Humboldt Acquisition Corp., Inc.*, 681 F.3d 312, 321 (6th Cir. 2012); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 963–64 (7th Cir. 2010).
4. *See, e.g., Egan v. Delaware River Port Authority*, 851 F.3d 263, 274 (3d Cir. 2017) (interpreting FMLA to allow mixed-motive jury instructions); *Ion v. Chevron USA, Inc.*, 731 F.3d 379, 389 (5th Cir. 2013) (same); *Woods v. START Treatment & Recovery Centers, Inc.*, 864 F.3d 158, 169 (2d Cir. 2017) (same).
5. 140 S.Ct. 1009, 1014 (2020).
6. *Id*. at 1019.
7. "The Court shows little regard for the trial judges who will be obliged to charge discrete causation standards when a claim of discrimination 'because of,' *e.g.,* race is coupled with a claim of discrimination 'because' the individual has complained of race discrimination. And jurors will puzzle over the rhyme or reason for the dual standards."
570 U.S. 338 at 364 (J. Ginsberg, dissenting).
8. This would not necessarily preclude plaintiffs from alleging different kinds of discrimination and/or retaliation in the pleadings stage based on a plaintiff's ability to plead in the alternative under Federal Rule of Civil Procedure 8(d)(2), but it could force them to chose just one avenue to pursue at the summary judgment stage and at trial.
9. *Comcast*, 140 S.Ct. at 1013.
10. No. 21 C 4443, 2022 WL 7426211 (N.D. Ill. Oct. 13, 2022).
11. *Id*. at *2.
12. 585 F.Supp.3d 78, 85 (D.D.C. 2020).
13. *See, e.g., Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1048 (10th Cir. 2020); *comp. Coffman v. Indianapolis Fire Dept.*, 578 F.3d 559, 563 (7th Cir. 2009) (noting that whether sex-plus discrimination is cognizable under Title VII is an open question in the Seventh Circuit).
14. *See, e.g., Malin v. Hospira, Inc*., 762 F.3d 552, 562 FN 3 (7th Cir. 2014) ("A single event can have multiple but-for causes, so Malin's FMLA leave request and her sexual harassment complaint could both have been but-for causes of Hospira's allegedly retaliatory conduct. A jury could find that both claims have merit."); *Myers v. IHC Construction Companies, LLC*, No. 18-cv-4887, 2021 WL 1172740, at *9 (N.D. Ill. Mar. 29, 2021) ("The Court considers Plaintiff's discrimination and retaliation claims together (as Defendant does) because a reasonable jury could conclude that either, or both, Plaintiff's race and his protected activity (complaining about Newell's comment) caused his termination and other adverse employment actions."); *Zekucia v. Ounce of Prevention Fund*, No. 19 C 8081, 2020 WL 12602230, at *3 FN 2 (N.D. Ill.

Nov. 6, 2020) (Dismissing complaint alleging multiple but-for legal theories, but explicitly rejecting the Defendant's argument that these claims are inconsistent); *Myvett v. Kraft Heinz Foods Company, LLC*, No. 17 C 8711, 2020 WL 1248342, at *4 (N.D. Ill. Mar. 16, 2020) (Plaintiff "need only show that her disability was a but-for cause of her firing; the disability need not be the only but-for cause of her firing.").
15. 205 F.Supp.3d 946 (N.D. Ill. 2016).
16. *Id.* at 959.
17. *Id*.
18. 140 S. Ct. 1731, 1739 (2020).
19. 62 F.4th 350, 353 (7th Cir. 2023).
20. *Id*. at 355 (quoting *Carlson v. CSX Trans*., Inc., 758 F.3d 819, 828 n.1 (7th Cir. 2014)).
21. *Arora*, 2022 WL 7426211 at *3 ("The Court declines to apply *Bostock* to Section 1981 in contravention of *Comcast*.").
22. *See, e.g., Brackett v. Peters*, 11 F.3d 78, 80 (7th Cir. 1993) ("An event is, as we have emphasized, typically the consequence of multiple causes."); *Loughman v. Consol–Pennsylvania Coal Co.*, 6 F.3d 88, 106 (3d Cir. 1993) ("As both tort law and common sense tell us, there may be multiple but-for causes of a single loss."); *Zann Kwan v. Andalex Group LLC*, 737 F.3d 834, 846 (2d Cir. 2013) ("'but-for' causation does not require proof that [the conduct] was the only cause.").
23. *Comcast*, 140 S.Ct. at 1014 (relying on "textbook tort law" in concluding that the "but for" causation standard applies to 1981 claims); *Nassar*, 570 U.S. at 2525 (citing the Restatement of Torts as "the background against which Congress legislated in enacting Title VII, and these are the default rules it is presumed to have incorporated" in concluding that "but for" causation standard applies to Title VII retaliation claims).

