



Pregnancy and Parenting Compliance Strategies Under the 2024 Title IX 2024 PWFA Regulations

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Disclaimer #1

We can't help it – we're lawyers

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use the chat function to ask general questions and hypotheticals.
- We are discussing federal law today.
- Please check state law (and local ordinances) to determine whether additional rules may apply.
- Approximately 26 States sued the 2024 Title IX Regulations - so far, we have 15 states enjoined and *dozens* of higher education institutions.

State of Kansas v. Dep't of Education

- Injunction granted July 2, 2024, in four states: Alaska, Kansas, Utah, and Wyoming.
- Injunction also applied to "schools attended by the members of Young America's Foundation or Female Athletes United, as well as the schools attended by the children of the members of Moms for Liberty."
- Court gave until July 15 to file a Notice identifying each school to which the injunction applied.
- Enjoined schools: [https://connect.brickergraydon.com/447/2898/landing-pages/exhibit-b-\(1\).pdf](https://connect.brickergraydon.com/447/2898/landing-pages/exhibit-b-(1).pdf)
- Check this list and consult with counsel!

Poll - Are You Enjoined?

Help us understand, is your institution *currently* enjoined from implementing the 2024 Regulations?

- A. Yes.
- B. No.
- C. I'm not sure yet.

Aspirational Agenda

Current Impacts to Higher Education

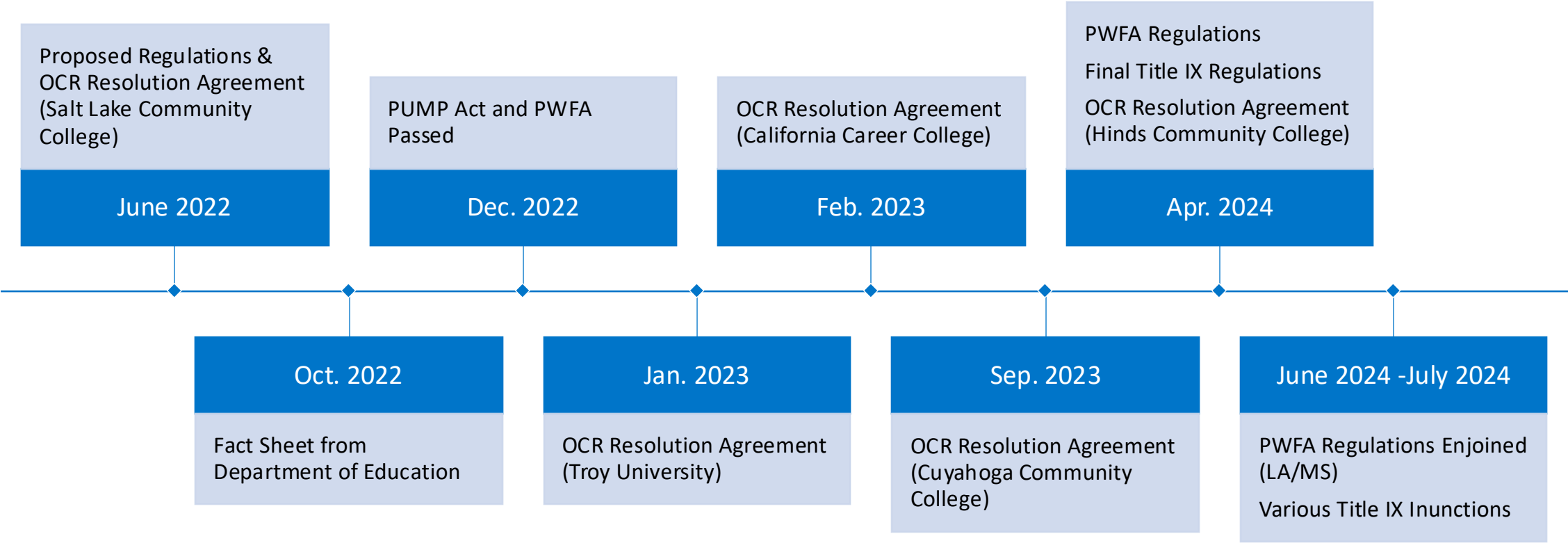
- Ensuring Equal Access: Employees
 - PWFA Regulations
 - Best Practices
- Ensuring Equal Access: Students
 - What's Existing: 2020 Title IX Regulations
 - What's New: 2024 Title IX Regulations
 - Where is there overlap?
 - Best Practices



Recent Developments



June 2022-Present



Accommodating Pregnant and Nursing Employees on the Clock

- Data & Trends
- Overview of Current Federal Law
- Best Practices
- Learn from Others
- Questions



Laws, Regulations, and Policy applicable to employees

Cluttered Legislative/Regulatory landscape...

- Laws & Regulations
 - Pregnant Workers Fairness Act (PWFA)
 - New Regulations - April 2024
 - Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act
 - ADA/504
 - FLSA
 - FMLA
 - Title VII and PDA
 - Title IX
 - Guidance/Guidelines
- Your Institution's Policy



A Note on Enforcement:

Department of Labor v. EEOC

EEOC

The Equal Employment
Opportunity Commission

Enforces federal laws regarding
discrimination based on sex and pregnancy

PWFA, TVII, PDA, ADA

Independent Agency

DOL

Department of Labor

Works to promote the welfare of
laborers in the United States.

PUMP, FLSA, FMLA

Oversees: OFCCP, OIG, Wage and
Hour Division, & More

- The Bipartisan Policy Center teamed up with Morning Consult to conduct a survey in 2022.
 - The Survey consisted of questions to 2,200 adults over a two-day period.
 - Survey data showed:
 - Almost 1 in 4 mothers* considered leaving their jobs due to a lack of reasonable accommodations
 - 1 in 5 mothers* said they experienced pregnancy discrimination
 - 1 in 5 mothers* said they were afraid to tell their employer about a pregnancy
 - 1 in 4 fathers* said their spouse or partner experienced pregnancy discrimination
- *"Mothers"/"Fathers" was the language used in the survey questions and data

Gitis, B., Sprick, E., & Schweer, E. (2022, February 22). *Bpc – morning consult: 1 in 5 moms experience pregnancy discrimination in the workplace*. Bipartisan Policy Center. <https://bipartisanpolicy.org/blog/bpc-morning-consult-pregnancy-discrimination/#:~:text=Nearly%201%20in%204%20mothers,pregnancy%20discrimination%20in%20the%20workplace.>

Effect of pregnancy discrimination on PPD

- A 2022 study of 285 Japanese women who were employed during pregnancy showed:
 - **23.9%** reported experiencing pregnancy discrimination during pregnancy
 - Pregnancy discrimination was “significantly associated with post-partum depressive symptoms”
- The study concluded:
 - “**Pregnancy discrimination has adverse effects on postpartum depressive symptoms**, partially through prenatal depressive symptoms, especially among non-regular employees. To prevent perinatal depression in female workers, employers should comply with legislation and take preventive measures against pregnancy discrimination, while considering vulnerable employees.”

