# Legal Updates for Employers: Recent Supreme Court Rulings and The Pregnant Workers Fairness Act


Presented by:

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*with special guest:*

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# Litigation Stayed During Arbitration Appeals

- *Coinbase v. Bielski*, 599 U.S. ___, 143 S.Ct. 1915 (June 23, 2023)
- Reversed a 9th Circuit decision rejecting a party's efforts to stay litigation of a class action while arbitrability of the claims was determined
- Not an employment case – a cryptocurrency platform and its customers
- Turns on 1988 Amendment to the Federal Arbitration Act (FAA) which added Section 16(a)

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# Litigation Stayed During Arbitration Appeals

- Section 16(a) provides a one-way right to interlocutory appeal
- If a motion to compel arbitration is *denied*, the party seeking to compel arbitration as an immediate right to an interlocutory appeal
- If a motion to compel arbitration is *granted*, no such immediate right to appeal exists under the FAA
- Question for the Court was if litigation should be stayed during an interlocutory appeal of the District Court's denial of motion to compel arbitration

# Litigation Stayed During Arbitration Appeals

- Justice Kavanaugh delivered the 5-4 majority opinion (Roberts, Alito, Gorsuch and Barrett)
- Acknowledged that the FAA does not address whether the district court proceeds must be stayed
- Reasoned that an appeal divests the federal trial court of control over those aspects of the case involved in the appeal
  - Then reasoned that where the location of the case is the question (arbitrability), the entire case is involved (citing *Griggs v. Provident Consumer Discount Co*., 456 U.S. 56, 103 S.Ct. 400 (1982))
- Explained that the right to an interlocutory appeal of arbitrability is “like a lock without a key, a bat without a ball, a computer without a keyboard – in other words – not especially sensible”
- Disregarded arguments about frivolous appeals/delays and the availability of discretionary stays available at the District Court level

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# Personal Jurisdiction via Business Registration

- *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. __, 143 S.Ct. 2028 (June 27, 2023)
- an out-of-state entity may be required to consent to personal jurisdiction in Pennsylvania as a condition of doing business
- Arose out of Pennsylvania's business registration statute, 42 Pa Cons. Stat. § 5301(a)(2)
- Validates a consent-based test for personal jurisdiction under *Pennsylvania Fire*, 243 U.S. 93, 37 S.Ct. 344 (1917), separate from the specific and general jurisdiction analysis since *International Shoe*, 326 U.S. 310, 66 S.Ct. 154 (1945)

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# Personal Jurisdiction via Business Registration

- 4-1-4 Plurality Opinion (Gorsuch for Majority)
- Alito's concurrence suggests Pennsylvania's statute (and those like it) may be vulnerable to a Dormant Commerce Clause challenge on remand
  - Dormant Commerce Clause prohibits states from passing legislation that discriminates against or excessively burdens interstate commerce
- Four dissenting judges (Barrett, Roberts, Kagan, Kavanaugh) expressed disapproval under the Due Process Clause
- Short lived victory after remand?

# Personal Jurisdiction via Business Registration

- Looking ahead…
  - Beware of “litigation tourism” and vulnerability to it
  - Be mindful of states’ laws where you are registered or are registering to do business
  - Monitor this case for outcome of Dormant Commerce Clause challenge, if raised

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# Affirmative Action

- *Students for Fair Admissions, Inc. v. Harvard College*
  - Decided June 29, 2023
  - 6-2 decision (Jackson recused herself)
  - Roberts opinion
  - Gorsuch concurring (Thomas joined)
  - Kavanaugh concurring
  - Sotamayor dissenting (Kagan joined)


- Key holding – Institutions of higher education cannot use race as a factor in admissions; Harvard's AA program unconstitutional

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# Affirmative Action (cont'd)

- Impact on government contractors
  - OFCCP made clear Supreme Court decision applies only to higher education admissions programs and does not address the employment context
  - EO 11246 placement goals are still legal (and required by regulation if women or minorities are underutilized) – not quotas or set-asides
  - Contractors can still give hiring preference to veterans and special opportunities to individuals with disabilities
  - May consider removing "affirmative action" tagline in job postings to avoid confusion – focus on status as EEO employer
  - Consider a self-audit

