



2023 AIRLINE LABOR & EMPLOYMENT LAW SYMPOSIUM



# Taking Flight: Navigating the Skies of Aviation Employment Law in 2023

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SEPTEMBER 21 AND SEPTEMBER 22, 2023 | ST. ANTHONY HOTEL | SAN ANTONIO, TX

2023 AIRLINE LABOR & EMPLOYMENT LAW SYMPOSIUM



## Agenda

- New Religious Accommodation Standard
- EEOC Regulation of Workplace AI
- Breastfeeding Accommodation
- Pregnancy Accommodation
- Paid Military Leave Lawsuits
- New Workplace Protections
- PRD Implementation Impacts
- Federal Contractor TikTok Ban
- California Meal and Rest Break Application

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## New Religious Accommodation Standard

- Supreme Court's June 29, 2023 decision (*Groff v. DeJoy*)
- Significantly broadens entitlements of workers seeking accommodations for religious practices
- Religious accommodations must be granted unless they cause **undue hardship**
- Supreme Court rejected the **de minimis** test long used to determine whether a request created an undue hardship



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## New Religious Accommodation Standard

- New undue hardship standard: whether accommodation results in **substantial increased costs** in relation to conduct of the business
- What does that mean?
- Clue: SCOTUS does not think this ruling will affect EEOC religious accommodation regulations
- Expect a lot of uncertainty around this new standard
- Case-by-case analysis



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## EEOC Regulation Of Workplace AI

- EEOC May 18, 2023 guidance on when use of AI may have a disparate impact
- Provides clarity on use of AI under existing law
- Addresses AI in “selection procedures” for applicant screening, hiring, promotions, terminations
  - resume scanners that prioritize applications using keywords
  - employee monitoring software that rates employees
  - virtual assistants or chatbots that ask candidates about qualifications and reject those who do not meet certain requirements
  - video interviewing software that evaluates candidates based on facial expressions and speech patterns
  - testing software that provides job fit scores for applicant or employee personalities, aptitudes, cognitive skills, or cultural fit based on test or game performance



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## EEOC Regulation Of Workplace AI

- Carriers are likely liable for tools designed or administered by a vendor or third party
  - You're likely still on the hook for disparate impact no matter what the vendor says
- Carriers should self-audit the tools they use
- If you identify potential disparate impact consider making an adjustment
- **EEOC is paying significant attention to this topic**
- Pay close attention to federal, state and local laws when auditing
- Educate your team on the risks associated with using AI



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## Breastfeeding Accommodation

- Providing Urgent Maternal Protections for Nursing Mothers Act
- Passed December 2022
- PUMP Act amends FLSA to give most nursing employees break time and space to express breast milk at work
- Prior to PUMP Act:
  - Only hourly employees had these rights
  - Airline employees were excluded (due to RLA overtime exception)



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## Breastfeeding Accommodation

- What the PUMP Act changed:
  - Overtime exempt (salaried/professional) employees have same rights
  - Airlines are covered
  - **Crewmembers are expressly excluded**
- Details of requirements:
  - Must provide reasonable break time to pump breastmilk
  - Must provide space that is shielded from view, free from intrusion, and not a bathroom
  - Up to one year after childbirth
- Pressure from Congress on FAA (via FAA reauthorization) to address crewmember breastfeeding



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## Pregnancy Accommodation

- Pregnant Workers Fairness Act passed in December 2022
- Requires employers to provide **reasonable accommodations** to pregnant workers
- EEOC issued *proposed* regulations on August 7, 2023
- EEOC advises that the PWFA extends to infertility, pregnancy, childbirth and related medical conditions
- Accommodation process is similar to disability accommodation
- Documentation can be provided only if reasonable under the circumstances



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## Pregnancy Accommodation

- Examples of reasonable accommodations:
  - Allow seating for jobs that require standing
  - Allow standing for jobs that require sitting
  - Telework
  - Temporarily suspending an essential function of the job
- Need to assess on a case-by-case analysis
- EEOC began accepting charges under PWFA on June 27, 2023



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## Paid Military Leave Lawsuits

- Increasing litigation over pay and benefits for pilots taking military leave
- Governing law is USERRA:
  - USERRA requires employers to offer same benefits to employees on military leave that are offered to those on other types of leave
- Two primary arguments:
  - **Pay:** (unpaid) short-term military leave is similar to (paid) jury duty and bereavement leave and should be paid
  - **Benefits:** pilots on military leave are entitled to benefits (bonuses, vacation accrual, retirement contributions, etc.) given to other pilots
- Cases are brought as class-action lawsuits