Source: Kachi, Y., Fujiwara, T., Inoue, A., Baba, S., Eguchi, H., Ohta, H., & Tsutsumi, A. (2022). The effects of pregnancy discrimination on postpartum depressive symptoms: a follow-up study. *BMC Pregnancy and Childbirth*, 22(1). <https://doi.org/10.1186/s12884-022-05148-2>

Effect of pregnancy discrimination on maternal health

Researchers at Baylor University analyzed data from two studies. The studies showed:

- Perceived pregnancy discrimination was positively associated with perceived stress
- Perceived stress was positively associated with perceived postpartum depressive symptoms

Source: Hackney, K. J., Daniels, S. R., Paustian-Underdahl, S. C., Perrewé, P. L., Mandeville, A., & Eaton, A. A. (2020, July 2). Examining the Effects of Perceived Pregnancy Discrimination on Mother and Baby Health. *Journal of Applied Psychology*. Advance online publication. <http://dx.doi.org/10.1037/apl0000788>

- Following current law, policy, and guidance minimizes risks of potential EEOC /DOL/DOE complaints and civil litigation (discussed later)
- Preventing and responding to workplace discrimination and harassment based on pregnancy could:
 - Prevent morale concerns/turnover among employees
 - Prevent adverse impacts to maternal health

PREGNANT WORKERS FAIRNESS ACT (PWFA)

- Act Effective 6/27/23
- Final Regulations
Published - April 2024
- Rules effective 6/18/24
- Injunction granted in two
states (LA/MS)



Pregnant Workers Fairness Act

The Final Rule states that the “covered entity” must “make **reasonable accommodations** to the *known limitations* of a **qualified employee** related to *pregnancy, childbirth or related medical conditions*, absent **undue hardship**.”
(§ 1636.1(b)(1))

Covered Entity

"Under the PWFA include public and private employers with 15 or more employees, unions, employment agencies, and the Federal Government." 29096

Qualified Employee 42 USC 2000gg(6)

The term “qualified employee” means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if—

- (A) any inability to perform an essential function is for a temporary period;
- (B) the essential function could be performed in the near future; and
- (C) the inability to perform the essential function can be reasonably accommodated

Essential Function 1636.3 (g)

- "*Essential functions* mean the fundamental job duties of the employment position the employee with a known limitation under the PWFA holds or desires. The term “essential functions” does not include the marginal functions of the position."
- Considerations:
 - Does the position exist to perform the function
 - Are there a limited number of people available to perform that function
 - Is it highly specialized
- Evidence of Essential Functions
 - Job descriptions, time in the job v. Time needed for accommodation; terms of the CBA; consequences of nonperformance; work experience of past incumbents in the job or similar jobs

Known Limitation 106.36.3(a)

- The term “known limitation” means **physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions** that the employee or employee’s representative has **communicated to the employer** whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102); 42 USC 2000gg(4)
- Under that definition a limitation is “known” to a covered entity if the employee, or the employee's representative, has communicated the limitation to the covered entity. 1636.3(a)(1)

Limitations 1636.3(a)(2)

- “Physical or mental condition” is an impediment or problem that may be modest, minor, and/or episodic. The physical or mental condition may be that an employee affected by pregnancy, childbirth, or related medical conditions has a need or a problem related to maintaining their health or the health of the pregnancy. The definition also includes when an employee is seeking health care related to pregnancy, childbirth, or a related medical condition itself. The physical or mental condition can be a limitation whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990, [42 U.S.C. 12102](#)."

Pregnancy, Childbirth, or Related Medical Conditions 1636.3(b)

- Relate to the employee, not a spouse or partner
- Current, past, potential or intended pregnancy, labor, childbirth
- Related medical conditions:
 - Termination (including miscarriage, stillbirth, abortion)
 - Other conditions: ectopic pregnancy; pre-term labor; nerve injuries, nausea, edema, anxiety, depression or psychosis, and more.

Reasonable accommodation 1636.3(h)

- Modifications or adjustments to enable a qualified applicant with a known limitation for consideration
- Modifications to the work environment that enable a qualified employee to perform the essential functions of the job
- Modifications that would allow an employee to enjoy equal benefits and privileges that are enjoyed by similarly-situated employees
- Temporary suspension of essential functions and or modifications that permit the temporary suspension of an essential function

Reasonable Modifications

- Specific examples in 1636.3(i)(3)(i) through (iii)
- The ability to use paid leave or unpaid leave
- Lactation needs 1636.3(i)(4):
 - Breaks, a space for lactations required under PUMP Act, that the lactation space is "in reasonable proximity to employee's usual work area"
 - Under PWFA, that space must be "that it is regularly cleaned; that it has electricity, appropriate seating, and a surface sufficient to place a breast pump; and that it is in reasonable proximity to a sink, running water, and a refrigerator for storing milk"

Undue Hardship 1636.3(j)

- Undue hardship means, "with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth" below:
 - Nature and cost of the accommodation
 - Overall financial resources of the facility and entity and the number of persons employed, the effect on expenses
 - Type of operation of the entity
 - Impact of the accommodation on the entity – including the ability of other employees to perform duties or the ability of the business to conduct business
 - Length of time the employee is unable to perform the functions
 - The nature of the essential functions
 - Whether other employees have had similar accommodations
 - If there are others who can perform the duties
 - Whether the function can remain unperformed/postponed for any period of time.

Individualized Assessment

- The assessment of a modification must be individualized—including whether the modification is reasonable and/or constitutes an undue hardship.
- Must engage an interactive process.

Limitation on supporting documentation

(1 of 2)

A covered entity is not required to seek supporting documentation. A covered entity may seek supporting documentation from an employee who requests an accommodation under the PWFA only when it is reasonable under the circumstances for the covered entity to determine whether the employee has a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions (a limitation) and needs an adjustment or change at work due to the limitation.

§ 1636.3(l)

