



Accommodations for Pregnant and Nursing Students, Student-Employees and Employees

January 17 and 18, 2024

**Bricker
Graydon**

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Our Presenters

**Bricker
Graydon**

Follow us on LinkedIn to stay up to date!



Kyle Stryffeler



Erin Butcher



Jessica Galanos

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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 have a variety of stakeholders here, so please keep that in mind.

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Disclaimer #2



We can't help it – we're lawyers

- We are discussing federal law today. Please check state law (and local ordinances) to determine whether additional restrictions may apply.
- Title IX is a major part of our discussion. We recognize that there are new regulations that have been proposed. Today, we are discussing only current regulations and guidance. For more information on proposed regulations, check out our recorded webinars at <https://www.bricker.com/titleix>.

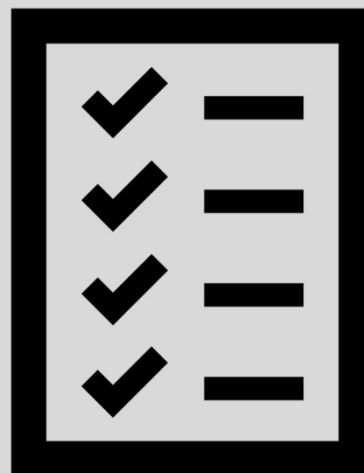
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Day 1 Aspirational Agenda

Focusing on *Current* impacts to Higher Education



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

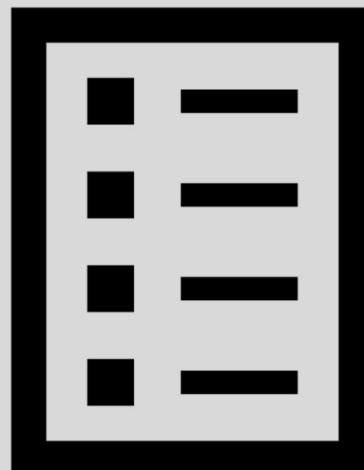


Day 2 Aspirational Agenda

Focusing on *Current* impacts to Higher Education



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



A Quick Note on Terminology



- Not all pregnant individuals identify as women, and not all lactating individuals are mothers.
- In *Bostock v. Clayton County* (2020), the U.S. Supreme Court held that Title VII includes transgender status in its prohibition against employment discrimination because of sex.
- Consider using non-gendered terminology, such as “parent” instead of “mother” or “father,” to be more inclusive, when discussing these topics.

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Audience Poll



Please let us know who is participating today!

- A. Title IX Team
- B. Human Resources
- C. Student Affairs
- D. Faculty
- E. Other Staff

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Accommodating Pregnant and Nursing Employees on the Clock

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



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Employee Concerns



- 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 lac 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>.

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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>

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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>

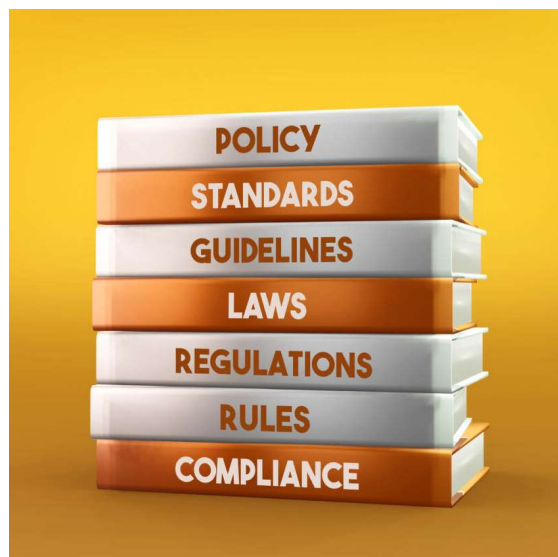
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Laws, Regulations, and Policy applicable to employees

Cluttered Legislative/Regulatory landscape...



