Labor and Employment Law Update

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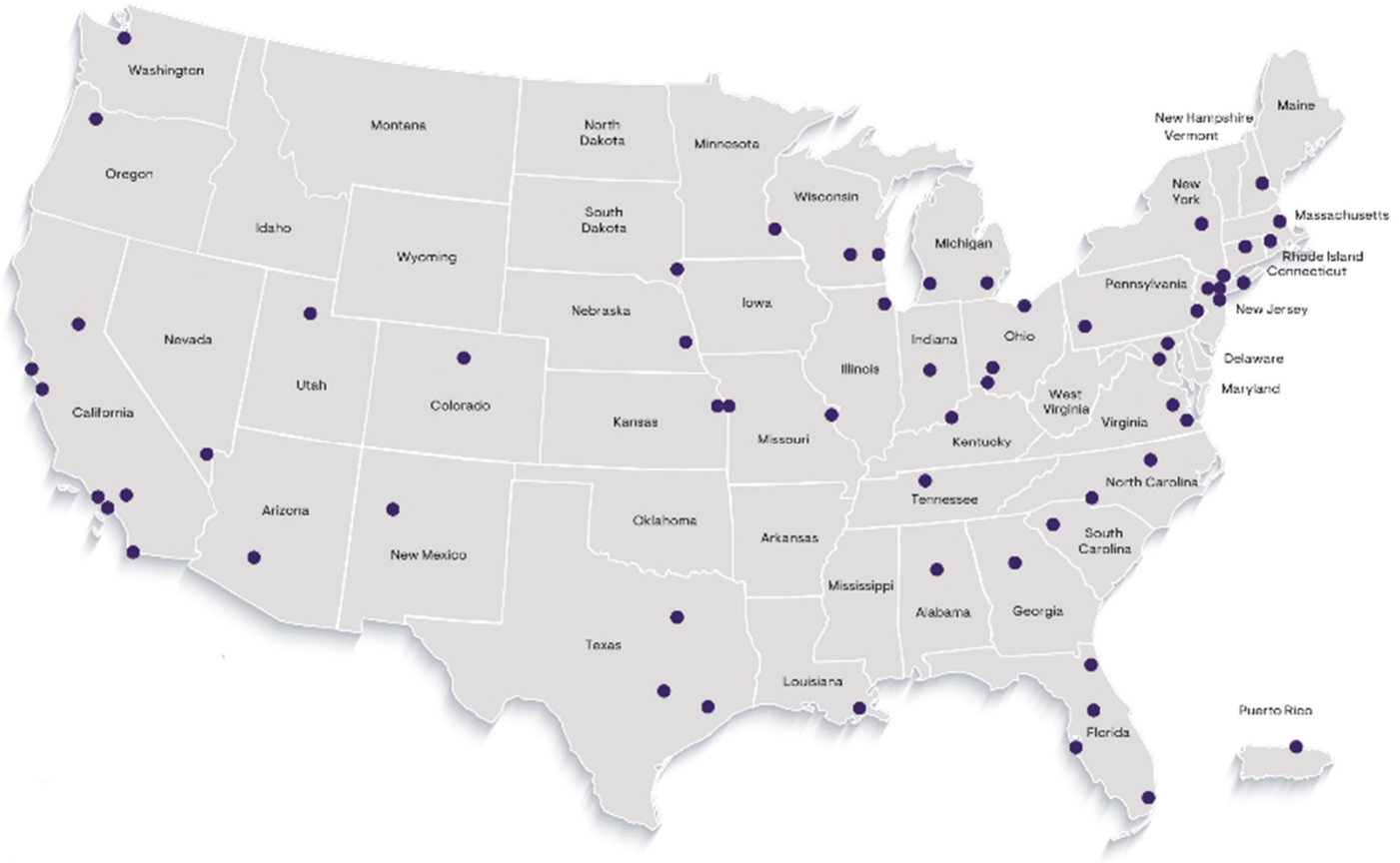
Strategically located to serve employers' needs

61

Locations Nationwide

1,000+

Attorneys



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We're Watching...

