



Employment Legislation Update // HR Mistakes That Lead to Lawsuits

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 @WLJEmployment

Overview of Recently Passed and Pending Employment Legislation / Administrative Actions

Newly Enacted Federal Laws

Pregnant Workers Fairness Act

(Effective June 27, 2023)

Requires employers (15 or more employees) to provide "reasonable accommodations" to an applicant or employee's known limitations due to *pregnancy, childbirth, or related medical conditions*, unless the accommodation will cause an "undue hardship."

Existing laws already make it illegal to discriminate against workers on the basis of pregnancy.

Think in terms of how you might accommodate a disabled employee. It's the same type of accommodation process.

Examples of reasonable accommodations *may* include:

Permission to sit or drink water
Receiving closer parking
Flexible hours

Access to appropriately sized uniforms and safety apparel
Receiving additional break time to use the bathroom, eat & rest
Taking leave or time off to recover from childbirth
Being excused from strenuous activities

All of which normally would be short-term

Taking paid or unpaid leave should be the last resort

And it's generally fine to request a doctor's note to back up any request for an accommodation, especially if the need is not obvious.

Reasonable Accommodation Scenarios

Lifting/Standing Restrictions

Bed Rest

Post-Partum Depression

Big Question: What is a "related medical condition"?

The PUMP for Nursing Mothers Act

Most nursing (and non-exempt) employees have the right to **reasonable break time and a place, other than a bathroom, that is shielded from view** to express breast milk while at work. This right is available for up to **one year** after a child's birth.

The Pump Act expands the requirement that employers provide certain accommodations to **salaried employees**. Time spent to express breast milk is considered "hours worked" if an hourly employee is not completely relieved from duty.

Salaried employees should not face a reduction in pay for time spent expressing breast milk.

Employers with fewer than 50 employees can get out of this if they prove compliance with the law would impose an **undue hardship**. Undue hardship is determined by looking at the difficulty or expense of compliance based on the size, financial resources, nature, or structure of the employer's business.

The Speak Out Act // The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

These Acts invalidate past and future *pre-claim* agreements requiring arbitration and non-disclosure of sexual harassment and sexual assault claims in the workplace.

For instance, if your employees sign confidentiality agreements at the outset of employment that prevent them from publicly discussing any claims of sexual harassment or sexual assault, those agreements will be unenforceable as to any *future* claims.

If your employees sign handbook acknowledgements that contain an arbitration clause, then that clause will be **unenforceable** if an employee later brings a claim for sexual harassment or sexual assault.

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Don't forget that Arkansas law (ACA 11-5-116) already requires break times for mothers expressing breast milk.

Arkansas employers must make a **reasonable effort** to provide **a private, secure, and sanitary room** or other location in close proximity to the work area, other than a toilet stall.

These breaks can run concurrently with other paid or unpaid breaks.

One difference from federal law -- there is no one year limit.

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Federal Agency Actions

National Labor Relations Board

(General Counsel Mem. 23-05 on Confidentiality and Non-Disparagement Clauses)

The NLRA covers primarily "**non-supervisory**" employees, protects **concerted protected activity** related to the terms and conditions of employment, and applies to **overly broad non-disparagement** and **confidentiality provisions**.

General prohibitions against disparagement will be considered unenforceable, while a provision against **intentionally or recklessly false/maliciously untrue statements** will be upheld.

Think in terms of prohibiting statements that would rise to the level of being "defamatory" instead of just negative.

Confidentiality clauses precluding employees from discussing with other employees workplace issues or from communicating with the NLRB, a union, legal forums, the media or other third parties are considered unlawful by the NLRB.

You can keep the **financial terms** of a settlement confidential, but not the settlement itself.

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Federal Trade Commission's Proposed Rule on Non-Compete Agreements

In January 2023, the Federal Trade Commission proposed a rule that would ban employers from **a)** entering into non-competition agreements with their employees and **b)** enforcing *existing* non-competes.

The rule would require employers to rescind existing non-competes and to actively inform workers that the existing non-competes are no longer in effect.

The proposed rule does not affect **non-disclosure or non-solicitation agreements**, which employers would still be free to use.

Status: This proposed rule is still in process (no vote until 2024) and undoubtedly will be challenged in court.

NLRB Rulings on Handbook Policies

Facially neutral employment rules are not enough under recent NLRB decisions. Any rule that might "chill" the exercise of NLRA rights is suspect.

Employers must show "legitimate and substantial business interests" for a policy and that it is unable to advance the interest with a more narrowly tailored rule.