# Affirmative Action (cont'd)

- Impact on DEI programs
  - July 13, 2023 – Joint letter from 13 state AGs to large US companies
    - "immediately cease any unlawful race-based quotas or preferences" or be "held accountable—sooner rather than later—for your decision to continue treating people differently because of the color of their skin"
  - EEOC generally referenced the ruling as a "problem", BUT
  - Commissioner Andrea Lucas praised the decision as one "in a series of recent rulings designed to restore the full meaning of the Civil Rights Act for the benefit of all Americans"
    - Referenced in context of *Hamilton v. Dallas County* – en banc Fifth Circuit decision that overruled requirement for Title VII plaintiffs to allege discrimination with respect to an "ultimate employment decision"
    - Sees cases as restoring "federal civil rights protections for anyone harmed by divisive workplace policies that allocate professional opportunities to employees based on their sex or skin color, under the guise of furthering diversity, equity, and inclusion."

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# Wage & Hour

- *Helix Energy Solutions Group, Inc. v. Hewitt*
  - Decided February 22, 2023
  - 6-3 decision
  - Kagan opinion
  - Gorsuch dissenting
  - Kavanuagh dissenting (Alito joined)

- Key holding – Day rate workers are not paid on a “salary basis” unless there is a reasonable relationship between guaranteed pay and total pay under 29 C.F.R. § 541.604(b)

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# DOL Proposed Regulations

- NPRM released August 30, 2023 (officially published September 8)
- Guaranteed salary for white collar exemptions increased to at least $1,059/week (from current $684/week)
- Highly-compensated exemption threshold increased to at least $143,988/year (from current $107,432/year)
- Implement automatic updates to these thresholds every 3 years
- Apply standard salary levels in Puerto Rico, Guam, U.S. Virgin Islands, and Northern Mariana Islands
- No change (yet) to duties test
- Comment period open through November 7, 2023

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# The Supreme Court's Religious Accommodations Ruling

## The Evolution of 'Undue Hardship' From *Hardison to Groff*

# *Groff v. DeJoy*

- Unanimous Decision
- Justice Alito delivered the opinion

# *Groff v. DeJoy* – Context

Gerald Groff, a USPS letter carrier and an Evangelical Christian who believed that Sunday should be devoted to worship and rest, brought action against the Postmaster General under Title VII, alleging the Postal Service failed to make reasonable accommodations for his Sunday Sabbath practice and instead disciplined him for failing to work on Sundays.

# *Groff v. DeJoy – Takeaway #1*

The Supreme Court held that the undue hardship defense to providing a religious accommodation requires showing that the proposed accommodation would cause a **substantial burden** in the overall context of the employer's business.

# *What about Trans World Airlines v. Hardison (1977)*

"To require TWA to bear **more than a *de minimis* cost** in order to give Hardison Saturdays off is an undue hardship."

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# *Groff v. DeJoy – Takeaway #2*

Earlier interpretations of the undue hardship defense which suggested employers only needed to show more than a *de minimis* cost are incorrect.

# *Krizhner v. PurePOWER Techs., LLC*, No. CA 3:12-1802-MBS, 2013 WL 5332686, at *6 (D.S.C. Sept. 23, 2013)

"When a plaintiff has established a prima facie case of religious discrimination under Title VII, the burden of proof shifts to the employer to demonstrate either (1) that it provided the plaintiff with a reasonable accommodation … or (2) that such accommodation was not provided because it would have caused an undue hardship-that is, it would have resulted in **more than a de minimis cost** to the employer."

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# *Groff v. DeJoy - Holding*

"We hold that showing 'more than a *de minimis* cost,' as that phrase is used in common parlance, does not suffice to establish "undue hardship" under Title VII. *Hardison* cannot be reduced to that one phrase."

# *Groff v. DeJoy - – Takeaway #3*

Religious accommodation requests are likely to remain highly fact-specific issues.