Illinois Amends Day and Temporary Labor Services Act

CONTINUED FROM PAGE 1

1. Labor Dispute Provisions

The amendment provides that no day and temporary labor service agency (i.e., a staffing agency) may send a day or temporary laborer (worker) to a place where a strike, a lockout or other labor dispute exists without providing, at or before the time of dispatch, an understandable written statement that informs the worker of the labor dispute and the worker's right to refuse the assignment. Notably, failure to adhere to any of these notice requirements will constitute separate and distinct violations.

2. Pay Provisions

The amendment further provides that a worker assigned to a staffing agency client for more than 90 days must be compensated with at least the same pay and benefits (or an hourly cash equivalent) as the client's lowest-paid direct employee of the same or closest level of seniority and work. To allow staffing agencies to comply, the amendment also requires clients to provide the information regarding comparable employees' pay and benefits upon request from staffing agencies. If clients fail to provide this information, the impacted staffing agency can immediately file a civil action against the client for up to $500 per violation as well as fees and costs.

3. Worker Notice, Safety and Documentation Requirements

Also new are the following safety requirements, to which staffing agencies must adhere ***before*** assigning workers to sites. Staffing agencies must now:

1. Inquire about the client's safety and health practices and hazards at the assignment site (which may include a site visit), make the client aware of any safety concerns that the staffing agency learns of during the assignment, remove the worker from the site if these concerns are not corrected and document these efforts.
2. Provide free general industry safety training to the worker. Notably, this is in addition to any training the client may provide and must be provided in the worker's preferred language, and the date and content must be documented, maintained and provided to the worker.
3. Transmit a general description of the safety training program to the client.
4. Provide the worker with a work-site contact and the DOL's hotline number, which is (877) 314-7052, so the worker can report any safety concerns.

The amendment also requires clients to adhere to similar enhanced notice, safety and documentation requirements. The amendment further details that workers or staffing agencies have the right to refuse new tasks if the safety and health awareness training for the new task has not been reviewed or the worker has not received appropriate training for the new task.

4. Other Civil Action Provisions

Civil actions may now also be initiated by an "Interested Party" with a reasonable belief that a staffing agency or its client is in violation of the Day and Temporary Labor Services Act. "Interested Party" is defined as "an organization that monitors or is attentive to compliance with public or worker safety laws, wage and hour requirements, or other statutory requirements." However, prior to filing suit, the Interested Party must submit a complaint to the Illinois DOL, which will send notice to the accused party. The accused staffing agency or client will then have 30 days after receiving the DOL's notice to contest or cure the alleged violation. Regardless of whether the accused contests or cures the alleged violation, it seems that:

The DOL will, after an undefined period, eventually issue a right-to-sue notice.

Even if the DOL does not issue a right to sue, after 180 days of service of the notice of the violation to the parties, the Interested Party may file suit.

Suits by Interested Parties must be brought within three years of the alleged violation, though this limitation will be tolled by the 180-day period and any mutually agreed-upon extension of that 180-day period. While these civil suits may garner the full amount of the increased statutory penalties discussed below, an Interested Party is entitled to receive only 10% of the penalties, plus fees and costs. The remaining 90% of the penalties will be deposited into Illinois' Child Labor and Day and Temporary Labor Services Enforcement Fund.

5. Other Penalty and Fee Provisions

Lastly, the amendment adjusts applicable fees and penalties as follows.

Statutory penalties for general violations of the Day and Temporary Labor Services Act are now between $100 and $1,500 per violation for violations found in an audit by the DOL or as awarded in any civil action brought by an Interested Party or the Illinois Attorney General. Repeat violations within three years of an initial violation will now subject staffing agencies or clients to a penalty of between $250 and $7,500

per violation. It remains that separate and distinct violations will be construed for each worker and each day that violations continue.