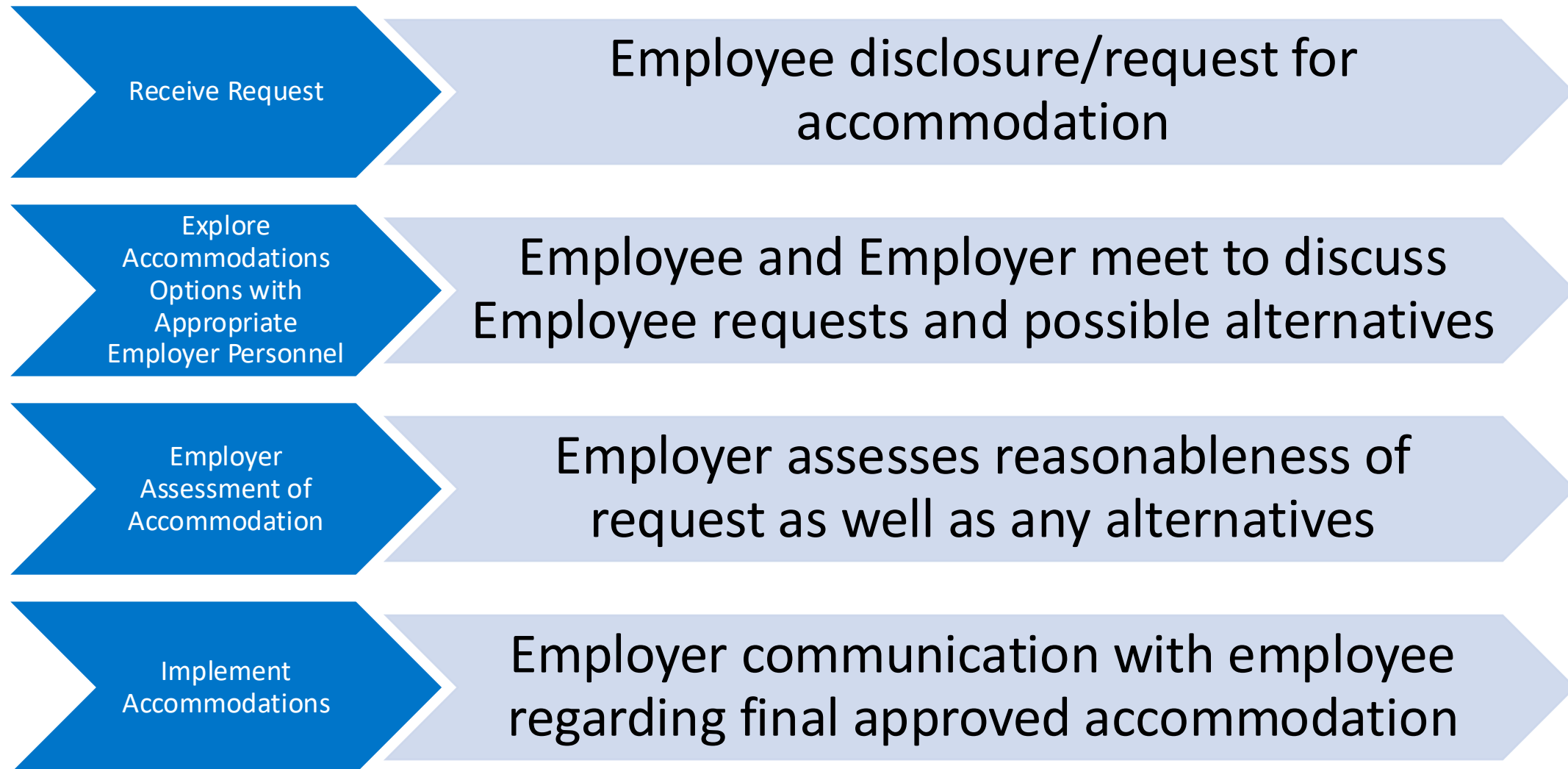
Limitation on supporting documentation

(2 of 2)

Reasonable documentation is the minimum necessary to "confirm the physical or mental condition" is "related to, effected by, or arising out of" pregnancy, childbirth or related condition, and describes the adjustment or change that is needed due to the limitation.

1636.3(I)

PWFA Process:



Family Medical Leave Act - 29 U.S.C. § 825.100



- To be eligible, employees must:
 - work for a covered employer,
 - have worked for the employer for at least 12 months and 1,250 in those 12 months, and
 - must work at a location where the employer has 50 employees within 75 miles
- Entitled to leave of 12 workweeks in a 12 month period for:
 - Birth/Adoption; to care for a spouse/child/parent with a serious health condition; for a serious health condition that makes the employee unable to do their job
- Serious Health Condition - 29 C.F.R. Part 825 *et seq.*

Assessing Accommodations Requests

Does the individual have a disability?

If so, provide reasonable accommodations as determined through the interactive process.

Pregnant Employee?

If so, provide reasonable accommodations as determined through the interactive process.

Serious Health Condition?

If so, an employee may be entitled to FMLA leave.

Concern necessitate leave?

If FMLA does not apply, look to your institution's policies for employees.

Accommodate similar temporary needs for non-pregnant people?

If so, what have you previously done?

Other policies apply?

If so, explore those options!

Ethic of Care?

Be consistent with your institution's ethic of care.

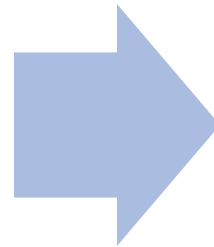
Impact of PWFA Injunction

- On June 17, 2024 – the US District Court for the Western District of Louisiana issued an injunction that applies to Louisiana and Mississippi (and four plaintiff organizations).
- The Court stated that the regulations "exceeded" statutory authority.
 - In June, the Supreme Court overturned *Chevron* in *Loper v. Bright*. **Stay tuned.**
- The PWFA is therefore enjoined in those states and for those four organizations.
- All other states and covered entities must comply with the regulations.

Fair Labor Standards Act/PUMP ACT

- Employers must provide reasonable breaks for employees to express breast milk for a nursing child for one year after the child's birth, each time the employee must express milk
- Employers must provide a private space other than a bathroom – shielded from view, and free from intrusions
- Breaks must be provided “as frequently as needed” for the purpose
- This applies to both exempt and non-exempt employees
- Recall additional PWFA requirements regarding the space

Paid Breaks for
all Employees?



Paid Break for
Lactation

States with Pregnancy Discrimination Protections

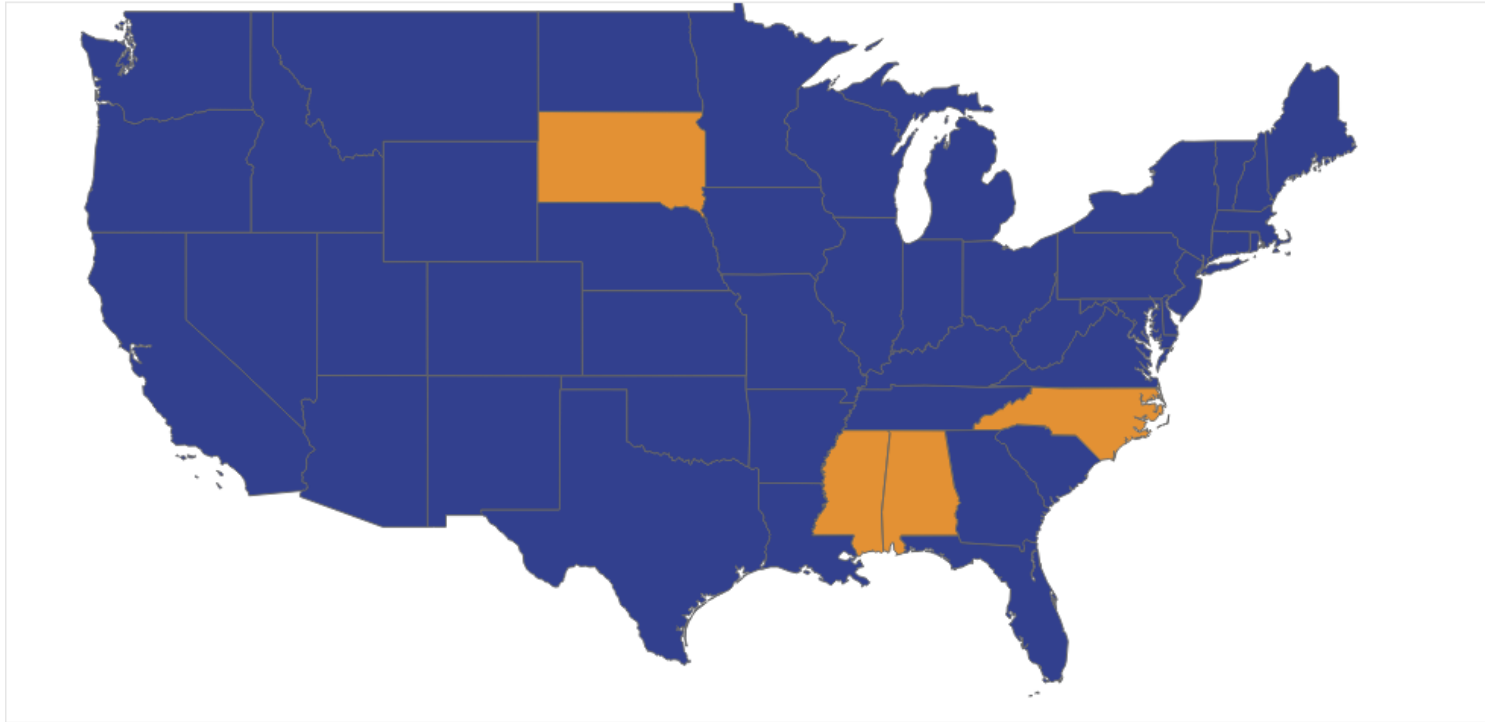
- Almost every state and territory with the exception of South Dakota, North Carolina, Alabama and Mississippi.
- Source:
<https://www.dol.gov/agencies/wb/pregnancy>

Employment Protections for Workers Who Are Pregnant or Nursing

Hover over the map for information on available state protections. (Last updated in 2023.)