- Laws & Regulations
 - New & Noteworthy:
 - Pregnant Workers Fairness Act (PWFA)
 - 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

Pregnancy Discrimination Charges



EEOC – FY 2022

- Received a total of around 99,947 complaints
- Of those complaints:
 - 2,273 Receipts were Pregnancy related
 - 2,104 were resolved. Of those resolved:
 - 265 were settled
 - 1,077 were determined to have no reasonable cause
 - 555 were merit resolutions

Source: *Pregnancy Discrimination Charges FY 2010 - FY 2022*. US EEOC. <https://www.eeoc.gov/data/pregnancy-discrimination-charges-fy-2010-fy-2022>

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EEOC Trends FY 2010-2022



	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
Receipts	4,029	3,983	3,745	3,541	3,400	3,543	3,486	3,174	2,790	2,753	2,698	2,261	2,273
Resolutions	4,130	4,590	4,225	3,580	3,221	3,439	3,762	3,781	3,340	2,996	2,868	2,417	2,104
Resolutions By Type													
Settlements	522	584	463	436	356	405	393	355	322	313	338	328	265
	12.6%	12.7%	11.0%	12.2%	11.1%	11.8%	10.4%	9.4%	9.6%	10.4%	11.8%	13.6%	12.6%
Withdrawals w/Benefits	253	271	267	233	260	270	298	285	267	294	266	222	215
	6.1%	5.9%	6.3%	6.5%	8.1%	7.9%	7.9%	7.5%	8.0%	9.8%	9.3%	9.2%	10.2%
Administrative Closures	691	709	620	578	585	626	671	654	536	515	574	502	472
	16.7%	15.4%	14.7%	16.1%	18.2%	18.2%	17.8%	17.3%	16.0%	17.2%	20.0%	20.8%	22.4%
No Reasonable Cause	2,484	2,822	2,698	2,154	1,899	1,954	2,259	2,312	2,032	1,736	1,577	1,263	1,077
	60.1%	61.5%	63.9%	60.2%	59.0%	56.8%	60.0%	61.1%	60.8%	57.9%	55.0%	52.3%	51.2%
Reasonable Cause	180	204	177	179	121	184	141	175	183	138	113	102	75
	4.4%	4.4%	4.2%	5.0%	3.8%	5.4%	3.7%	4.6%	5.5%	4.6%	3.9%	4.2%	3.6%
Successful Conciliations	67	89	68	87	53	71	62	77	84	62	57	38	41
	1.6%	1.9%	1.6%	2.4%	1.6%	2.1%	1.6%	2.0%	2.5%	2.1%	2.0%	1.6%	1.9%
Unsuccessful Conciliations	113	115	109	92	68	113	79	98	99	76	56	64	34
	2.7%	2.5%	2.6%	2.6%	2.1%	3.3%	2.1%	2.6%	3.0%	2.5%	2.0%	2.6%	1.6%
Merit Resolutions	955	1,059	907	848	737	859	832	815	772	745	717	652	555
	23.1%	23.1%	21.5%	23.7%	22.9%	25.0%	22.1%	21.6%	23.1%	24.9%	25.0%	27.0%	26.4%
Monetary Benefits (Millions)*	\$14.7	\$13.9	\$14.3	\$17.0	\$14.4	\$14.8	\$15.5	\$15.0	\$16.6	\$22.4	\$15.3	\$14.0	\$12.0

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Slide 16

SK22 This slide is an eyesore, but I wanted to capture the types of data & trends.

Stryffeler, Kylie, 1/4/2024

Takeaways



- 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 among employees
 - Prevent adverse impacts to maternal health

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General Non-Discrimination Principles



- Non-Discrimination
 - Are you requiring someone to do something different because they are pregnant or because they are a parent?
 - If you had a non-pregnant person or non-parent ask for the same accommodation or leave in any other circumstance, would you grant it to them?
- Remember: Parents and pregnant people generally maintain autonomy to choose how to navigate their education/employment.
 - Informed consent is key.

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A Word On Title IX

Stay tuned...

- As of this presentation (January 17-18, 2024), new Title IX regulations are said to be finalized in March (they may not be).
 - The proposed regulations would provide *even more* clarity on what is expected. We will briefly discuss the proposed regulations tomorrow.
 - **Our Resource Center will be kept current and will be updated as new information becomes available.**
 - In the meantime, the U.S. Department of Education appears to be stepping up enforcement of the current protections (particularly for students).



Resource Centers

Higher Education Pregnancy & Parenting

Overview

Educational institutions must take measures to

Title IX: 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 for Employees (1 of 2)



- 34 C.F.R § 106.57:
- Don't use potential marital, parental, or family status of an employee or applicant as a reason for employment decisions
- Don't use whether an employee is the breadwinner as a reason for employment decisions
- Can't discriminate or exclude from employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom

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Title IX for Employees (2 of 2)



- 34 C.F.R § 106.57:
- Temporary disabilities from pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom should be treated the same as the employer treats any other temporary disability
- If no leave with pay is available, these are reasons for leave without pay. The employee must be reinstated to a "comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment."