Additionally, clients who fail to:

Meet the Day and Temporary Labor Services Act's Work Verification Form requirements may now be subject to civil penalties between $100 and $1,500 per initial violation and between $500 and $7,500 for subsequent violations.

Verify a staffing agency's state registration prior to contracting with the agency may now by subject to civil penalties between

$100 and $1,500 per day that the contract exists.

Registration fees are likewise increased — up to $3,000 annually per agency and up to $750 per branch.

Actions by the Illinois Department of Labor

Following the Governor's signature, on Aug. 7, the Illinois DOL filed Emergency Rules and Proposed Permanent Rules to implement the amendment. The Emergency Rules became effective Aug. 7, and the DOL has indicated that the required public comment period for the Proposed Permanent Rules is likely to run through Oct. 2. The DOL also announced that it will post new guidance on its webpage regarding the amendment in short order, though as of the date of this publication, guidance has yet to be posted.

Next Steps for Staffing Agencies and Their Clients

Given the significant changes and increased consequences for violation presented by the amendment, staffing agencies with a presence in Illinois and businesses that utilize staffing agencies should review their current practices to see what, if any, changes are necessary to comply with the revised Day and Temporary Labor Services Act.■

EEOC Issues Draft Regulations on the Pregnant Workers Fairness Act – Key Takeaways for Employers

BY ANGELA VOGEL, MEG A. BURNHAM, AND ARIELLE SPINNER

Employers should take note – the U.S. Equal Employment Opportunity Commission ("the EEOC") unveiled draft regulations and guidance on the new federal Pregnant Workers Fairness Act (PWFA).

While the new PWFA does not replace the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), the Family and Medical Leave Act (FMLA), or state and local laws that may provide protections for pregnant employees, the PWFA applies 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 appear 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.

PWFA Overview and the Gap the Act Is Trying to Fill

On June 27, 2023, PWFA went into effect. The PWFA, 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 has generally not been covered by the ADA because of its temporary nature. And while the FMLA provides leave for employees who are FMLA eligible, it does not 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 related to pregnancy, childbirth, or related medical conditions, unless the accommodation will impose an undue hardship on the employer.

The PWFA also prohibits employers from denying job and employment opportunities to qualified employees and applicants, requires that employers engage in the interactive process, and prohibits employers from taking adverse action or retaliating because employees have requested accommodations or opposed unlawful practices. In addition, the PWFA requires that leave only be provided as an accommodation 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.

Draft Regulations Confirm the PWFA Provides Broad Coverage for Known Limitations

One of the main differences between the PWFA and the ADA is that the PWFA provides broad coverage for "known limitations" that do not 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 the employee or applicant—or the representative of the employee or applicant—has 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 to maintain 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" shall be construed broadly to the maximum extent permitted by the PWFA.
- "Pregnancy" and "childbirth" are also defined broadly and include but are not limited to: current pregnancy; past pregnancy; potential or intended pregnancy; labor; and childbirth (including vaginal and cesarean delivery).
- "Related medical conditions" are also defined broadly and include conditions which 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.

Draft Regulations Further Define Qualified Individuals and Applicable Time Periods for Limitations

The PWFA extends protections to "qualified employees" who, with or without reasonable accommodation, can perform essential job functions. In addition, employees and applicants *who cannot perform essential function(s) of their job* may also be qualified if the inability to perform the function is for a "temporary period" and the essential function(s) can be resumed "in the near future" (if the employee can be reasonably accommodated). The terms "in the near future" and "temporary period" are not defined by the PWFA but are addressed in the draft regulations.

Although it is not clear from the PWFA, the draft guidance specifies that definition of "qualified" in the PWFA is a two part definition, and the first part of the definition applies to those *who can perform essential functions* and the second part of the definition (and analysis to determine if an individual is qualified) is only relevant in circumstances where an individual *cannot perform an essential function*.

In addition, based on the two part definition in the PWFA, the draft regulations set forth a separate analysis to determine whether an individual who cannot perform essential functions is qualified, including:

1. 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;'"
2. 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 forty weeks of its suspension;"** and
3. 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, while the draft regulations define "in the near future" as 40 weeks from the start of the temporary suspension of the essential function, the EEOC's draft guidance indicates that employees may need (1) accommodations because of pregnancy, (2) leave to recover from childbirth, and (3) additional accommodations (including the suspension of essential functions) upon returning to work. **This means 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 time period could be considerably longer than 40 weeks**. The EEOC sought comments on the defined time period of "in the near future," including whether a one-year time period should be implemented, and whether the periods of suspension of temporary functions during pregnancy and post-pregnancy should be combined.