Examples of Impacted Policies

Civility Rules

Insubordination

Use of Social Media

Restrictions on Recordings

Requiring Confidentiality of Investigations

HR Mistakes That Lead to Lawsuits

(Based on 30+ Years of Experience)

Inconsistent Treatment of Employees

"Looking the other way" for some employees is a recipe for an EEOC charge.

You can't play favorites.

And follow your handbook guidelines -- often employers have progressive discipline policies.

Discipline Scenario

Alec is habitually late returning from lunch.
You want to fire him. Should you?

What questions should you ask?

What does our handbook say?

Personnel File: What types of verbal and
written counseling have happened?

*How have we treated others in similar
situations?*

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How have we treated others in similar situations?

Allowing Hourly Employees to Work Off-the-Clock or "Volunteer" Time

Watch for problems with employees coming in early/
staying late, lunch breaks (working at one's desk),
attending required training, taking work home, or simply
not recording their time correctly.

Supervisors can be personally liable if they allow this to
happen.

Misclassifying Employees as Independent Contractors

If someone is working for you, assume they are an hourly employee entitled to overtime *unless* you can prove otherwise.

The risk if you are careless with this -- DOL, IRS and Workers' Compensation Commission issues

Being Unprofessional

* Losing Your Cool *

Being professional helps you avoid questions about your intent when making an employment decision.

As a manager, you have to be the adult in the room.

And language you consider innocent might be perceived as race-based ("boy"), age-based ("grandpa") or sexist ("honey" or "sweetie").

Your on-going professionalism can be the best defense to a charge of sexual or some other type of harassment, too.

Are people going to think about **you** and say, “I just can’t see that happening”?

Or are they going to think “I can *totally* see that happening”?

Being Careless with e-Mail and Text Messages

e-mail and text messages can be used to document performance and other issues.

But, e-mail and texts are never private,
and
e-mail and texts hang around forever

Three Simple Rules

1. Don't put something in an e-mail or text you wouldn't want a jury of your peers (or your friends or mom) to see.
2. "Cooling off" periods are a good thing before firing off an e-mail or text message -- count to ten (or a hundred) if needed.
3. Sometimes, it's better to have conversations in person or by phone, especially if you have questions for your HR staff.

Using False/Made-Up Reasons for Employment Decisions

Scenario

A long-beloved employee, who is in her 70s, is actually quite terrible at her job.

Instead of addressing the performance issue, you decide to "eliminate" the job so to not hurt her feelings. Six weeks later, you hire a 30 year old to do the same job.

Former employee finds out and files an age discrimination claim with the EEOC.

Failing to Address/Ignoring
Harassment and Retaliation

WHAT IS UNLAWFUL HARASSMENT?

- Any conduct that **demeans, insults or intimidates** a person or group because of their race, gender/sex, color, religion, national origin, age, disability, military service or genetic history.
- Prohibited conduct can include on-going jokes, labels, names, ridicule, or verbal abuse or stories offensive to an employee or group of employees. It can also involve physical touching/groping.

Harassment can occur off-site, off-the-clock and even on-line.

Roughly two-thirds of adults under 30 have been harassed online

% of U.S. adults who say they have personally experienced ___ online

	Any more severe behaviors	Only less severe behaviors	Any online harassment
U.S. adults	25	16	41
Men	24	19	43
Women	26	13	38
Ages 18-29	48	16	64
30-49	32	17	49
50-64	16	14	30
65+	7	14	21
Rep/Lean Rep	23	16	39
Dem/Lean Dem	27	15	43
Straight	23	16	39
LGB	51	17	68

Note: More severe behaviors include being physically threatened, stalked, sexually harassed or harassed for a sustained period of time. Less severe behaviors include being called an offensive name or having someone trying to purposefully embarrass them. LGB indicates those who identify as lesbian, gay or bisexual. Those who did not give an answer are not shown.

Source: Survey of U.S. adults conducted Sept. 8-13, 2020.