#1 Religious Accommodations

Groff v. *DeJoy*

- In Groff, a unanimous Supreme Court "clarified" (changed) the undue burden test.
- According to the Court, it now "understands Hardison to mean that 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business."
- According to the Court, "Courts must apply the test to take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer."
- The Court declined to incorporate the undue hardship test under the Americans With Disabilities Act which requires "significant difficulty and expense."
- But the Court did opine: "A good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by the Court's clarifying decision."
- The Court declined to determine what facts would meet this new test and remanded the case back to the lower court to decide.
- What's next? Years of legal battles with courts attempting to apply this new standard.

Undue Hardship Post *Groff*

Courts have found undue hardship in these situations:

- Allowing remote work where “fundamental aspect of the job was to be physically present” was an undue hardship.
- Hiring an extra employee for an indefinite period was an undue hardship.
- Vaccine exemption that posed a risk to the health and safety of other co-workers and would impact operations should the employer have to find substitutes for co-workers who fell ill was enough to establish undue hardship.
- Requiring employer to violate a state law is both "excessive" and "unjustifiable”.
- Inability to wear SCBA due to facial hair posed an undue hardship at fire department.

No Undue Hardship Post *Groff*

Courts have declined to find undue hardship in these situations:

- 1.5 days of leave was not an undue hardship.
- "A hypothetical policy reevaluation if *everyone* received an accommodation" did not show an undue hardship if the employer just grants one accommodation.
- Permitting a beard that might inhibit a correctional officer's gas mask from sealing tightly was not an undue hardship.