Draft Regulations Contemplate the Temporary Suspension of Essential Functions

Under the ADA, covered employers are already required to reasonably accommodate qualified employees and applicants, unless the employer can prove that doing so would impose an "undue hardship." However, the draft PWFA regulations identify types of potential reasonable accommodations **and expressly state that potential reasonable accommodations include the temporary suspension of essential functions –** which is a significant deviation from the ADA

and equivalent state laws. Other types of reasonable accommodations include: (1) modifications or adjustments to a job application process that enable an applicant to be considered for the position; (2) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held, that enable a qualified employee or applicant to perform the essential functions of the position; or (3) modifications or adjustments that enable a qualified employee or applicant to enjoy equal benefits and privileges of employment.

Within the general categories of reasonable accommodations listed above, the draft regulations include a few specific examples: job restructuring, modified work schedules, reassignment to vacant positions, temporarily suspending one or more essential functions, use of devices, additional breaks, telework, time off for medical appointments, and the use of paid and unpaid leave.

Further, the draft regulations generally define "essential functions" as "the fundamental job duties of the employment position the employee or applicant holds or desires," but also set forth specific factors to consider when determining essential functions. A job function may be considered "essential" if, for example: the reason the position exists is to perform that function; a limited number of employees is able to perform that function; and/or the function is so highly specialized that employees are typically hired for their ability to perform this function.

The draft regulations also include a non-exhaustive list of "evidence" that can help to determine whether a particular function is essential, such as: the employer's judgment; written job descriptions; the amount of time spent on the job performing the function; the consequences of not requiring current employees to perform the function; the terms of a collective bargaining agreement; and the work experience of current or past employees in the job. Presumably the detailed guidance pertains to determining whether a qualified individual or applicant is requesting the temporary suspension of an essential function.

Draft Regulations Provide Framework for Evaluating Undue Hardship and Provide a List of Presumptively Reasonable Accommodations

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: (a) the nature and cost of the accommodation; (b) the financial resources of the facility involved in providing the reasonable accommodation, the number of persons employed at the facility, and the effect on expenses and resources; (c) the employer's financial resources, the size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities; (d) the employer's operation(s), including the composition, structure, and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility to the employer; and (e) the impact of the accommodation upon 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. As well as the above-listed factors, additional factors include: (i) the length of time that the employee or applicant will be unable to perform the essential function(s); (ii) whether there is work for the employee or applicant to accomplish; (iii) the nature of the essential function(s), including its frequency; (iv) whether the employer has provided other employees or applicants in similar positions who are unable to perform their essential function(s) with temporary suspensions of essential functions; (v) if necessary, whether there are other employees, temporary employees, or third parties who can perform or be hired to perform the essential function(s); and (vi) whether the essential function(s) 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. These accommodations are referred to as "Predictive Assessments" and include: (1) allowing an employee or applicant to carry water and drink as needed during the workday; (2) allowing an employee or applicant additional restroom breaks; (3) allowing an employee or applicant whose work requires standing to sit and whose work requires sitting to stand; and (4) allowing an employee or applicant breaks as needed to eat and drink.

Draft Regulations Provide a Roadmap for the Interactive Process

The draft regulations confirm that once an employer learns or becomes aware of an employee's "known limitation," the employer must take affirmative steps to respond. If the "known limitation" can be easily accommodated (*e.g.,* allowing an employee to eat more frequently), 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, the employer and the employee should promptly engage in the interactive process.

Similar to 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. However, the draft regulations specifically contemplate the temporary suspension of essential functions in determining reasonable accommodations. The draft regulations provide 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 of the position. If the employee's limitation means that they are temporarily unable to perform one or more essential functions, the parties must also consider whether suspending the performance of one or more essential functions may be a part of the reasonable accommodation if the known limitation is temporary in nature and the employee could perform the essential function(s) in the near future (within generally 40 weeks).