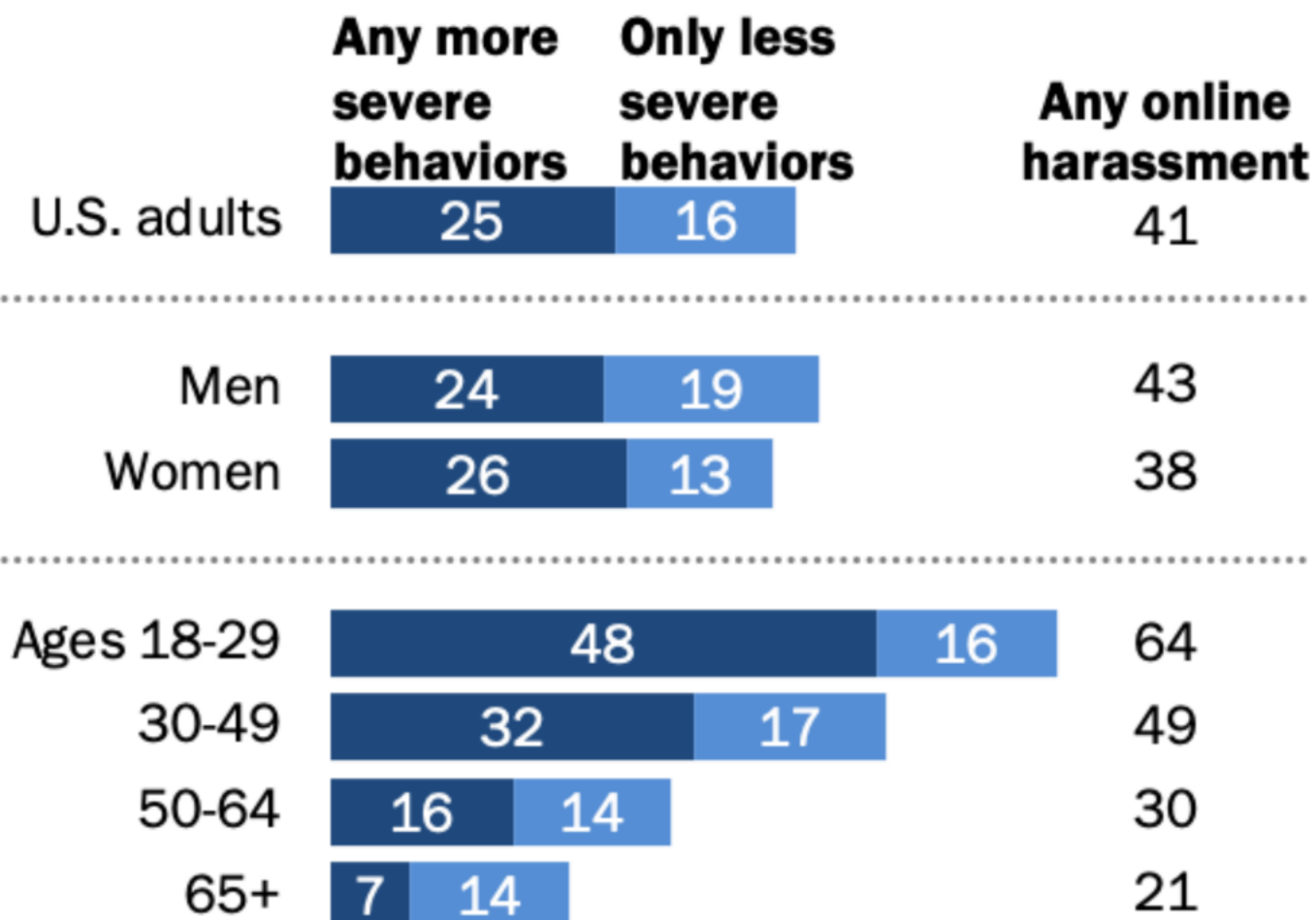
"The State of Online Harassment"