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Title VII – Married Women



- “[A]n employer’s rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by [T]itle VII...” 29 C.F.R. § 1604.4(a).
- Rules that apply to married women must also apply to married men.

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Hypothetical



Your institution prohibits University sponsored travel for parents who are pregnant. Would this prohibition violate Title VII?

- A. Yes.
- B. No.
- C. I need more information.

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Hypothetical



Your institution requires pregnant people submit medical certifications from a treating physician prior to all University sponsored travel. Would this prohibition violate Title VII?

- A. Yes.
- B. No.
- C. I need more information.

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Title VII – Pre-employment



- Employers **may** request an applicant's sex and/or whether they are "Mr. Mrs. Miss" on their application if "the inquiry is made in good faith for a nondiscriminatory purpose." 29 C.F.R. § 1604.7.
 - What is your nondiscriminatory purpose?

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Title VII – Pregnancy/Childbirth



- Employers cannot exclude applicants or employees because of pregnancy, childbirth, or related medical conditions
- “Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions”
 - Consider leave/reinstatement, accrual of seniority, payments under insurance/sick leave, etc.
- See 29 C.F. R. § 1604.10.

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Hypothetical



Your institution is hiring for a basketball coach. The season is set to begin in four months and one of the applicants came in for an interview and is visibly pregnant. Can your institution exclude the applicant from further consideration for the position?

- A. Yes.
- B. No.
- C. I need more information.

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Pregnancy Discrimination Act



- The PDA amended Title VII to codify the prohibition against discrimination based on pregnancy, childbirth, or related medical condition.
- Remember:
 - Employers must permit a pregnant employee to do the job for as long as the employee is capable
 - If you are providing temporary assistance to non-pregnant employees, plan on doing the same for pregnant employees
 - If a pregnant employee goes on leave, they are entitled to the return and accrual rights of other employees that go on leave
 - Cannot refuse to hire someone based on pregnancy, childbirth, or related conditions so long as they can do their job.

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ADA/504



- Applies to employees, students, and visitors
- Protect individuals with disabilities
- Qualified individuals with disabilities receive protection from discrimination
- Reasonable accommodations may be requested
 - Institution must engage in an interactive process to determine what accommodations are reasonable
 - Medical documentation to support accommodations may be requested
- Must be able to perform essential functions either with/without reasonable accommodations

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Is pregnancy 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!

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Unreasonable accommodations?



- Employers do **not** have to provide reasonable accommodations that would cause an “undue hardship” to the employer
 - Requires an individualized assessment that the specific request would cause **significant difficulty or expense**
 - Consider the overall financial resources of the facility

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Hypothetical



An pregnant employee works as a post-doctoral chemistry researcher. The employee has requested a change in duties to avoid coming onto campus at all to avoid exposure to hazardous chemicals. Is this accommodation reasonable or unreasonable?

- A. Reasonable
- B. Unreasonable
- C. It depends

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Hypothetical



Another pregnant post-doctoral chemistry researcher requested that the department provide new PPE, allow frequent breaks, allow a modification to work duties by using less-dangerous chemicals in the lab, and to hire a temporary graduate student to handle the chemicals on more dangerous experiments.

Are these accommodation reasonable or unreasonable?

- A. Reasonable
- B. Unreasonable
- C. It depends

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NEW: Pregnant Workers Fairness Act (1 of 2)



- Effective 6/27/23
- Applies to employers with 15 or more employees
- Requires employers to provide **reasonable accommodations** to employees and applicants for **conditions related to pregnancy**; prohibits retaliation
- The accommodations process is designed to mirror that under the ADA, except that the accommodations are likely to be temporary.