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 that 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 cannot defend against a failure to accommodate claim based on the lack of documentation provided by the worker. The draft regulations define "reasonable documentation" as documentation that describes or confirms (1) the physical or mental condition; (2) that it is related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions; and (3) that a change or adjustment at work is needed for that reason. The draft regulations provide some examples of when it would be *unreasonable* for an employer to require medical documentation, including:

- When the known limitation and need for reasonable accommodation are obvious;
- When the employee or applicant already has provided an employer with sufficient information regarding a known limitation and that a change or adjustment is needed;
- Requiring documentation other than self-attestation from the employee or applicant regarding the "Predictive Assessment" accommodations (carrying water/drinking, addition breaks for restrooms/eating/drinking, and allowing sitting/standing);
- Requiring documentation other than self-attestation from the employee or applicant regarding lactation or pumping.

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. The draft regulations list the factors it will consider in determining whether there has been an unnecessary delay, including reason and length for the delay, who contributed to the delay, and what actions the employer took to provide accommodation during the delay.

Remedies

The EEOC's draft regulations confirm that the PWFA adopts the remedies from Title VII, providing recovery of economic and non-economic damages, including compensatory and punitive damages.

Poster Requirement

Employers are required to post notices in a conspicuous place describing workers' rights under the PWFA. The EEOC recently updated its EEO poster, which employers can use to satisfy the posting requirement.

Takeaways

- The PWFA draft regulations and guidance are only proposed regulations - they are not in effect and were released for public comment in August.
- Although the draft regulations and guidance are only proposed at this point, employers can use them as guidance in navigating pregnancy and childbirth related accommodation requests while awaiting final regulations and guidance.
- Employers should 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 cannot perform an essential function of their job if the limitation is temporary and they can resume it "in the near future" – which, according to the draft regulations, means that employers must temporarily suspend essential functions for qualifying individuals, barring undue hardship.
- In addition, employers 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, and also identify numerous underlying conditions that may be exacerbated by pregnancy and childbirth.
- The proposed regulations and guidance set forth a detailed and comprehensive method for engaging in the interactive process and evaluating accommodation requests, including a process to determine if the temporary suspension of essential functions may be a reasonable accommodation, and numerous considerations regarding undue hardship. While such a framework may be helpful, it could also be burdensome to comply with and may make it more challenging to deny accommodation requests.
- Employers should understand that there may be limitations imposed in connection with requesting medical documentation during the interactive process. Specifically, the proposed regulations identify several presumptive reasonable accommodations, and would prohibit employers from seeking medical documentation regarding these requests. This is similar to some existing state laws which

require employers to provide certain pregnancy- and childbirth-related accommodations without supporting documentation.

- Employers should carefully review their current policies and practices to ensure compliance with the PWFA. Additionally, employers should train their managers and supervisors to recognize pregnancy- and childbirth-related requests in order to ensure that requests are promptly addressed to avoid a potential violation, including providing interim accommodations while waiting for reasonable supporting documentation. ■

Illinois Legislature Passes More Employee-Friendly Bills

BY DANIEL O. CANALES & JENNIFER LONG

The Illinois Legislature has passed another string of employee-friendly bills that will impose new obligations for Illinois employers. First, following the leads of New York, California, Colorado and other like-minded legislatures, the Illinois Legislature passed a pay transparency bill that requires all employers with 15 or more employees to satisfy pay transparency requirements for recruitment- related job postings beginning in January 2025. The Illinois Legislature also added protections and leave of absence benefits for employees who are victims of domestic, sexual, gender or criminal violence (or who have a family member who is such victim), organ donors, or who suffer the loss of a child through suicide or homicide. Finally, both temporary labor employment agencies and the employers using them face additional training, wage payment and other obligations.

Illinois Takes Cue from Other States, Passes Job Pay Transparency Bill

Under the Job Pay Transparency Law, Illinois businesses with at least 15 employees will be required to provide pay scale and benefits information in all job postings for positions that are physically located in Illinois or that report to a supervisor or office located in the state. Required pay scale information includes an employer's "good faith" expectation of the wage or salary for the position or an acceptable range dictated by a number of factors, which may include the actual range of compensation for employees currently or formerly holding the position, as well as any budgeted amount for the position. An employer's disclosure obligations also extend to a general description of any available benefits, which includes typical employee benefit plans, as well as bonuses, stock options and other incentive-based compensation.