- Protection against pregnancy discrimination
- Provisions for pregnancy accommodation
- Workplace breast feeding rights

Presence of protection
■ No State Protection
■ State Protection



States with Pregnancy Accommodation Provisions

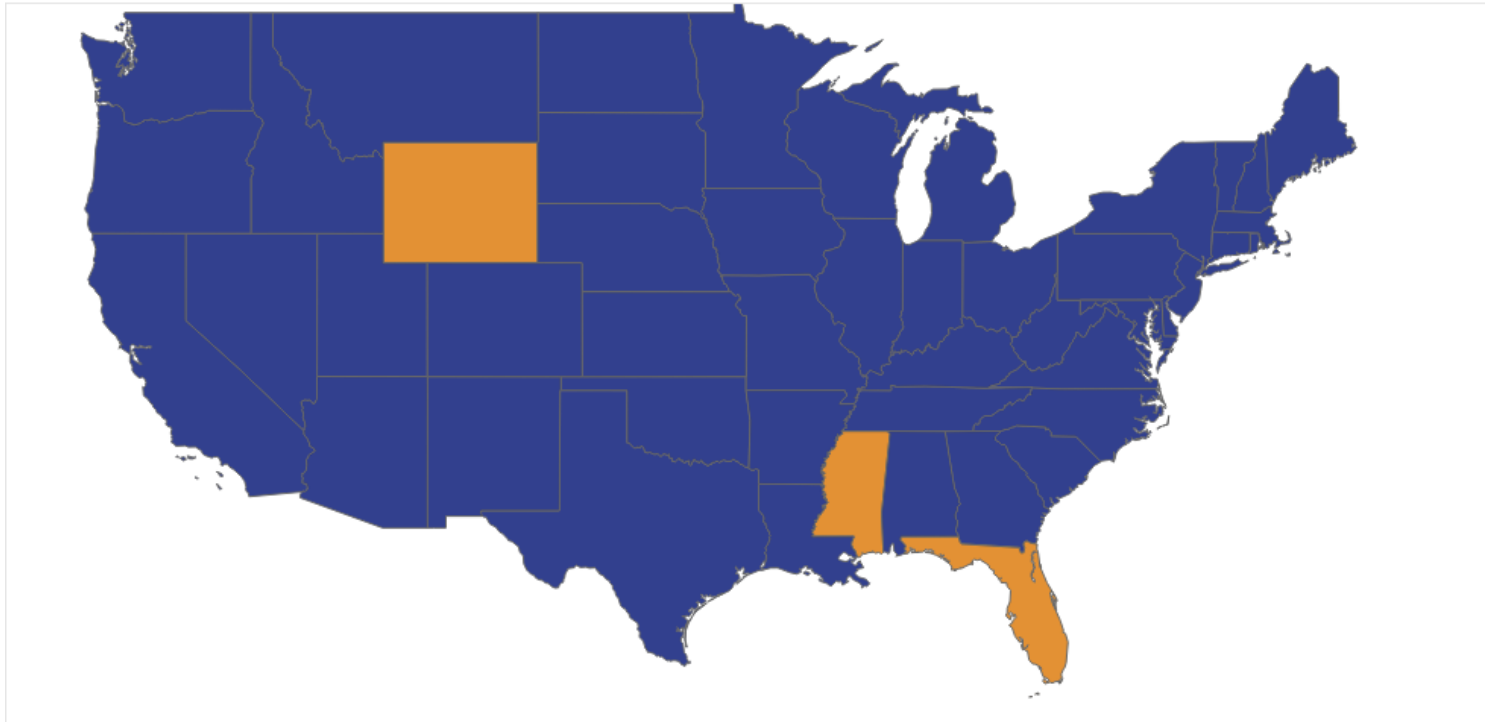
- All states and territories with the exception of Wyoming, Mississippi, Florida, and American Somoa.
- Source:
<https://www.dol.gov/agencies/wb/pregnancy>

Employment Protections for Workers Who Are Pregnant or Nursing

Hover over the map for information on available state protections. (Last updated in 2023.)

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Presence of protection
■ No State Protection
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States with Lactation Rights

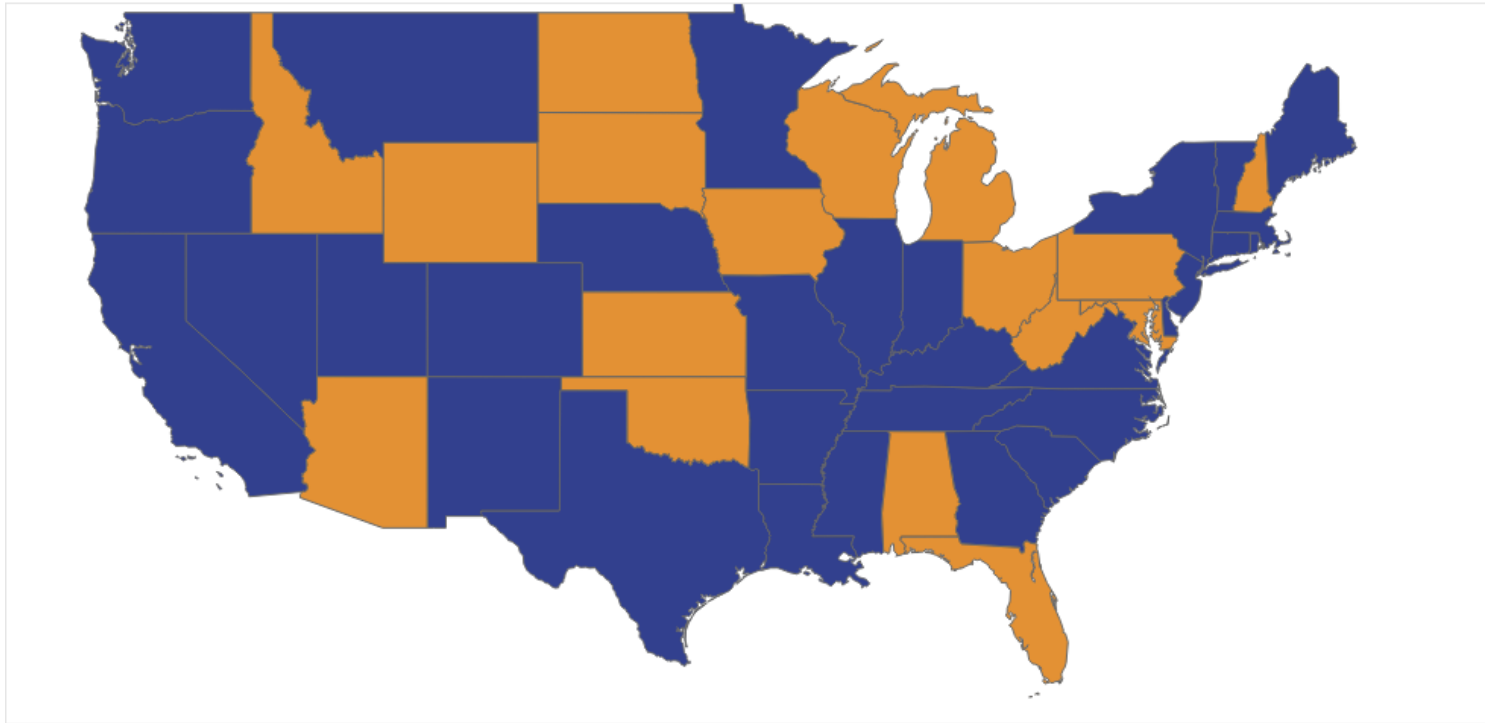
- Fewer states and territories have incorporated lactation/nursing protections.
- Source:
<https://www.dol.gov/agencies/wb/pregnancy>

Hover over the map for information on available state protections. (Last updated in 2023.)