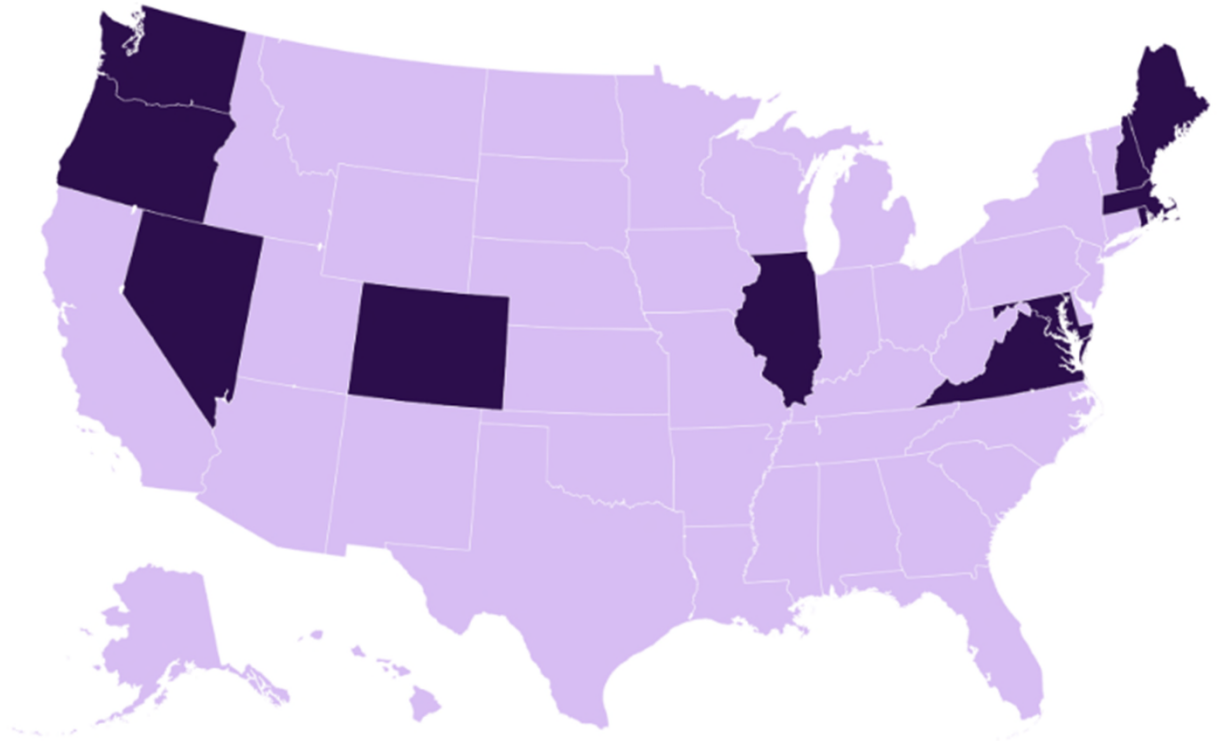
Employer Takeaways

1. Consider facts surrounding an employee's request for a religious accommodation when deciding whether the accommodation would impose an "undue hardship."
2. Consider unique facts related to the business, including the size of the business.
3. Assess the actual expense and hardship of implementing the request.
4. Consider reasonable alternatives beyond what is requested, and the impact.
5. Keep in mind, the requirement that employee must have a sincerely held religious belief remains unchanged.

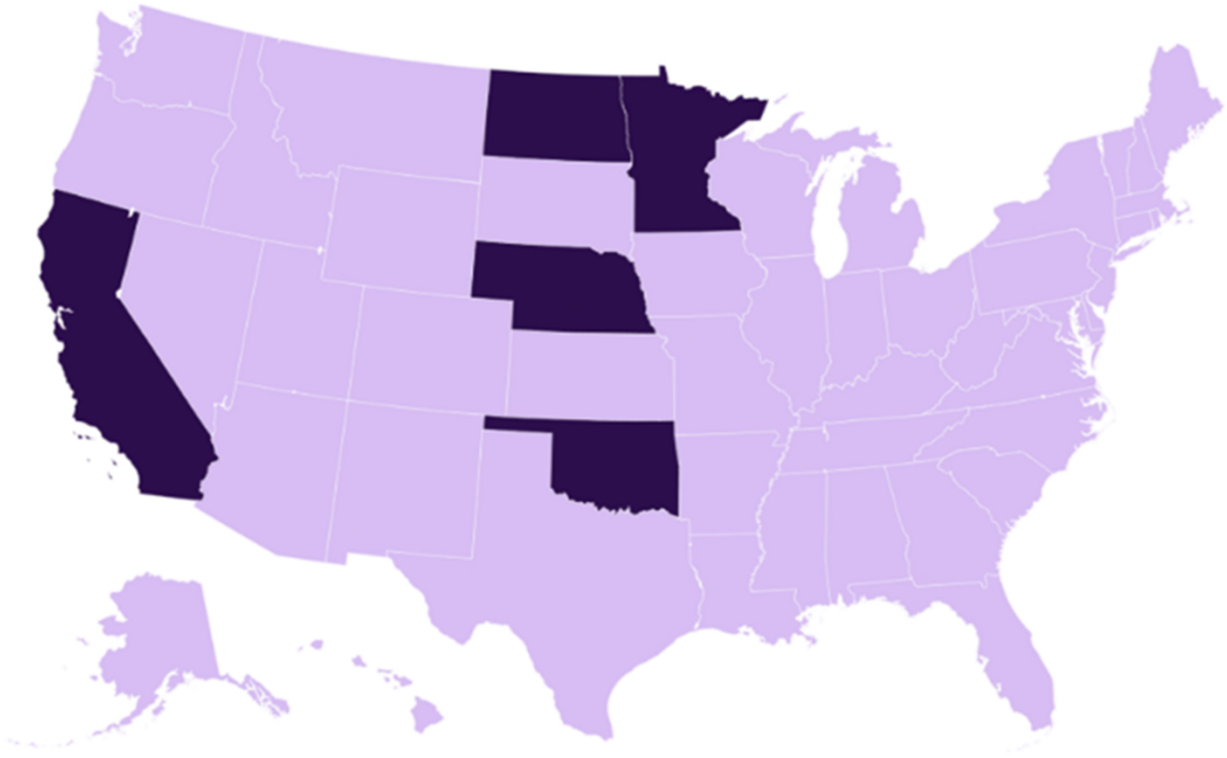
We're Watching...