Additionally, businesses who engage third-party recruitment agencies or vendors to publicize their openings will also be responsible for equipping any third party with the necessary pay scale information to accompany their postings. Illinois businesses may satisfy their transparency obligations by providing a hyperlink to a publicly viewable webpage for all pay scale and benefits information. Finally, a covered employer must advertise all opportunities for promotion internally to their existing workforce within 14 calendar days of any external job posting, with limited exception.

The new law provides aggrieved individuals the right to bring complaints to the Illinois Department of Labor within one year of the alleged violation. At its discretion, the department may issue a notice of violation to any covered employer, which will prompt a 14-day window for the business to cure the alleged violation. Failure to do so will result in a $500 penalty for any first time offense. A subsequent violation notice will initiate a seven-day cure period followed by a $2,500 fine, and a third offense will result in a $10,000 fine with no opportunity for cure.

The Job Pay Transparency Law takes effect on January 1, 2025.

Illinois Legislature Approves Additional Protections for Grieving Employees

Following new leave requirements implemented under the Family Bereavement Leave Act (FBLA) last year, the Illinois Legislature has provided additional time off benefits to allow workers to grieve the loss of a child under challenging circumstances. The Child Extended Bereavement Leave Act (CEBLA) requires employers with at least 50 employees to provide between six weeks (employers with 50-249 full-time employees) or 12 weeks (employers with 250 or more employees) of unpaid protected leave to employees who have lost a child due to suicide or homicide. Employees will be entitled to take leave continuously or intermittently in increments of at least four hours to grieve or for circumstances related to the loss, so long as the duration of the leave is completed within one year of the employee notifying their employer of the loss.

Employees taking leave under the CEBLA will not be entitled to take additional leave under the FBLA, which has required employers to provide unpaid bereavement for the loss of a child under any circumstance since 2016.

The CEBLA also takes effect January 1, 2024.

Illinois Legislature Extends Leave Available Under VESSA

Illinois lawmakers also amended the Victims' Economic Safety and Security Act (VESSA), broadening the list of circumstances for which employees may take leave to include those related to an employee

with a family or household member who was killed as a victim of violent crime.

Under the new protections, employees may use up to two weeks of additional unpaid leave to make arrangements, attend the funeral or mourn the death of a family or household member killed in a crime of violence. This leave must be completed within 60 days after the date the employee learns of the victim's death, and cannot be combined with leave available under the FBLA. Under prior recent amendments, VESSA provides unpaid protected leave to employees for purposes related to the employee or their family member being a victim of sexual, gender or violent crime, in addition to the original circumstances of being a victim of domestic violence or abuse. The VESSA leave time permitted for non-death-related reasons remains unchanged: 12 weeks of unpaid leave for employees of an employer with at least 50 employees; eight weeks for businesses employing between 15-49 employees; and four weeks for businesses employing 1-14 employees.

The additional leave time available under VESSA became effective immediately upon Governor J.B. Pritzker's signature on July 28, 2023.

Organ Donors Entitled to Paid Leave

The newly retitled Employee Blood Donation and Organ Donation Leave Act provides that any Illinois employees who serves as an organ donor will be entitled to 10 days of paid leave in any 12-month period. The new organ donation leave requirement is in addition to employees' long- existing rights to take one hour of paid leave every 56 days for the purpose of donating blood. This legislation became effective immediately upon Governor Pritzker's signature on August 4, 2023.

New Equivalent Compensation and Other Requirements for Staffing Agency Employers Will Also Impact Client Companies

The Illinois Legislature made significant changes to the Day and Temporary Labor Services Act (DTLSA), which became effective immediately upon Governor Pritzker's signature on August 4, 2023. The many new changes to the DTLSA include an equivalent compensation and benefits requirement for all day and temporary laborers that are assigned to a client company by a staffing agency for more than 90 days, new labor dispute, safety and job hazard notice and disclosure obligations, as well as new training requirements. The amendment also provides increased staffing agency registration fees and significantly increased enforcement penalties for violations (up to $18,000 for each first violation) that may be imposed against both staffing agencies and client companies. On August 7, 2023, the Department of Labor also published Emergency Rules, as well as Proposed Permanent Rules, to implement the new requirements under DTLSA. The public comment period for the Proposed Permanent Rules runs through October 2, 2023. It is anticipated that the Department intends to finalize the Proposed Permanent Rules prior to the expiration of the Emergency Rules on January 5, 2024. Full details on the new requirements under the DTLSA are available in the recent Duane Morris Class Action Defense Blog post.