PEW RESEARCH CENTER

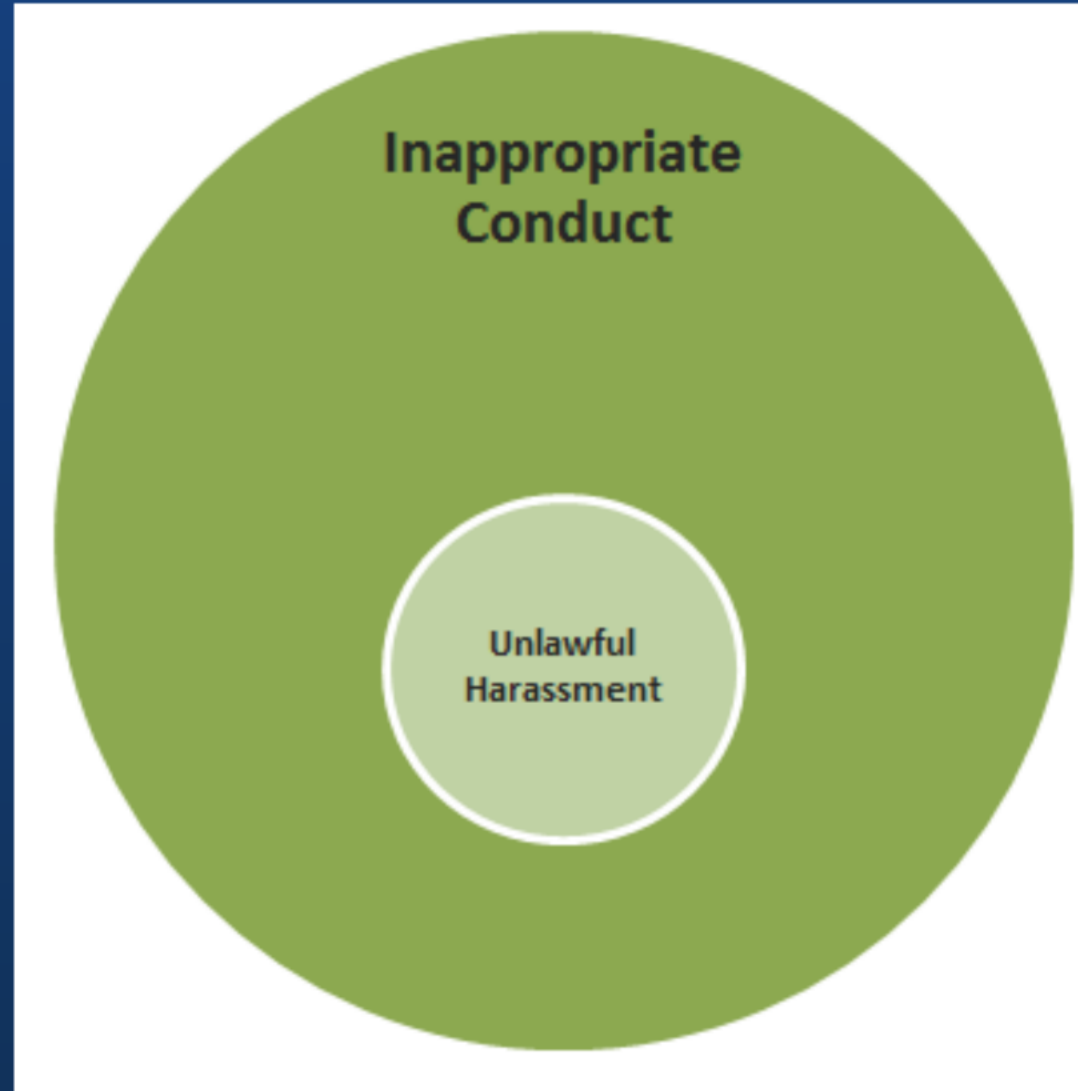


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Not All Inappropriate Conduct = Violation of the Law



Goal: Never Come Close to the Line

Scenario

Wendy is having issues with a co-worker (Pete) who is constantly asking her out and berating her for saying "no." The last time Pete asked, he came up behind Wendy and put his arms around her.

Wendy describes all of this to her supervisor when she runs into him at the grocery store over the weekend. She does not say she wants to file a complaint and does not use the word "harassment."

The supervisor responds, "That's just Pete being Pete."

Are there better responses?

Better Responses

How about we go to HR together on Monday and let them know about this?

Would you be comfortable with me asking HR to talk to Pete about his behavior?

What can I do to help you with this?

Retaliation for making a good faith complaint of discrimination or harassment is also a violation of the law.

Retaliation occurs when an employer takes some type of adverse action against an employee for complaining of discrimination (or even participating in an investigation).

Retaliation Scenario: Suspicious Timing

In late January, Steve made a complaint that his supervisor was making racial statements.

In early February, Steve receives a write-up for tardiness. The dates he was tardy were in December and early January, weeks before he made his complaint.

Is this suspicious? Could this be retaliation?
What questions do you ask?

How about:

Why did you wait so long to write up Steve?

Have others been tardy, and did you write them up for tardiness?

Failing to Recognize a Potential Accommodation Situation

(Disabilities, pregnancy/childbirth-related conditions and sincerely-held religious beliefs)

ADA/Disability

Employers have an obligation to **reasonably accommodate the known disabilities** of an applicant or employee who is **qualified** for the job.

An accommodation is a change in the work environment or in the way things are customarily done that enables an individual with a disability to perform the core parts of the job.

ADA/Disability Scenario

John is your maintenance guy. His job occasionally requires him to come into contact with a cleaning fluid when he is performing one particular job duty.

After being exposed several times to the fluid, he develops a pretty severe allergic reaction to the cleaning fluid.

What do you do?

Is the allergic reaction a disability?

MAYBE

If it is a disability, is the job duty that exposes John to the cleaning fluid an essential part of his job?

MAYBE

If it is an essential function, is there a reasonable accommodation that would allow John to continue performing the job duty?

MAYBE

How about trying a different cleaner or making sure he has protective clothing/gloves?