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# *Groff v. DeJoy*

"As we have explained, we do not write on a blank slate in determining what an employer must prove to defend a denial of a religious accommodation, but we think it reasonable to begin with Title VII's text."

# *Groff v. DeJoy*

"Having clarified the Title VII undue-hardship standard, we think it appropriate to leave the context-specific application of that clarified standard to the lower courts in the first instance."

# Beyond Goods and Services

*303 Creative LLC v. Elenis*

# *303 Creative LLC v. Elenis*

- 6-3 Decision

- Justice Gorsuch delivered the majority opinion.
- Justice Sotomayor issued the dissenting opinion (joined by Justices Kagan and Jackson)

# *303 Creative LLC v. Elenis* - Context

Lorie Smith, a graphic designer, filed a lawsuit seeking an injunction to prevent Colorado, under the state's Anti-Discrimination Act, "from forcing her to create websites celebrating marriages that defy her belief that marriage should be reserved to unions between one man and one woman."

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# *303 Creative LLC v. Elenis*

The Supreme Court held that the First Amendment prohibits states from forcing website designers from designing websites with messages with which the designer disagrees.

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# Didn’t the Court look at this already?

In the Supreme Court’s 2018 decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the court issued a narrow ruling in favor of a bakery that refused to bake a wedding cake for a same-sex couple - but that ruling did not answer the question of whether anti-discrimination in public accommodations laws apply to businesses whose services are arguably expressive in nature.

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# *303 Creative LLC v. Elenis*

- Smith was willing to create custom websites for individuals who identify as “LGBT,” provided the sought messages do not conflict with her Christian faith and religious views.
- Regarding wedding websites, Smith alleged a sincerely held religious belief “that marriage is only between one man and one woman.”

# *303 Creative LLC v. Elenis*

Justice Gorsuch specifically rejected the state's argument that Smith's wedding websites are not really speech but an "ordinary commercial good."

- The state stipulated to the fact that she creates "original, customized creation[s] for each client."

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# *303 Creative LLC v. Elenis*

The dissent stated the majority holding is "profoundly wrong" and the first time in the Court's history in which it "grants a business open to the public a constitutional right to refuse to serve members of a protected class."

# *303 Creative LLC v. Elenis* - Takeaways

Public accommodations laws in the United States have long mandated businesses open to the public provide equal access to **goods and services** regardless of protected characteristics.

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# *303 Creative LLC v. Elenis* - Takeaways

- However, the First Amendment prohibits states from requiring creative individuals or businesses that provide services that are expressive in nature, namely wedding vendors, to create messages with which they do not agree.
- Specifically, Justice Gorsuch mentioned artists, speechwriters, movie directors, muralists, and "[c]ountless other creative professionals" as being potentially affected.

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# The Pregnant Workers Fairness Act – an Overview

# The Pregnant Workers Fairness Act

- Signed December 2022; effective on June 27, 2023
- Applies to employers with 15 or more employees
- Fills in gaps left by Title VII, ADA, and FMLA
- Purpose is to ensure pregnant and postpartum employees can retain their jobs
- Covered employers must provide reasonable accommodations to a *qualified* employee's or applicant's known limitations related to, affected by, or arising out of *pregnancy, childbirth, or related medical conditions*, absent undue hardship on the operations of the business

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# Proposed PWFA Regulations

- August 11, 2023, EEOC issued proposed regulations
- Remain open for comment for 60 days
- EEOC must implement final regulations by December 29, 2023