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NEW: Pregnant Workers Fairness Act (2 of 2)



EEOC Guidance on possible accommodations

- ability to sit or drink water;
- receive closer parking;
- have flexible hours;
- receive appropriately sized uniforms and safety apparel;
- receive additional break time to use the bathroom, eat, and rest;
- take leave or time off to recover from childbirth;
- be excused from strenuous activities and/or activities that would involve exposure to compounds not safe for pregnancy



**U.S. Equal Employment
Opportunity Commission**

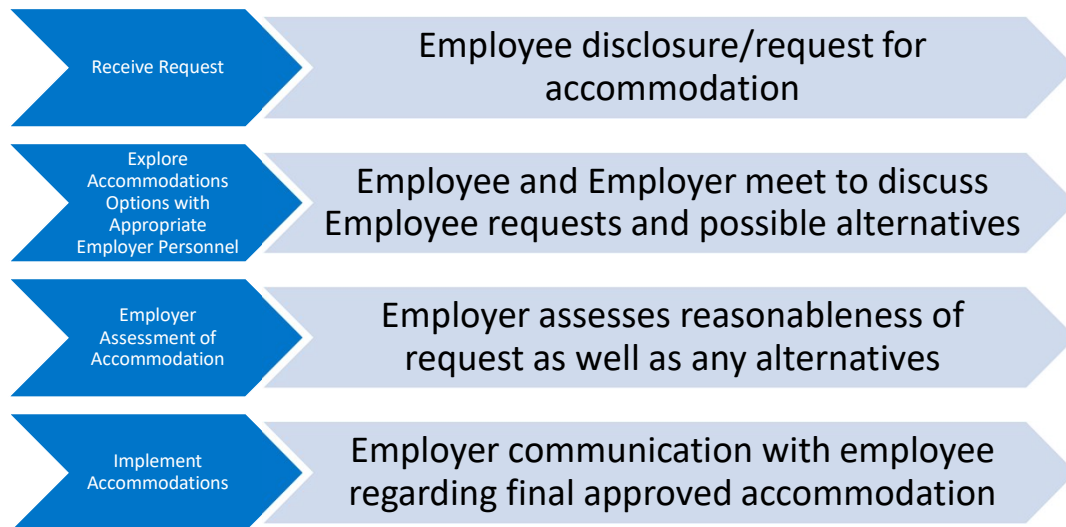
[About EEOC](#) ▾ [Employees & Job Applicants](#) ▾ [Employers / Small Business](#) ▾ [Federal Sector](#) ▾

[Home](#) » [statutes](#) » [The Pregnant Workers Fairness Act](#)

The Pregnant Workers Fairness Act

EDITOR'S NOTE: The following is the text of the Pregnant Workers Fairness Act (Pub. L. 117-328) (PWFA), as it appears in volume 42 of the United States Code, at section 2000gg. The PWFA, which is administered and enforced by the EEOC, 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. Cross references to the PWFA as enacted appear in italics following each section heading. Editor's notes also appear in italics.

PWFA Process:



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Family Medical Leave Act



- This could be a whole hour webinar in itself
- 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
- See 29 U.S.C. § 825.100

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FMLA Leave



- 12 workweeks in a 12-month period for
 - Birth/adoption
 - To care for a spouse, child, or parent with a serious health condition
 - For a serious health condition that makes the employee unable to perform the essential functions of his or her job
- (More leave is available in certain military-related situations not relevant to us today.)

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Serious Health Conditions



- Illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.
- This includes “any period of incapacity due to pregnancy, or for prenatal care”
- Very specific regulations in this area. See 29 C.F.R. Part 825 *et seq.*

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Hypothetical



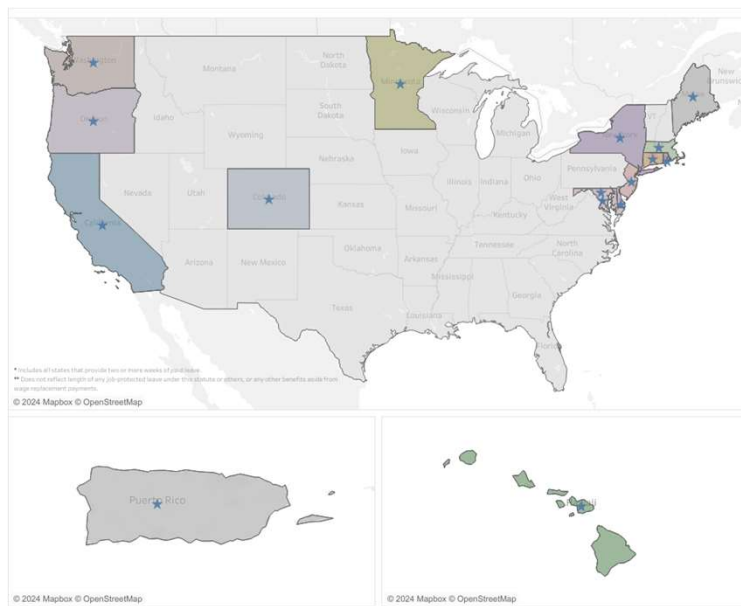
A pregnant employee asks to use FMLA time as a result of their recent diagnosis of Hyperemesis gravidarum (HG). Could the employee use FMLA time prior to the birth of their child to take time off for HG?