Protection against pregnancy discrimination	Presence of protection
<p>○ Protection against pregnancy discrimination</p> <p>○ Presence of protection</p>	

- ☐ Protection against pregnancy discrimination
- ☐ Provisions for pregnancy accommodation
- ☒ Workplace breast feeding rights

■ No State Protection
■ State Protection



2020 v. 2024 Title IX Regulations

Updates for Employees in 106.57

2020 Regulations

- No rules or policies re: marital, parental, or family status that discriminate on basis of sex or treat people differently based on who is head of family unit
- Cannot discriminate on basis of pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery
- Treat as temporary disability
- Pregnancy leave

2024 Regulations

- Cannot discriminate against employees/applicants for employment on basis of current, potential, or past pregnancy or related conditions
- Comparable treatment to other temporary medical conditions
- Voluntary leaves of absence
- Access to lactation time and space

- Will need to accommodate both as a student and, potentially, as an employee – two analyses that may have overlapping results (e.g., may have designated lactation rooms open to students and employees with breaks during class and work)
- Some considerations:
 - Is this person here primarily as a student and who also works as an employee (e.g., as a resident assistant, cashier at the on-campus café, assistant in the library)?
 - Is this person here primarily as an employee and who also takes classes as a student (e.g., works full time in the library and takes one or two classes a semester as part of an employment benefit)?
 - What if it's unclear (e.g., part-time student and part-time employee)?

General Principles:

-
- Treat pregnant people the same way you treat non-pregnant people who have similar needs.
 - Let pregnant people decide if/when they can no longer work.
 - When it comes to risks to pregnant people, informed consent is key. You are not their parent.



Learn from Others...

Constitutional vagueness challenge to state statute on reproductive health decisions 61 F.4th 278 (2nd Cir. 2023)

- Plaintiff-Appellant employer challenged New York state statute that, in pertinent part, prohibited employers from accessing employee's personal information regarding the employee's reproductive health decision-making, arguing it was unconstitutionally vague
- District court determined not unconstitutionally vague because an “ordinary employer” would understand the statute prohibited them from “accessing an employee['] medical record to determine whether that employee had used birth control or not, or had an abortion or carried a child to term” and “discrimination against or retaliation against an employe[e] for decisions made about birth control or pregnancy.”
- Court of Appeals upheld this part of the district court's determination, agreeing with its analysis and underscoring that the terms at issue were also defined under New York law.

EEOC v. Wal-Mart Stores East

Light duty accommodation under Title VII/Pregnancy Discrimination Act 46 F.4th 587 (7th Cir. 2022)

- Wal-Mart provided light duty assignments to workers injured on the job. The policy provided lifting restrictions and other light duty assignments until employees could return to regular duty. Wal-Mart refused to provide light duty assignments to pregnant workers for pregnancy related reasons and instead required they take leave.
- The EEOC sued alleging violations of Title VII/the PDA
- The court applied a burden-shifting test developed in *Young v. UPS*, 575 U.S. 206, 135 S. Ct. 1338, 191 L. Ed. 2d 279 (2015)
 - After establishing the prima facie case, Wal-Mart was provided the opportunity to show a legitimate, non-discriminatory reason for denying the accommodation
 - Then, Plaintiff must show that the policy imposes a significant burden on pregnant workers.
 - Wal-Mart alleged that the policy was non-discriminatory because its policy of applying light duty to workers with work-related injuries applied equally to all employees—including pregnant employees and the EEOC did not demonstrate there was a significant burden on pregnant workers.

EEOC v. Ryan's Pointe Houston

Pretext for Discrimination with Comment About Abortion No. 19-20656 (5th Cir. Sept. 27, 2022)

- Appeals Court reversed and remanded summary judgment to Defendant in district court in part on issue of pregnancy discrimination
- Employee at issue was assistant property manager of Defendant apartment complex when management changed and new management began to question employee's job performance
- EEOC proffered sufficient circumstantial evidence pretext for pregnancy discrimination – fight over her qualifications for her position an issue of fact and comments about pregnancy – including one from management that employee's career was taking off and should get an abortion before terminated

QUESTIONS?



Accommodating Pregnant and Nursing Students

- Data & Trends
- 2020 Regulations
- 2024 Regulations
- Best Practices
- Learn from Others
- Questions



What applies to Students?

- Title IX
- Section 504 of the Rehabilitation Act
- ADA
- Fair Housing Act
- State Laws
- University policies

Student Parents on Campus

- 42 % of parents attending college attend public 2-year institutions
 - 18% attend private for-profit institutions
 - 17% attend public four-year institutions
 - The remaining 23 % attend private 4-year non-profit institutions or other institutions.
- Source: Institute for Women's Policy Research analysis of data from the U.S. Department of Education, National Center for Education Statistics, 2015-16 National Postsecondary Student Aid Study (NPSAS:16).

Student Parents on Campus

“Student parents face several hurdles to completion, including a nationwide shortage of affordable child-care options, a lack of lactation space and family housing on many campuses, and the daily struggle to juggle work, school, and family responsibilities. Though they have higher GPAs, on average, than their nonparenting peers and are often highly motivated, only a third earn a degree or certificate within six years.”

Field, K. (2022) Colleges brace for more pregnant and parenting students.
<https://www.chronicle.com/article/colleges-brace-for-more-pregnant-and-parenting-students>

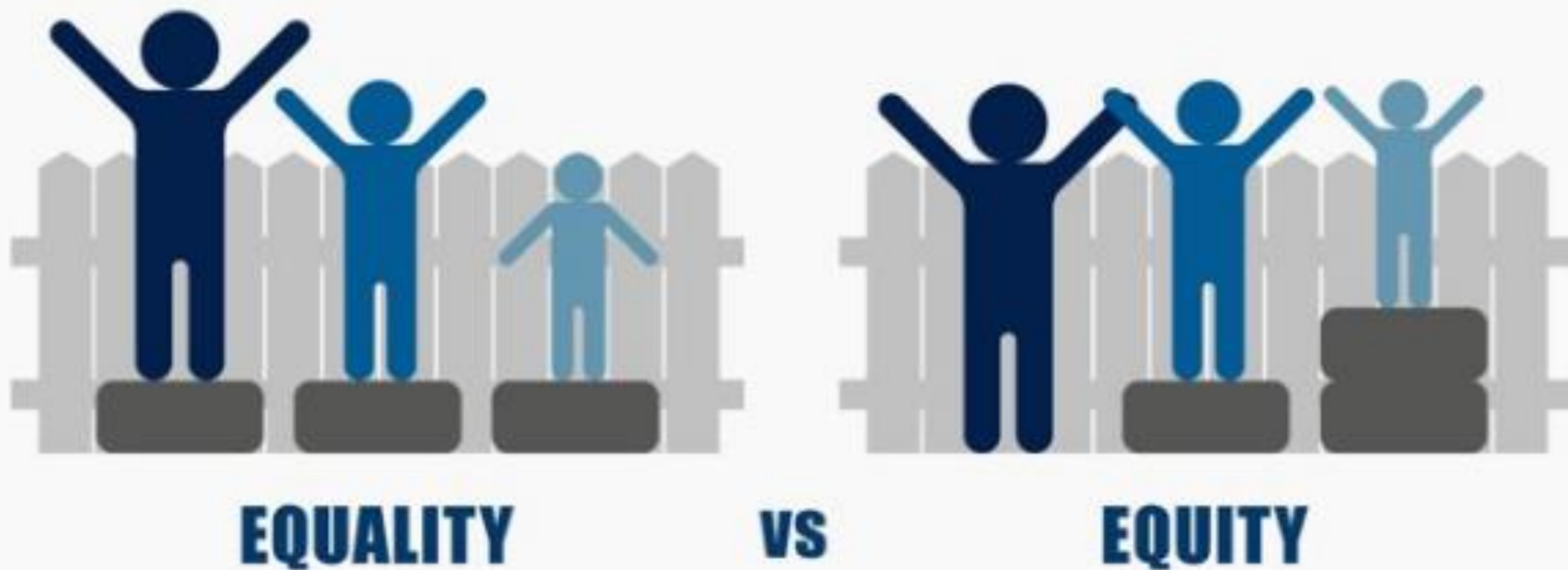
33% of student parents have a GPA of 3.5 or higher, which is higher than all other students without children.