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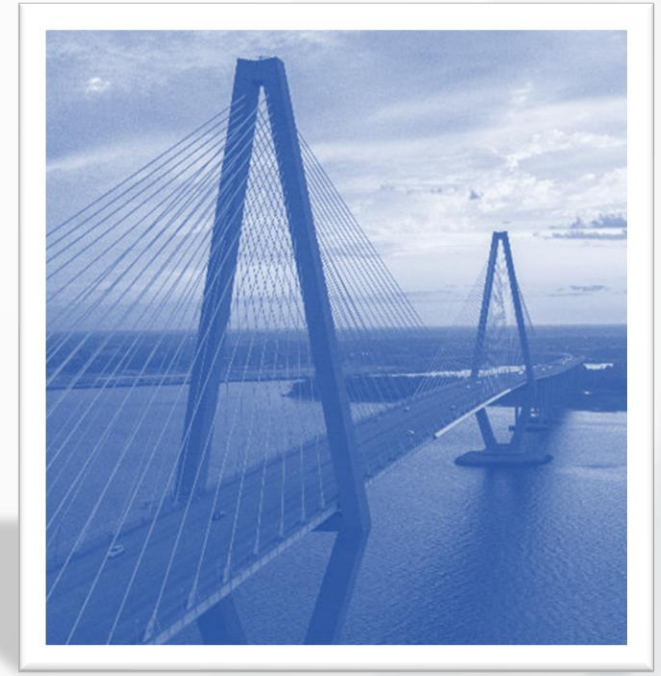
# Some things look familiar…

- Coverage/definitions from Title VII & ADA
  - Employee (includes applicants & former employees)
  - Covered employers (private employers with 15+ employees)
- Look to existing ADA processes
  - Notice from employee
  - Employer obligation to promptly engage in interactive process
- Regulations rely on ADA principles
  - Undue hardship
  - Essential job functions
  - Interactive process
  - Reasonable accommodation
  - Individualized assessment
  - Qualified individual
  - Mitigating measures

# …especially in South Carolina.



- SC Pregnancy Accommodation Act (SCPAA)
- Same categories of coverage
  - Pregnancy, Childbirth, Related Medical Conditions
- Similar types of accommodations enumerated
  - i.e., Breaks, Seating, Modification of Food/Drink Policy, Lifting Assistance, Temporary Transfer, Light Duty
- Includes obligations related to lactation
- But PWFA may be broader…
  - List of "related medical conditions" may be interpreted more broadly
  - Different definition of "Qualified" Individual
  - "Predictable Assessment" Accommodations
  - Limits on documentation for some accommodations

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# Related Medical Conditions – Proposed Regs

- Infertility and Fertility Treatments
- Past Pregnancy
- Endometriosis
- Birth Control Use
- Miscarriage and Stillbirth
- Postpartum Depression
- Having or Choosing Not to Have an Abortion
- Post-pregnancy Limitations or Complications that are a Consequence of Pregnancy
  - i.e., Carpal Tunnel Syndrome, Anxiety, HBP
- Lactation (and conditions related to lactation, such as low milk supply, mastitis, etc.)
- Menstruation

# Definition of “Qualified” Individual

- Two definitions:
  - Employees/applicants are qualified if they can perform the essential functions of their jobs, with or without reasonable accommodation
  - Employees/applicants are qualified even if they cannot perform one or more essential functions of the job, *provided*:
    - The inability to perform the essential function(s) is for a temporary period;
    - The essential function(s) could be performed *in the near future; and*
      - “In the near future” = within 40 weeks of inability
    - The inability to perform the essential function(s) can be reasonably accommodated
- Second definition different from ADA -
  - Signal of things to come?