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## Paid Military Leave Lawsuits

- Mixed results
- Conservative and liberal judges/courts reach different conclusions
- Decisions turn on CBA language
- Anticipate that these challenges will accelerate post-COVID in current pilot environment
- Recommend that you audit your leave policies for potential issues



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## New Workplace Protections

- **CROWN Acts** (“Create a Respectful and Open World for Natural Hair”)
  - Prohibits discrimination based on hair texture and style (e.g., protective styles like afros or cornrows)
  - 22 states
  - More than 40 localities
- **Caste Discrimination**
  - Prevalent in parts of United States, not just South Asia
  - First lawsuit in June 2020 alleging Cisco Systems failed to address caste discrimination against an employee from a certain caste by two supervisors from more privileged castes
  - Seattle and California
- **Height and Weight**
  - May 26, 2023 New York City ordinance
  - Michigan weight discrimination law
  - Obesity is ongoing controversial topic under ADA
- **Caregiver Discrimination**
  - Significant focus for EEOC



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## New Workplace Protections

- **Reproductive/Gender-Affirming Health Choice Discrimination**
  - May 20, 2019 - New York law banning employers from taking adverse action against an employee for sexual or reproductive health decisions
  - February 1, 2023 - Chicago law banning discrimination and retaliation over applicant/worker/family member reproductive health care or gender-affirming care decisions
- **Marital/Relationship Status Discrimination**
  - Colorado – marital status
  - Somerville, Massachusetts – relationship status or “intimate personal relationship choices” including polyamorous relationships and multi-generational households



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## PRD Implementation Impacts

- As of June 10, 2022 all carriers should be using the PRD
- Two deadlines for uploading historical records: June 12, 2023 (>1/1/15) and September 9, 2024 (<1/1/15)
- Transition to PRD should be complete by September 9, 2024
- **FAA Notice of PRD Compliance Oversight (March 31, 2023)**
  - FAA inspectors will begin surveilling for PRD compliance
  - For 121 carriers surveillance “must begin” by **June 30, 2023**
- Seeing more challenges (threatened claims) to PRD process, likely due to new reporting parameters



## PRD Implementation Impacts

- Reporting of “final disciplinary action records” is slightly different under PRD regulations
  - Must not have been subsequently overturned
    - No determination that the event did not happen
    - No determination that the pilot was not at fault
  - Must indicate if there are supporting/relevant documents
- Reporting of “separation records” is slightly different under PRD regulations
  - There are different reporting categories for terminations due to pilot performance, disqualification, and “employer initiated”
  - Must not have been subsequently overturned
    - No determination that the event did not happen
    - No determination that the pilot was not at fault
  - Must indicate if there are supporting/relevant documents







## Federal Contractor TikTok Ban

- Companies with covered contracts must ban TikTok use on employee devices, including personal cell phones, used in the performance of government contracts
- Ban does not apply to devices “incidental to a federal contract,” but the term is not defined
- Prime contractors must flow down the clause in subcontracts, but no mechanism requiring prime contractors monitoring
- No self-certification or non-compliance reporting obligation
- Public comments are still being solicited



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## Federal Contractor TikTok Ban

- Recommend review of contracts entered in after June 2, 2023 and upcoming solicitations to determine applicability
- Revise company policies and procedures to ban TikTok usage
- Consider obtaining employee acknowledgment of the policy
- Block TikTok on company-issued devices
- Identify existing policies and practices that may be implicated
- Evaluate legal risks and compliance issues, especially in connection with personal employee devices used for work



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## California Meal And Rest Break Application

- *Bernstein* litigation (Virgin America/Alaska Airlines) created obligation for carriers to provide California meal/rest breaks to California resident and domiciled crewmembers
  - 10-minute break after 4 hours of work
  - 30-minute break for every 5 hours of work
  - Must be completely relieved of duty
- FARs prohibit crewmembers from being completely relieved of duty
- Fallout resulted in legislative fix



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## California Meal And Rest Break Application

- **Carriers comply with CA meal and rest break laws when they have meal or rest language in their CBA**
  - Management and unions must decide by mutual agreement how best to provide these benefits
- Legislative fix resolves the issue only for represented workgroups
  - Spearheaded by AFA



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# Questions?

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