Source: Institute for Women’s Policy Research analysis of data from the U.S. Department of Education, National Center for Education Statistics, 2015-16 National Postsecondary Student Aid Study (NPSAS:16).

20 U.S.C. §1681 *et seq.*

“No person in the United States shall, **on the basis of sex**, be **excluded** from participation in, be **denied** the benefits of, or be **subjected to discrimination** under any education program or activity receiving Federal financial assistance.”

Title IX is an Equity Statute



2020 Title IX Regulations

- 34 C.F.R § 106.21(c)
 - No discrimination on the basis of Marital or Parental Status - Admissions
- 34 C.F.R § 106.40
 - No discrimination on the basis of Marital or Parental Status - Students
- 34 C.F.R § 106.57
 - No discrimination on the basis of Marital or Parental Status – Employees
- Non-Regulatory Guidance
 - *Supporting the Academic Success of Pregnant and Parenting Students (July 1991, reprinted June 2013)*
 - *Discrimination Based on Pregnancy and Related Conditions (October 2022)*

2020 Title IX Regulations: 106.40

- Non-discrimination on the basis of parental, family or marital status. 34 CFR 106.40 (a)
- Non-discrimination on the basis of "student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom...." 34 CFR 106.40 (b)(1)
- No physician certifications. 34 CFR 106.40 (b)(2)
- Voluntary separate but comparable programs. 34 CFR 106.40 (b)(3)
- Treat same as temporary disabilities. 34 CFR 106.40 (b)(4)
- Allow for leave of absence but return to same status. 34 CFR 106.40 (b)(5)

2020 Regulations In Practice

- Provide "reasonable and responsive" modifications to the policies/practices of the program to ensure equal access
 - Excuse absences
 - Make up missed work/give extensions
 - Access to elevators, breaks, etc.
- Engage in an interactive process
- TIXC should "coordinate" that process

Lessons from OCR

Update website

Interactive process for
reasonable modifications

Clearly defined
procedures/processes

Centralization/coordination
of process via TIXC

Documentation

Implementation of
modifications must be
effective

2024 Title IX Regulations

- Adopted non-regulatory guidance into the regulations.
- Revitalized the regulations for first time since 1975.
- Added two definitions (Pregnancy or Related Condition; Parental Status).
- Imposed new obligations on employees and clarified the role of the TIXC.

106.2 – Definitions

106.10 – Scope
includes “pregnancy or
related conditions”

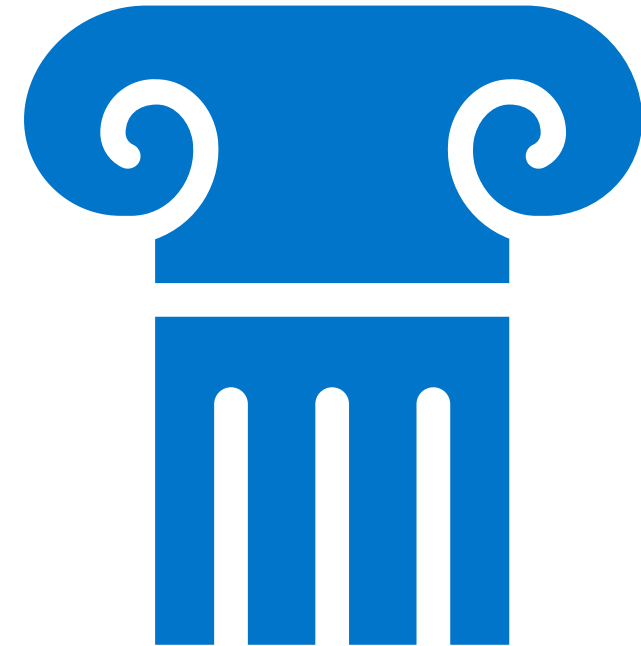
106.21(c) – Admissions

106.40 – This
provides the bulk of
the requirements
for students

106.51(b)(6) – Leaves

106.57 – This
provides the bulk of
the requirements
for employees

Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, **pregnancy or related conditions**, sexual orientation, and gender identity.



- The status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:
 - A biological parent;
 - An adoptive parent;
 - A foster parent;
 - A stepparent;
 - A legal custodian or guardian;
 - In loco parentis with respect to such a person; or
 - Actively seeking legal custody, guardianship, visitation, or adoption of such a person.

Pregnancy or Related Condition 2024 Regulations 34 CFR 106.2

- (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
- (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

Note: A pregnancy related medical condition "does not have to be a disability" in order to fall within this definition. 89 FR 33756.

Note: "The Department interprets 'termination of pregnancy' to mean the end of pregnancy in any manner, including, miscarriage, stillbirth or abortion."

89 FR 33757.

2024 Regulations - Non-Discrimination

- 2024 34 C.F.R. 106.40(a)
 - Recipients "must not adopt or implement any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex."
- 2024 34 C.F.R. 106.40(b)(1)
 - No discrimination based upon "pregnancy or related conditions"

- 106.40(b)(2)
 - When a student/person with legal right to act on behalf of the student informs "ANY EMPLOYEE" of pregnancy or related condition, the employee **MUST**
 1. provide the student with the Title IX Coordinator's information and
 2. inform the student that the Title IX Coordinator can coordinate measures to preserve equal access to the education program or activity.
 - **Exception:** if the employee reasonably believes that the Title IX Coordinator has already been notified.
- This **does not** impose a requirement to affirmatively ask students if they have a pregnancy or related condition! 89 FR 33767.
- **Records:** "the provision **does not require documentation of compliance**...Any records maintained voluntarily by a recipient would be subject to the disclosure restriction of 106.44(j) of the final regulations, which prohibits the disclosure of personally identifiable information obtained in the course of complying with this part, with some exceptions." 89 FR 33768.

Referral to TIXC - Takeaways

Who does this apply to?

- ANY Employee
- Does not have to be student facing or someone.

Considerations for implementation:

- Have resources handy for employees to provide to students.
 - Can be creative: QR Codes with link to website; standard template letters or emails to send students so they have that information readily available and can refer back to it.
- Incorporate this information into any required training:
 - Onboarding Training
 - Annual training
 - Employee handbook or other resources
 - Title IX Website
- What, if anything, are you documenting?