ADA/Disability Scenario

Jane works the day shift. She rarely clocks in on time -- sometimes up to 30 minutes late.

Jane's supervisor meets with her and gives her a written warning. Jane then tells her supervisor that she has been diagnosed with depression and has trouble getting out of bed in the morning.

What Can You Do?

Is depression a disability?

Yes

Can the supervisor still give Jane the written warning?

Yes

Do we need to start talking to her about possible reasonable accommodations for her depression?

Yes

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What types of accommodations
could you explore?

A later start time.

Working the same job on a different shift.

Working a different job (for which she is qualified) that has more flexible start times.

Time off (maybe FMLA) to seek treatment.

Get your HR staff involved!

Pregnancy Scenario

Susan is a teller, and she is pregnant.

Late in her pregnancy, her doctor wants her to limit any strenuous activity, wants her to be able to take additional breaks to eat and rest, and wants to limit the amount of time she spends on her feet.

You allow employees with workers' comp. injuries or other impairments to perform "light duty."

Do you have to attempt to reasonably accommodate Susan? **Yes.**

Don't forget **The Pregnant Workers' Fairness Act**: *Would it matter if you had not accommodated employees with work injuries or other impairments in the past? Answer: No.*

Additional Pregnancy Scenario

Susan has her baby and takes maternity leave. However, she suffers from postpartum depression and cannot return to work after her regular maternity leave ends.

Do you have to attempt to reasonably accommodate her again?

Yes.

Under **The Pregnant Workers' Fairness Act**, employers must reasonably accommodate *pregnancy, childbirth, or related medical conditions*, unless the accommodation will cause an “undue hardship.”

Employers also have the obligation to reasonably accommodate the **sincerely-held religious beliefs** of employees.

Religious Scenario

Jake's religion requires him to abstain from working sunset Friday to sunset Saturday.

Your bank requires employees to work every other Saturday -- kind of a mandatory OT.

Jake requests a religious accommodation and suggests working late on other days or switching shifts with someone.

You discharge Jake for refusing to work on Saturdays without any consideration of options.

Is that going to cause you a problem?

You must go through the process of attempting to find a reasonable accommodation. In this case, ask yourself:

Is the mandatory work policy really needed?

Would it actually be a problem to allow Jake to switch shifts with someone or work extra time on another day? Or just not work the Saturday shift at all?

Regardless of the ultimate decision, document your efforts to find a solution, even if there ultimately isn't one.

Failing to Document Performance
or Behavior Problems

The Importance of Documentation

1. Documentation records the **facts** of a situation.
2. It records the "who, what, when, where, how and why" of a situation.
3. Documentation gives you the opportunity to prove to the EEOC or a court that you were concerned with and discussed an issue with an employee.

What normally doesn't count as documentation?

Voicing a complaint to HR about an employee without any follow-up.

Writing up something, but never getting it acknowledged by the employee.

What should be in
documentation?

You should explain at a basic level what happened using **facts**. And **don't mischaracterize** any of the relevant facts.

You should state whether an issue is a **continuing problem** and list past discussions or counselings.

Formal documentation always should reflect an opportunity for a **written response** from the employee.

It should also show some type of **acknowledgment from the employee** (a signature or sent to the employee's e-mail address).

Other Documentation Tips

Don't wait **weeks** to prepare documentation.

Documentation should be prepared with the thought that **complete strangers** (with no idea what happened) might be reading your account.

Keep it **straightforward**. Use **plain language**.

Documentation Allows you . . .

To **preserve a record** of what you did for posterity. Even if you are unavailable for trial, your company can rely on your records.

To **refresh your memory** if needed for an agency investigation, a deposition or a trial in the future.

To **appear credible**. Accurate and timely documentation adds credibility to your account of what happened, especially when the documentation occurs before a claim of discrimination *and* it's acknowledged by the employee.

Which one is better?

1. INCIDENT: Describe the situation (behavior, performance, policy violation, etc.) that occurred. Include date(s), time(s), location(s), people involved, witnesses, effects of incident on employee's work or other employees, and all other relevant circumstances or contributing factors. Be specific in stating observable behaviors and comments whenever possible.

John was late to work today. He's fired.

Versus

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John was 35 minutes late to work today. He blamed traffic.

This is the fifth time he has been late in the last three months. John was verbally counseled twice for being late in November 2022, and given written warnings for being late on December 10, 2022, and January 7, 2023.

John's tardiness prevents us from opening up all of our teller lines for our in-office customers.

John's employment is being terminated pursuant to our attendance policy ("no habitual tardiness or absence from duty without prior approval").

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