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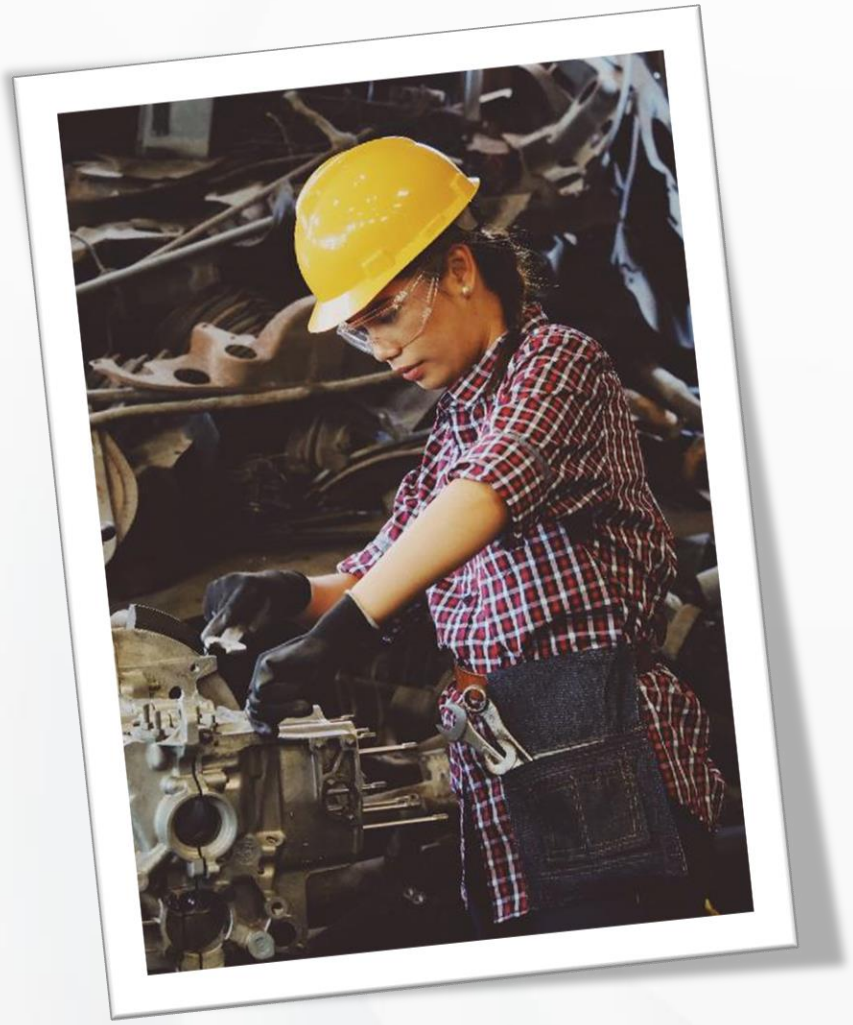
# Sample Reasonable Accommodations

- Job restructuring
- Reassignment
- Part-time schedules
- Providing reserved parking spaces
- Allowing employees to telework on a full-time or part-time basis
- Assigning an employee to light duty
- Adjusting or modifying policies
- Making existing facilities readily accessible to and usable by employees and applicants
- Additional Lactation Accommodations (beyond PUMP Act and other laws)
- Temporarily suspending one or more essential functions

# Pregnancy-Related Limitation Requiring Removal of an Essential function?



- A 20-pound lifting restriction during pregnancy with no accommodation allowing the employee to perform an essential function without lifting more than 20 pounds
- A requirement to avoid certain hazardous chemicals with no ability to accommodate through ventilation, etc.
- What if attendance is the essential function?
- What if employee requests placement in a light duty program otherwise for on-the-job injuries “only”?

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# Interim Reasonable Accommodations

- Best practice to provide, especially in urgent or unforeseeable situations
  - Regulations specifically mention early pregnancy symptoms, such as morning sickness where individual has not yet established OB care and pregnancy not yet “obvious”
- Regular interactive process can continue without prejudice

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# “Predictable Assessment” Accommodations

- Proposed regulations state that some accommodations should be granted in virtually all cases of pregnancy
- Will rarely be an undue hardship
- No supporting documentation or extensive individualized assessment
  - “Self-Attestation” sufficient
- Examples:
  - Allowing an employee to carry water and drink in the work area
  - Allowing additional restroom breaks
  - Allowing sitting in jobs that require standing, and standing in jobs that require sitting
  - Allowing breaks as needed to eat and drink
- Can still *argue* undue hardship, but…


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# Next Steps

# Next Steps

- Look for final regulations at the end of December
- Consider a separate Pregnancy Accommodation Policy or revise accommodation policies to address pregnancy explicitly
- Consider separate PWFA reasonable accommodation and interactive process forms or revise current forms
- Train appropriate personnel on accommodations and obligations
  - This includes first level supervisors!
- Make sure using current EEO poster that includes PWFA

# Thank you!


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# About the Firm

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