#2 Non-Compete Agreements

States That Impose Income or Other Compensation-Based Thresholds



States That Ban Non-Compete Agreements Entirely



Navigating the Non-Compete Minefield in 2024

- Employers need to comply with California's notice provision by February 14, 2024
- FTC's final rule (4-23-2024) would ban most non-compete agreements
  - Potential August 2024 effective date
  - Legal challenges expected
- Delaware Chancery Court is no longer a safe space
- States and the FTC are poised to zealously enforce bans

We're Watching...

#3 Artificial Intelligence and Impact on Employers

AI & Employment – Federal & State Developments

Federal Developments

May 2023:

- **EEOC** Issues Technical Assistance: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964.

August 2023:

- First EEOC Consent Decree with AI-related claims: ***EEOC v. iTutorGroup.***

October 2023:

- President Biden signs **Executive Order** on Artificial Intelligence dated October 30, 2023.

State Developments

January 2023:

- **New Jersey** proposes *Assembly Bill 4909* requiring companies to notify candidates of the use of AI when screening applicants.
- **California** proposes *AB 331* and *SB 721 (Becker)* modifying use of AI in automated-decision systems.
- **Vermont** proposes *Assembly Bill 114* restricting the use of AI in employment decision making.

February 2023:

- **Massachusetts** introduces *House Bill 1873* restricting the use of AI when making employment-related decisions.
- **Washington, D.C.** introduces *"Stop Discrimination by Algorithms Act of 2023."*

July 2023:

- **New York City** regulation (*Local Law 144*) on using AEDT in employment goes into effect.

Takeaways for Using AI in the Workplace

- Understand the risks of using AI in the workplace (e.g., recruiting, performance monitoring, performance improvement, safety and so on).
- Track emerging laws, guidance, and established frameworks surrounding the use of AI.
- Consider the risks and implement strategies to minimize.
    - Possible strategies can include providing notice to candidates of the use of AI, providing candidates with informed consent, being transparency with the Company's use of AI, and performing annual audits on the technology to ensure fairness and non-discrimination.
- Incorporate "promising practices" suggested by the EEOC, such as ensuring reasonable accommodations are available.
- Review record retention obligations on federal, state, and local levels.

October 2023: White House Issues Executive Order Regarding AI

- Direct the following actions related to employment:
  - Secretary of Labor to develop guidelines to mitigate the harms and maximize the benefits of AI for workers by addressing displacement, labor standards and related issues.
  - Chair of Council of Economic Advisers to produce a report on AI's potential labor market impacts and study and identify options for strengthening federal support of workers facing labor disruptions.
  - Federal Trade Commission to develop rules to ensure fair competition in the AI marketplace and workers protection from harms enabled by the use of AI.
  - Office of Management and Budget to issue guidance to agencies for assessing and mitigating disparate impact, algorithmic discrimination, and more.
- Order also calls for the Department of Homeland Security and Department of State to identify new pathways and build upon existing programs to attract and retain the best foreign nationals with AI knowledge, skills, and education.

We're Watching...

#4 DOL White-Collar Exemption Rule

DOL Issues White-Collar Exemption Final Rule (4-23-2024)

Major Changes

- Minimum salary increases from $35,568 per year ($684 per week) to:
  - July 1, 2024: $43,888 per year ($844 per week)
  - January 21, 2025: $58,656 per year ($1,128 per week)
- Highly Compensated Employee (HCE) exemption minimum increases from $107,432 to:
  - July 1, 2024: $132,964
  - January 1, 2025: $151,164
- Automatic adjustments (increases) every 3 years based on current wage data beginning July 1, 2027

Refresher: FLSA White-Collar Exemption Requirements

Salary basis test

Employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.