Role of Title IX Coordinator (1 of 3)

Title IX Coordinator must take "specific actions" to ensure equal access 106.40(b)(3)(i)-(vi):

- Provide information about obligations. 106.40(b)(3)(i)
- Provide reasonable modifications. 106.40(b)(3)(ii)
- Provide voluntary access to separate and comparable program. 106.40(b)(3)(iii)
- Voluntary leave of absence. 106.40(b)(3)(iv)
- Access to lactation spaces. 106.40(b)(3)(v)
- Limitation on requests for supporting documentation under 106.40(b)(3)(ii) to (v). 106.40(b)(3)(vi)

Role of Title IX Coordinator (2 of 3)

Once a TIXC has been informed of a pregnancy or related condition:

- "A recipient must **promptly** take the steps specified in 106.40(b)(3), including implementing reasonable modifications." 89 FR 33769.
- "**No matter when** a student notifies the Title IX Coordinator of Pregnancy or related conditions...a recipient **must respond promptly and effectively** to ensure equal access to the recipient's education program or activity consistent with the requirements of Title IX." 89 FR 33769-70.

Role of Title IX Coordinator (3 of 3)

A Title IX Coordinator can delegate duties:

- "The Title IX Coordinator must be responsible for coordinating the actions" but "a recipient may delegate...specific duties...provided that the Title IX Coordinator retains ultimate oversight." 89 FR 33770.

Consider:

- Bandwidth of current Title IX personnel
- Expertise of others
 - Consider partnerships with those in accessibility offices?
 - Pros: could have experience with the interactive process
 - Cons: use to requesting a lot of supporting documentation
- Training

- § 106.40(b)(3)(ii)(A)
 - "A recipient must make reasonable modifications to its policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity; that each modification must be based on a student's individualized needs; that the recipient **must consult with the student** when determining what modifications are required; **and that a modification that a recipient can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification.**"
- If a student accepts the offered modification, it must be implemented. (§ 106.40)(b)(3)(ii)(B))

Comparable processes to disability modifications

- "When recipients can use the same or similar processes for pregnancy and disability in a manner that is consistent with the requirements of these Final Title IX Regulations and applicable disability laws, recipients may do so." 89 FR 33772.

An aside...Pregnancy as a Disability?

- A healthy pregnancy is generally not considered to be a *disability*.
 - However, pregnancy complications may or may not rise to the level of a disability that substantially limits one or more major life activities, so don't overlook these protections!
 - Also – practical overlap in concepts and decades of precedent
- Potential for related concepts in proposed Title IX regs
 - Inclusion of “fundamental alteration” language (proposed 106.40(b))

- Relevant provisions:
 - ADA Title II (public entities)
 - ADA Title III (public accommodations)
 - Section 504 (programs rec'ing federal financial assistance and contracts)
- The devil is in the ~~details~~ **definitions!**
 - “Qualified individual” (ADA)
 - “Essential to the instruction” (Section 504)
 - “Fundamentally alter” (ADA)
 - “Undue hardship” (ADA)

- Holding students to academic requirements that are essential to the instruction ≠ discrimination
- Declining to provide modifications if they would fundamentally alter the nature of the public service provided ≠ discrimination
- Reasonable accommodations/adjustments may be requested
 - Institution must engage in an interactive process to determine what accommodations are reasonable
 - Medical documentation to support accommodations **may** be requested

Fundamental Alterations & "Reasonable Modifications" under Title IX (1 of 2)

- "Jurisprudence outlining modifications that would be unreasonable or rise to the level of a fundamental alteration to the nature of the program in the educational and disability context is illustrative." 89 FR 33775.
 - The Department noted that fundamental alterations could include:
 - Modifications that "completely waive requirements that demonstrate mastery"
 - That "jeopardize an institution's accreditation"
 - That "completely waive requirements that demonstrate academic competency" like clinicals.
 - Waive entire senior year and graduate without the credits
- 89 FR 33775-76

Fundamental Alterations & "Reasonable Modifications" under Title IX (1 of 2)

- Not Fundamental Alterations:
 - Make up exams at a later date
 - Repeat one or more classes
 - Tutoring
 - Taped lectures
 - Untimed [or extended time] exams
 - Changing seating arrangements
 - Modifying or reducing duties in a clinical course
 - Deferring to another semester to complete clinical requirements
 - Intermittent absences
 - Make up lost class time
 - Switching to a comparable course at a different time
 - Take credits at a slower pace
 - Bathroom breaks

89 FR 33775-76

Other Reasonable Modifications

106.40(b)(3)(ii)(C)

- Breaks
 - To express breast milk/breastfeed
 - To attend health needs
 - Drink/snacks/keep water by them
 - Use restroom
- Online courses/homebound education
- Intermittent absences
- Changes to schedules or course sequences
- Extensions of time to complete coursework/reschedule exams
- Allow student to sit/stand
- Counseling
- Changes in physical space
- Etc.

Working with Stakeholders

- Coordination and consistency is key
- Identify stakeholders
 - ADA/504 Coordinator
 - TIXC
 - General Counsel
 - Human Resources
 - Academic leadership
- Consider delegation to ADA/504 office + consult with TIXC
 - New regs = be aware of training requirements, limitations on documentation, etc.

- Fact specific – no bright line test. Must work closely with stakeholders (including faculty) and the student to assess the requested modification & whether it is reasonable or constitutes a fundamental alteration
- Consider accreditation
- Be flexible and INTERACTIVE

- Highly fact specific – no easy answer or bright line test
- CONSULT WITH COUNSEL.
- Look to your housing contracts/policies.
 - What are the Fair Housing Act considerations?
 - Does the policy/contract discriminate against people based on sex/family status?
 - If families allowed on campus: be mindful not to adopt/apply a rule that treats folks differently (i.e. charging them more) as a result of sex/family status.
 - If students are required to live on campus, can you offer to release the student from their housing contract?
 - Think of some *legal* (i.e. *non-discriminatory*) limitations on who can live in the residence halls: numbers of folks per room, enrolled students only, guest policies.
- Look at your minors on campus policies.

Limitation on Supporting Documentation

- A recipient **must not** require supporting documentation under § 106.40(b)(3) unless the documentation is **necessary and reasonable** to determine the reasonable modifications. (89 FR 33789-90)
- Examples:
 - Not necessary when the need for action is obvious (i.e. student is pregnant and requests a bigger uniform) or when medical documentation has previously been provided or when the request is to keep water, sit, stand, use a bigger desk, go to the bathroom, or has lactation needs. 106.40(b)(3)(vi).

- "The Department has also removed the proposed requirement for the Title IX Coordinator to “document” reasonable modifications to decrease administrative burdens on the Title IX Coordinator and address privacy concerns related to such documentation. The Department emphasizes that while a recipient must comply with the final regulations regarding reasonable modifications, the reasonable modification provision does not require a recipient to maintain documentation of compliance with § 106.40(b)(3)(ii). While a recipient may choose to voluntarily maintain such records, those records would be subject to § 106.44(j) of the final regulations, which prohibits the disclosure of personally identifiable information obtained in the course of complying with this part with some exceptions. "

89 FR 33778

Records & Documentation Considerations

- Request only the information necessary to make the ultimate determination re: the modifications.
- What information is the TIXC sharing in the course of the assessment of the modification and to whom?
- What records are you keeping to "show your work"?

Separate Programs

- The recipient must allow the student to voluntarily access any separate and comparable portion of the recipient's education program or activity under paragraph (b)(1) of this section.