What This Means for Employers

Because many of these new obligations became effective immediately upon signature by Governor Pritzker, Illinois employers should review existing bereavement and victim leave policies, as well as existing and anticipated contracts or service agreements with temporary labor agencies, to ensure compliance with the new requirements. Employers will also want to proactively prepare to comply with new compensation and benefits transparency obligations, including notice and posting requirements that will be imposed on the recruitment process for all Illinois positions.■

Reprinted with permission. Originally published by Duane Morris LLP at https://www.duanemorris.com/alerts/illinois_legislature_passes_more_employee_friendly_bills_0723.html.

U.S. Department of Labor Announces Final Rule Revamp of the Davis-Bacon Act

BY TIMOTHY TAYLOR & NICOLE ELLIOTT

Highlights

- In a long-awaited action, the U.S. Department of Labor (DOL) announced that it has finalized its rule revamping regulations for the Davis-Bacon Act (DBA).
- DOL has published a summary of the rule, as well as the 812-page rule itself, on its website.
- The final rule will impact many industries, employers, and state and local governments. In particular, portions of the rule will apply to those projects aiming to take advantage of the tax incentives included in the Inflation Reduction Act (IRA).

The U.S. Department of Labor (DOL) has announced it has finalized its new rule relating to the Davis-Bacon Act (DBA). This rule goes into effect 60 days after it is officially published in the Federal Register. The final rule will have far-reaching consequences, including its potential impact on those seeking a 'bonus credit' under the Inflation Reduction Act (IRA).

Higher Prevailing Wages Likely

At first glance, the final rule appears to embrace most of the substantial changes from the proposed rule. Those changes include several that will likely result in higher prevailing wages, including:

- Importantly, the final rule lowers the threshold for setting the prevailing wage. The rule reduces from 50 percent to 30 percent of workers to be paid a particular wage for that to become the prevailing wage. This will likely raise prevailing wages in certain locations where the union pay scale is less prevalent.
- The same process is used for fringe benefits: if 30 percent or more of workers receive a certain fringe benefit (rather than 50 percent), then that is the prevailing fringe wage rate.
- Prevailing wages can be calculated on a multicounty or highway-district basis, rather than on a county basis.
- The final rule eliminates the prohibition on mixing and matching rural and metropolitan data to determine wage rates.
- Prevailing wages as determined by a state or local government can be adopted by DOL in certain circumstances.

Updating the Prevailing Wage

Changes regarding how and when prevailing wages are updated include the following:

- The final rule expressly adopts DOL's guidance that prevailing wages need to be updated whenever a contract is extended or is modified to include newly scoped substantial construction work.
- The final rule requires annual prevailing-wage updates to long-term, indefinite contracts, such as IDIQ contracts, schedule contracts, and long-term operations and maintenance contracts. Task orders under such contracts need to include the most recent prevailing wage.
- The final rule provides that prevailing wages are deemed to be included by operation of law even if not included by the contracting agency. Consistent with current practice, however, contractors are entitled to compensation for retroactively required prevailing wages.

DBA Coverage Expansion

The final rule expands DBA coverage in a number of ways, including:

- The final rule expressly includes certain new-technology projects as DBA-covered work: solar panels, wind turbines, broadband installation, and installation of electric car chargers. Addition of these categories is relevant under the IRA.
- The final rule codifies DOL's guidance that demolition work is covered when it is done in order to clear the way for new construction.
- The final rule clarifies that certain prefabrication work is DBA-covered.
- The final rule makes liable for underpaid prevailing wages not only the prime contractor itself, but also the controlling shareholders or members of any entity holding a prime contract, or participants or partners of any joint venture (JV) or partnership holding the contract

Whistleblower Protection

The final rule contains a new anti-retaliation provision. Whistleblowers who are retaliated against are entitled to 'make-whole relief,' including reinstatement, back pay, and compensatory damages—which in other contexts DOL has argued should include damages for emotional distress and similar relief.■

The Supreme Court Redefines the Religious Accommodation Obligation for Employers

BY FIONA W. ONG & ELIZABETH TORPHY-DONZELLA

On June 29, 2023, a unanimous U.S. Supreme Court ruled that religious accommodations under Title VII of the Civil Rights Act must be provided to employees or prospective employees unless the employer is able to demonstrate that the burden is **substantial**. The Court rejected the "de minimus" standard as a misreading of the Court's precedent in *TWA v. Hardison*.