Salary level test

The amount of salary paid must meet a minimum specified in the regulations.

Duties test

Primary duties must involve executive, administrative, or professional duties, as defined in regulations.

What To Do Now?

1. Identify all exempt employees and current salary levels
2. Identify employees in each job title below projected salary level and potential salary level
3. Identify total cost to raise salaries to minimum level
4. Evaluate options
   - Increase salary so affected employees retain exempt status (assuming they satisfy the duties test)
   - Reclassify as non-exempt/overtime-eligible and pay overtime
   - Reclassify as non-exempt and adjust hourly pay rate to account for anticipated overtime (so overall pay is consistent and reclassification is cost-neutral).
   - Reclassify and use fluctuating workweek method of pay (where allowed by state law).
   - Reduce hours to avoid overtime, shift work to other employees

We're Watching...

#5 Pay Transparency

Pay Transparency Laws

- An ever-evolving patchwork of state laws
  - Some require disclosure of benefits in addition to salary.
  - Some require salary info in job postings. Some merely require disclosure upon request by employee/applicant.
  - Some require disclosure for internal job movements as well as external postings.
  - Some require annual pay data reporting to state agency.
- Most problematic: Washington Equal Pay and Opportunity Act
  - Private right of action
  - The result: 50 class action suits actions and counting…
- Other laws requiring pay disclosure in job ads: California, Colorado, New York
- Passed: Hawaii (eff. Jan.1, 2024); Illinois (eff. Jan. 1, 2025)
- Pending: numerous states
- Federal legislation: Introduced in Congress: Salary Transparency Act (with private right of action)

We're Watching...

#6 The Pregnant Workers Fairness Act

Pregnant Workers Fairness Act

- Effective June 27, 2023.
- EEOC published final regulations on April 15, 2024.

** EEOC is accepting charges and enforcing the PWFA NOW.

***Applies to employers with 15 or more employees.

5 Key Rules. Employers Cannot:

1. Fail to "make reasonable accommodations to the known limitations related to pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business."
2. Require an employee to accept accommodations without engaging in the interactive process.
3. Discriminate against employees based on their need for reasonable accommodations.
4. Mandate leave for an employee when a reasonable alternative accommodation can be provided.
5. Retaliate against an employee for requesting or utilizing a reasonable accommodation.

** Employers with at least **15 employees**.

***Remember some state laws may provide more protection than the PWFA and/or have affirmative policy and/or notice obligations.

Employees Who Cannot Perform Essential Functions May Be Entitled to Accommodation

ADA-Like Employees

- These employees can perform the essential functions of their job with or without a reasonable accommodation.
- The law does not require this ADA-Like employee to have a temporary limitation.
- If an employee can perform the essential functions with a reasonable accommodation, the employer may be required to provide the accommodation on a long-term basis (like the ADA).
- Employers must reasonably accommodate the ADA-Like employee subject only to the undue hardship defense.

ADA-Plus Employees

These employees cannot perform the essential functions of their position even with an accommodation.

ADA-Plus Employees

- **The Act says:**
  - These employees are qualified if (1) the inability to perform the essential job function is temporary, (2) the essential job function can be performed in the near future and (3) inability to perform the essential job function can be reasonably accommodated.
- **The EEOC says:**
  - Temporary = lasting for limited time, not permanent, may extend beyond "in the near future."
  - In the near future = ability to perform essential function will "generally resume within 40 weeks."
  - Reasonable accommodation may be accomplished by temporarily suspending the essential job function(s) and performing the remaining functions, transfer, light duty, or other arrangements.