Leave of Absence

- Allow for a leave of absence
- For either 1) the time period determined to be medically necessary by the student's licensed healthcare provider or 2) the time under an appropriate leave policy—whichever is greater
- Allow the student to return to the program to the same academic status they had when the leave began

- The space must be clean, not a bathroom, shielded from view, free from intrusion
- It must be accessible and available.
- Considerations (not requirements) for that space:
 - Is it functional?
 - Does it have: outlets, seating, a sink, refrigeration?

Comparable Treatment to Temporary Medical Conditions

- "A recipient must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions"
- Changed "temporary disabilities" to "temporary medical condition" to limit confusion. 89 FR 33791
- "§ 106.40(b)(3) provides a floor beneath which a recipient's treatment of pregnancy and pregnancy-related conditions may not fall, even if the recipient provides lesser protections for students with non-pregnancy related temporary medical conditions." 89 FR 33792

Certifications to Participate

- recipient must not require a student who is pregnant or has related conditions to provide certification from a healthcare provider or any other person that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless:
 - (i) The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;
 - (ii) The recipient requires such certification of all students participating in the class, program, or extracurricular activity; and
 - (iii) The information obtained is not used as a basis for discrimination prohibited by this part.

- Under 106.44(a)(1): "A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively"
- Under 106.45(a)(1): "A recipient's grievance procedures for the prompt and equitable resolution of complaints of sex discrimination must be in writing and include provisions that incorporate the requirements of this section."
- If it is sexual harassment in post-secondary school involving a student...106.46.

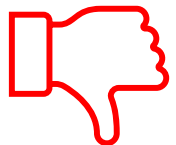
We're enjoined...now what?

Still required:



- Recipients have an obligation under the 2020 regulations to prevent sex discrimination.
- Those obligations include providing "reasonable and responsive" modifications to students for "pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom" under the 2020 regulations 106.40(b) and non-regulatory guidance.
- Treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom the same way you would treat a temporary disability.
- Provide leaves of absence, allow access to separate but comparable voluntary program, restrict use of certifications to participate.

Do not have to:



- Have mandatory referral to TIXC from all employees
- Update definitions
- Update "scope" - but, recall, discrimination based on sex includes discrimination based on pregnancy



OCR Findings and Resolution Agreements

- *Learn from Colleagues*

- Student alleged various instances of the college's failure to make academic adjustments during and after her pregnancy and failed to respond appropriately to the student's complaints of pregnancy discrimination and harassment.
- During the semester, the student asked for accommodations to leave class early to attend to medical appointments; or to remotely attend when she was hospitalized; or to take lactation breaks after the child was delivered (and the student pumped in the restroom at times).
- The student also developed complications due to a premature birth and the College did not provide adjustments under TIX or Section 504
- The College's staff "encouraged" the student to withdraw and finish the program later.
- The student filed a complaint with the TIX Office, and the TIX Office did not inform the student of the right to file a formal complaint.

- The College agreed to the following:
 - Revising its nondiscrimination notice, Title IX policies and grievance procedures to comply with Title IX;
 - Publishing information on its website for pregnant students about their Title IX rights and how to seek academic adjustments, special services, or excused absences;
 - Training its Title IX coordinator and other school employees involved in addressing Title IX requests from pregnant students regarding Title IX's and Section 504's protections for pregnant students and the academic adjustments and special services available to pregnant students;
 - Tracking and documenting requests by pregnant students to ensure pregnancy-related adjustments are being provided; and
 - Taking other measures to directly remedy the discrimination against the student.

- Allegations:
 - Student in nursing was told by two administrators that if she was pregnant, she would need to take a leave of absence and would not be able to complete her clinicals
 - Student withdrew from the program due to pregnancy
 - When Student was ready to come back, she was told she would have to complete the entire semester over again
- Resolution Agreement (no factual findings):
 - College must offer the student the option to return to the Program at the same time and status in the semester as when she began her leave of absence, and will not require her to redo assignments, exams, or coursework that she had previously completed.
 - If the student requires additional support to make up missed work, the College will offer the option of allowing the Student to retake the semester if she chooses.

- Student struggled with attendance and meeting deadlines due to pregnancy-related complications, early labor, and childbirth.
- Student's request for assistance were not promptly responded to by the Title IX Coordinator.
- Professor's request for guidance was not responded to by the Title IX Coordinator.
- Pregnancy adjustments from professors were "ad hoc and uncoordinated and dependent on each professor's individual interpretation" of the Title IX Coordinator's limited guidance.
- University updated its website to include protections for pregnant students, but it was unclear whether it had provided any training for faculty and staff regarding pregnant students who request adjustments

- Resolved via Resolution Agreement:
 - Required training for faculty and staff who may assist pregnant students with adjustments.
 - Post-training survey to determine the effectiveness of the training.
 - Tracking system for pregnancy-related adjustments for students: request, responses, reasons for denial (if any)
 - Removed student's grades for the semester in question and required the University to "work to limit the negative impact on the Complainant's future applications for financial aid that any disbursement of financial aid for the Courses may have had and reimburse the Complainant for Fall 2020 documented expenses related to any of the Courses the Complainant has since retaken."



Litigation Updates

Varlesi v. Wayne State Univ.

643 Fed. Appx. 506 (6th Cir. 2016)

- **The Facts:** Varlesi was a graduate student assigned to an internship placement. She excelled in her first year of her program, but became pregnant before her second year. She continued to excel in the classroom, but reported issues with her field placement—including that one individual there complained that Varlesi rubbed her belly, wore tight clothing, and “stimulat[ed]” men with her pregnancy. That same individual gave Varlesi a failing evaluation, after Varlesi had been told two weeks before that she was “doing great.”
- **The Complaint:** Varlesi alleged Title IX pregnancy discrimination & retaliation
- **The Outcome:** Jury awarded the student \$849,000
- **The Appeal:** the 6th Circuit affirmed the District Court and the Jury Award

Khan v. Midwestern University 879 F.3d 838 (7th Cir. 2018)

- **The Facts:** Pregnant medical school student was expelled after failing more courses than permitted to remain in the program. Most of the class failures occurred prior to the onset her pregnancy-related disability and her request for accommodations. Institution gave a second chance to take first year classes and remain, however she continued to fail courses, including those for she was given accommodations and was ultimately expelled.
- **The Complaint:** Failure to accommodate and discrimination under the Rehab Act
- **The Outcome:** University MSJ granted on the grounds that the student was not qualified

“Khan argues that she was not given the full panoply of accommodations she requested, but we need not reach the issue as to whether the accommodations provided were reasonable and sufficient. Khan was not qualified for the program long before the question of accommodations even arose.”

Stanford v. Fox College 2020 WL 814865 (N.D. Ill.) (unreported)

- **The Facts:** Pregnant Physical Therapy Assistant student was unable to complete her clinical training at her preferred location, and objected to the distance required to travel to the second location. The student ultimately withdrew from the program for one term, but returned and completed her degree after the birth of her child.
- **The Complaint:** Title IX Pregnancy Discrimination, ADA Title III, Rehab Act
- **The Outcome:** University MSJ granted: lack of adverse action under Title IX and the Rehab Act; no request for injunctive relief under ADA Title III (only relief available);

Takeaways

- Respond promptly
- Be open minded
- Treat students equitably.
- Don't be afraid to loop in counsel.
- Review your current processes and procedures.
- Consider updating your website to identify the Title IX Coordinator as a resource for pregnant individuals on campus.
- Train employees regarding obligations to make a referral to the TIXC

Thank You

Bricker
Graydon

The logo icon for Bricker Graydon consists of a green square with a white arrow pointing up and to the right, and a blue square with a white arrow pointing down and to the right, overlapping the green square.