Background of the Case. *Groff v. DeJoy* involves a rural mail carrier for the U.S. Postal Service who is a strict observer of the Sunday Sabbath. For the first several years of his employment with the USPS, the carrier was exempted from Sunday work (which involved package deliveries pursuant to a USPS contract with Amazon) as a reasonable accommodation.

The USPS subsequently entered into a Memorandum of Understanding with the carriers' union that resulted in the carrier being required to work Sundays. The Postmaster of the facility tried to find others to cover the Sunday shifts, but that was not always possible and the carrier was scheduled to work a number of Sundays. Because he repeatedly failed to report to work, he was disciplined. Moreover, his refusal to work Sundays required others to cover those shifts, including the Postmaster himself, may have resulted in increased overtime pay, increased the workload for those working, and created resentment among his co-workers.

The carrier eventually resigned based on the lack of accommodation for his religious beliefs and sued the USPS. The trial court found that, as a matter of law, the carrier's legal claims failed. This ruling was affirmed by the U.S. Court of Appeals for the Second Circuit, leading to the appeal to the Supreme Court.

The Prior Standard. Under Title VII, a private employer with 15+ employees must provide reasonable accommodations for employees' sincerely held religious observances that conflict with work requirements, absent an undue hardship. While this requirement sounds very much like the reasonable accommodation requirement under the Americans with Disabilities Act, the interpretation by most of courts of the standard for establishing an undue hardship under Title VII has been far less than under the ADA.

According to Supreme Court precedent as interpreted before today, "undue hardship" existed when there was more than a *de minimis* (or minimal) cost to the employer. Such cost need not be economic. Courts have found undue hardship where there were negative impacts on productivity or quality, personnel or overtime costs, increased workload for other employees, and reduced employee morale.

The Supreme Court's Ruling. The Supreme Court held that to establish that a religious accommodation presents an undue hardship, employers must present evidence that the burden is "substantial in the overall context of an employer's business." Writing for a unanimous Court, Justice Alito explained that, in common parlance, a hardship is, at minimum, something that is "hard to bear." Further, for a hardship to be "undue" as naturally understood by its dictionary definition, "the requisite burden, privation or adversity must rise to an 'excessive' or 'unjustifiable level.'" (citing several dictionaries).

The Court stated, "What matters more than a favored synonym for 'undue hardship' (which is the actual context) is that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular impact in light of the 'nature, size and operating cost of [an] employer.'" (citing the Solicitor General's brief).

The Court declined to accept alternating invitations by the parties to the case that it either adopt the undue hardship standard enunciated by cases under the ADA or the EEOC's guidance interpreting *Hardison* and religious accommodations. Neither of these interpretations has been examined by courts in the context of the standard enunciated today, so the Court found it more appropriate to allow courts to apply the "substantial burden" standard in the context of specific cases. The Court provided the following "guideposts" for future analysis.

First, courts should assess the impact of the proposed accommodation on the conduct of the employer's business. While impacts on coworkers are relevant, they are not dispositive.

Second, Title VII requires that the employer not simply assess the employee's requested accommodation and reach a conclusion, such as that it will lead to increased overtime pay (which, by itself, may not be an undue burden for some employers). Instead, employers must consider whether other accommodations may be appropriate. In the context of scheduling accommodations such as that at issue in this case, considering other options such as voluntary shift swapping, is also necessary.

The Court remanded the case to allow the lower court to consider the facts of the case in light of the Court's clarified standard.

Practical Impact of the Case. Employers must now review their current practices for considering religious accommodations (and take a fresh look at pending requests). The need to demonstrate a substantial burden before denying an accommodation is a significant change but does not place employers in "unfamiliar territory." As with analysis under the ADA, inconvenience to other employees is not dispositive and costs of granting the accommodation must be considered in light of the size of the employer and its overall resources, financial and otherwise.■

Reprinted with permission. Originally published by Shawe Rosenthal LLP at https://shawe.com/elerts/the-supreme-court-redefines-the-religious-accommodation-obligation-for-employers/.