* Removing an essential function is not required if there is an undue hardship. **However, the employer must consider other alternative accommodations that do not create an undue hardship.**

Other Highlights from the EEOC's Proposed Regulations

- "Related medical conditions" is not defined in the Act and EEOC's interpretation is extremely broad.
- Leave for recovery from childbirth does not count as time when an essential function is suspended and is not counted in determining whether qualified.
- Employers must consider providing leave as a reasonable accommodation, even if the employee is not eligible or has exhausted leave under the employer's policies. How much leave must be provided? *Up to the point of undue hardship.*
- There are 4 accommodations that are almost always reasonable:
    1. Allowing an employee to carry water and drink, as needed;
    2. Allowing an employee additional restroom breaks;
    3. Allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and
    4. Allowing an employee breaks, as needed, to eat and drink.
- Asking for medical documentation is not appropriate for the 4 "almost" always reasonable accommodations and accommodations for lactation.
- Lactation is covered as a related medical condition and must be accommodated subject to undue hardship. Accommodation obligation for lactation is broader than under the PUMP Act.

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#7 EEOC and Discrimination Litigation Trends

EEOC Enforcement Trends

- For FY 2022, EEOC reported 73,485 total charges, a 4-year high following 6 years of declining charges.
- The EEOC report notes FY2022 saw a significant increase in vaccine-related charges of religious discrimination being a possible source of data variation from prior years.
- The percentage of total claims related to religious discrimination was 18.8%, up from 3.4% of total claims in FY2021.
    - Religious discrimination claims increased from 2,111 in FY2021 to 13,814 in FY2022.
    - This was the only category of claims to increase in any significant way.
    - The percentage of religious discrimination claims had been relatively flat going back to FY2010.

Disability claims increased slightly from 22,842 to 25,004, however the percentage of disability claims to total claims decreased (37.2% to 34.0%)

The EEOC Strategic Enforcement Plan for Fiscal Years 2024-2028

- Expands the categories of workers considered to be vulnerable and underserved.
- Recognizes employers' increasing use of technology (including AI) in job advertisements, recruiting and hiring and other employment decisions.
- Updates emerging and developing issues priority to include protecting workers affected by:
  - Pregnancy, childbirth, and related medical conditions;
  - Employment discrimination associated with the long-term effects of COVID-19;
  - Technology-related employment discrimination.
- Focuses on potential impediments to access to the legal system from overly broad waivers, releases, non-disclosure agreements, or non-disparagement agreements.

Muldrow v. City of St. Louis, Mo. and its Potential Impact on Title VII Claims

- On December 6, 2023, SCOTUS heard oral arguments in Muldrow v. City of St. Louis, Mo., a case involving the question of whether a job transfer without a "significant disadvantage" to the employee is actionable under Title VII.
  - The Justices' questioning suggested a decision finding a job transfer based on a protected characteristic, in and of itself, is sufficient to give rise to a Title VII claim.
  - The Court expressed some concern about an increase in Title VII claims, but seemed to concur that claims without damages were not likely to make their way to court.
  - Some Justices questioned whether finding a Title VII violation without a separate disadvantage to the employee would impact companies' diversity initiatives.
- While the Court seemed to acknowledge the way the issue before it had been framed limited the scope of any potential decision, they also seemed to be thinking ahead to the impact their decision might have beyond transfers.
  - Contrary to the Justices' reasoning, a decision that a job transfer without a "significant disadvantage" to an employee likely will result in litigation with a claim the plaintiff is entitled to some compensation for the discrimination.
  - The Justices seemed open to expanding the reasoning of such a decision to go after DEI initiatives and affirmative action.

We're Watching...

#8 | Supreme Court Decisions Affecting Employers

NLRA Preemption of State Torts

Glacier Northwest, Inc. v. Teamsters Local 174

- The U.S. Supreme Court ruled in an 8-1 decision that the National Labor Relations Act does not bar state tort claims against unions for intentional destruction of company property during strikes
    - Unions must take steps during a strike to ensure reasonable precautions are taken to reduce the risk of foreseeable, aggravated, or imminent harm to property
    - Strike conduct that intentionally fails to take such steps, or that affirmatively endangers property, may not be protected by the Act
- The decision paves the way for state court-awarded damages against unions for their conduct during strikes

