



Hocus Pocus, Female Focused

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Agenda



Mother's
Accommodations



Leave Issues



Sexual
Harassment



Tips for
Employers



Examples &
Conclusion

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Mothers' Accommodations

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Pregnant Workers Fairness Act

- Went into effect June 27, 2023
- Covered employers
 - Numerosity requirements
- Requirements
 - Reasonable accommodations
 - Undue hardship

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Pregnant Workers Fairness Act

- Requires covered employers to provide reasonable accommodations to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship

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PWFA – Additional Prohibitions for Employers

- Cannot require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer
- Cannot deny a job or other employment opportunity to a qualified employee or applicant based on the person's need for a reasonable accommodation
- Cannot require an employee to take leave if another accommodation can be provided that would allow the employee to keep working
- Cannot retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding
- Cannot interfere with any individual's rights under the PWFA

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PWFA – Final Regulation

- Issued on April 15, 2024, went into effect on June 18, 2024
- Defines certain terms
- Sets limitations on supporting documentation requests
- Explains how an employee may request a reasonable accommodation – a two-step process

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PWFA – Requesting Medical Documentation

- An employer should not request documentation proving that the employee is pregnant.
- Medical documentation should not be requested for 1) extra bathroom breaks; 2) requests to eat or drink; and 3) requests to sit or stand.

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PUMP Act for Nursing Mothers

- Went into effect April 28, 2023
- Expands rights for nursing mothers
- Rights under the PUMP Act
- Employer obligations
 - Break times
 - Private space
- Violations/remedies

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Other Laws Affecting Pregnant Workers

- Title VII of the Civil Rights Act of 1964
 - Protects employees from discrimination based on pregnancy, childbirth, or related medical conditions
 - Requires covered employers treat workers affected by pregnancy, childbirth, or related medical conditions the same as other workers similar in the ability or inability to work
- The Americans with Disabilities Act
 - Pregnancy not a disability, but some related conditions may be
- The Family & Medical Leave Act

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FMLA - Eligibility & Entitlements

- Eligibility: worked for the employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles
- Entitlement: up to 12 weeks of unpaid leave for certain reasons
 - Time taken off due to pregnancy complications can be counted against the 12 weeks of family & medical leave

Reasons for Leave

- For the birth and care of a newborn child
- For placement of a child with the employee for adoption or foster care
- To care for an immediate family member with a serious health condition
- Because of the employee's serious health condition
- Military family leave

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Impact on Female Employees – Abt Associates Study (2018)

- Compared to men, more women need leave and take leave
 - 24% v. 17%
 - 18% v. 14%
- More women than men have an unmet need for leave
 - 9% v. 6%
- Length of leave for women is on average longer than for men
 - 34 days v. 21 days
- While on leave, substantially fewer women than men receive less pay, and more receive no pay
 - 32% v. 55%
 - 41% v. 25%

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Paid Parental Leave

- Federal Employee Paid Leave Act
 - Provides paid parental leave to federal employees covered under Title 5
 - May be used for birth, adoption, or placement of a child for foster care
 - Must be taken within a certain period of time
 - Up to 12 work weeks of leave
 - Work agreement requirement



Paid Parental Leave

- Private employers – no legal requirement in OK
- Non-discriminatory policies
- Differentiate between leave related to physical limitations and leave related to bonding with or caring a new child
- State law entitlements
- Recruiting & retention





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Sexual Harassment

Sex Discrimination & Harassment

- Discrimination on the basis of sex
- Unwelcome conduct based on gender that
 - Makes sexual favors a condition of employment
 - Retaliates against a person who refuses to grant sexual favors
 - Creates a hostile, offensive, threatening, or intimidating work environment that impacts a person's ability to perform his or her job

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Examples of Sexual Harassment

- Verbal harassment, epithets, derogatory comments, or slurs
- Physical harassment, assault, impeding, or blocking movement, or physical interference with normal work or movement when directed at an individual
- Visual forms of harassment – posters, cartoons, drawings, etc.
- Requests for sexual favors, unwanted sexual advances that condition an employment benefit or work condition upon an exchange of favors

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Quid Pro Quo

- Express or implied condition of employment
- Tangible job detriment for failure to submit
- Based on sex
- Harasser has authority

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Hostile Work Environment

- Conduct which interferes with work performance or creates an intimidating, hostile, or offensive working environment
- Conduct is so severe and pervasive that it alters the conditions of the victim's employment and creates an abusive working environment
- Standard: both objective and subjective
- Constructive discharge – often associated with HWE

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Employer Liability

- Supervisor harassment
 - Tangible employment action – automatically liable
 - HWE – employer liable unless it can prove it reasonably tried to prevent and promptly correct the harassing behavior and the employee unreasonably failed to take advantage of any preventative or corrective opportunities
- Non-supervisor harassment
 - Employer knew or should have known about the harassment and failed to take prompt and appropriate action

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Recent Legislation in Response to the “Me Too” Movement

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (2022)

- Prohibits the use of *mandatory* arbitration provisions with respect to claims of sexual assault and/or harassment. Not applied retroactively

Speak Out Act (2023)

- Prohibits employers from using non-disclosure and non-disparagement agreements to conceal acts of sexual harassment and/or sexual assault in the workplace.
- Only applies to “pre-dispute” agreements

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Tips for Employers

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Company Culture

- Attitudes towards women in the workplace
- Attitudes towards parental/family leave
 - Risk: retaliation claims
- Committed and engaged leadership
- Zero tolerance for inappropriate and unlawful behavior
- Uniform application of various employment policies
- Recruiting and retention efforts

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Employer Policies & Practice

- Comprehensive FMLA policy
- Updates re. PWFA/Pump Act
- Effective harassment policy
- Accessible complaint procedure

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Appropriate Investigations

- Take prompt action
- Thoroughly investigate
 - Witness interviews
 - Document review
- Take swift and appropriate action
- Consider disciplinary action
- Follow up



Management Training

- Ensure managers know how to respond to complaints
 - Escalation
- Train supervisors on facets of new laws
 - Ensure your managers know what the obligations are under the PWFA/Pump Act
 - Confirm your managers are aware of already-existing obligations
- Regular updates in training





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Examples & Conclusions

Example 1

- Jaime takes approved FMLA leave to care for her seven-year-old daughter when she is in the hospital overnight and recovering from surgery. Jaime returns to work as scheduled but receives three negative attendance points for the days she used FMLA leave. Under her employer's no fault attendance plan, employees are allocated points for every absence from work, regardless of the reason for the absence. Employees are disciplined when they accrue a set number of points, and employees who accrue more than ten points in a calendar year may be terminated.
- Is this acceptable under the FMLA?

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Example 2

- Peyton is a third-grade teacher. Under the FLSA, Peyton is entitled to time to pump breast milk in a private space. Peyton chooses to grade papers and complete student records while pumping breast milk.
- This is Peyton's personal choice. Does the employer have to pay her for the time spent pumping?

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Example 3

- Jeanette was offered a job as a waitress at a local restaurant. At the end of her interview, she mentioned that she was pregnant, but said that she was able to do the job and excited about the opportunity. When Jeanette called to get her start date, the manager said he had hired someone else. He said he was afraid that Jeanette would hurt her baby carrying heavy trays of food and that the customers might not like having a pregnant woman waiting on them. He invited her to reapply after she had her baby.
- Did the manager discriminate against Jeanette?

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Things to Consider

- Have you trained your managers on accommodating pregnant workers in accordance with the PWFA?
- Do you need to update your breastfeeding accommodation policy?
- Are your leave policies being uniformly applied to both men and women?
- Could your workplace use a sexual harassment refresher training?

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