Using Race in College Admissions

Students for Fair Admissions, Inc. v. Harvard College; Univ. of North Carolina

- The Court held using race in admissions violates the Equal Protection Clause
  - Notably, it is about admissions, not employment
- *Grutter* NOT overturned, BUT using race in admissions does not pass *strict scrutiny* standard
- Programs are not "'sufficiently measurable to permit judicial review' under the rubric of strict scrutiny"
- "'[c]lassifying and assigning' students based on their race 'requires more than . . . And amorphous end to justify it'"
- No prohibition on considering applicant's discussion of how race affected an applicant's life, but should be focused on the "student's unique ability to contribute to the university" and must be treated based on his/her "experiences as an individual – not on the basis of race"

Automatic Stay When Arbitration Denial Challenged

Coinbase, Inc. v. Bielski

- The Court held that when a district court denies a motion to compel arbitration under the Federal Arbitration Act (FAA), the district court must stay its proceedings while that appeal is pending
    - District court is divested of control over a case while an appeals court decides whether the case even belongs in the district court (rather than in private arbitration)
- The 5-4 decision resolves the circuit split on whether to stay proceedings or give discretion to court to decide whether to proceed with motion practice in discovery – in favor of automatic stay
- The decision is significant for companies that have adopted arbitration agreements in order to resolve employment-related disputes efficiently

Shifting Jurisdictional Sands

Mallory v. Norfolk Southern Railway Co.

- The Supreme Court upheld the state of Pennsylvania's registration statute, which requires that a corporation that registers to do business in Pennsylvania must consent to the "general personal jurisdiction" of the state

- PA is one of a handful of states that requires companies to consent to general jurisdiction when registering to do business in the state

- The majority reasons that, by registering to do business in PA for many years, the company assumed the risk of consenting to personal jurisdiction in exchange for taking full advantage of the benefits of doing business in the commonwealth

- The plurality decision may mean that courts will be able to assert jurisdiction over out-of-state defendants in the few states where, according to case precedents, a non-resident company may be subject to general jurisdiction simply by registering to do business in the state

Undue Hardship Burden "Clarified"

Groff v. DeJoy

- In *Groff*, a unanimous Supreme Court "clarified" (changed) the test.
- According to the Court, it now "understands *Hardison* to mean that 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business."
- According to the Court, "Courts must apply the test to take into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer."
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- But the Court did opine: "A good deal of the EEOC's guidance in this area is sensible and will, in all likelihood, be unaffected by the Court's clarifying decision."
- The Court declined to determine what facts would meet this new test and remanded the case back to the lower court to decide.
- What's next? Years of legal battles with courts attempting to apply this new standard.

Impact on Co-Workers

- To be an undue hardship, the accommodation must impact the conduct of the business.
- An accommodation's effect on co-workers may have ramifications for the conduct of the employer's business, but not all impacts on co-workers are relevant (it must impact the business).
- The concurring opinion recognized that "for many businesses, labor is more important to the conduct of the business than any other factor."
- A co-worker's animosity to a particular religion, to religion in general or the mere fact of an accommodation is not a factor in the undue hardship inquiry.

What Should An Employer Do?

1. Be prepared for an increase in religious accommodation requests.
2. Consider whether recently denied accommodations should be reconsidered.
3. Be cautious about non-privileged communications about the *Groff* decision.
4. Update company policies/practices on religious accommodations.
5. Assess requests under the new undue hardship standard.
6. Consider undertaking similar analysis as under ADA.
7. Consider interactive process.
8. Look for alternative accommodations.
9. Be aware of the risk of negative comments, frustration, and potential harassment.
10. Train HR and managers.

We're Watching...

#9 South Dakota Employment Law Updates

Practical Best Practice Reminders

- Discipline
- Documentation (Discipline/Performance Reviews)
- Managing Risk

Questions?

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Contact

If you have questions or would like to discuss further issues raised today, you may contact me at:

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Thank you.

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