- A. Yes
- B. No.
- C. I need more information

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Paid Leave?

- Currently no FEDERAL laws requiring employers to provide paid leave.
- As of 2023, 13 states plus the District of Columbia have laws that create some paid medical leave for eligible workers.
- Source: <https://www.dol.gov/agencies/wb/paid-leave/State-Paid-Family-Medical-Leave-Laws>



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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

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FLSA/PUMP Act



Paid Breaks for
all Employees?



Paid Break for
Lactation

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Hypothetical



Hourly employees at your institution are allotted two twenty minute breaks and a 60 minute lunch daily.

An employee recently returned from parental leave and is lactating. They have asked to take break time four times per day to accommodate their lactation needs. Do you have to pay the employee on breaks?

- A. Yes
- B. No.
- C. Maybe?

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Open discussion:



The office space for your IT department is “open format” and there are no private offices or spaces in your building for a lactation space. A lactating employee has requested a space to handle lactation needs. What options might your institution have to consider?

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States with Pregnancy Discrimination Protections

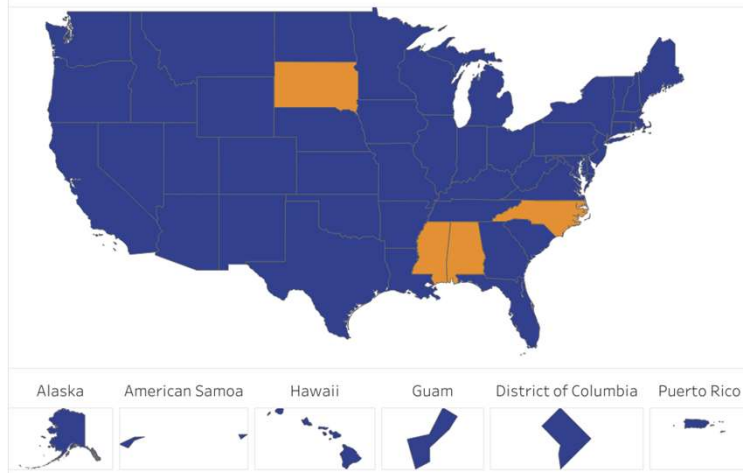
- Almost every state and territory with the exception of South Dakota, North Carolina, Alabama and Mississippi.
- Source:
<https://www.dol.gov/agencies/wb/pregnancy>

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

- No State Protection
- State Protection



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States with Pregnancy Accommodation Provisions

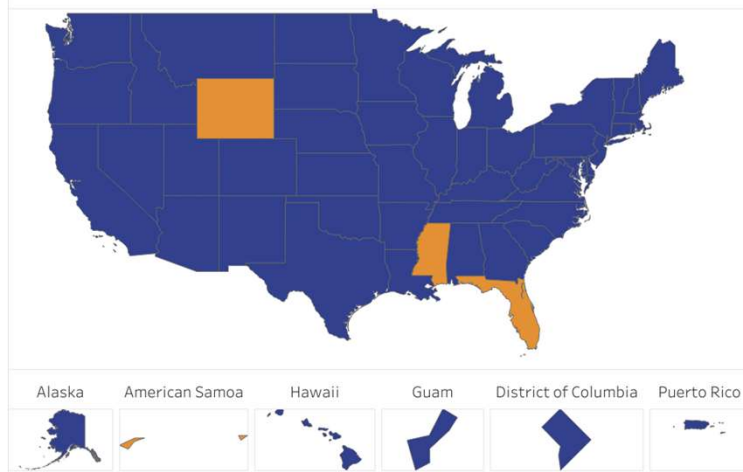
- All states and territories with the exception of Wyoming, Mississippi, Florida, and American Samoa.
- Source:
<https://www.dol.gov/agencies/wb/pregnancy>

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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- Workplace breast feeding rights

- No State Protection
- State Protection



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States with Lactation Rights

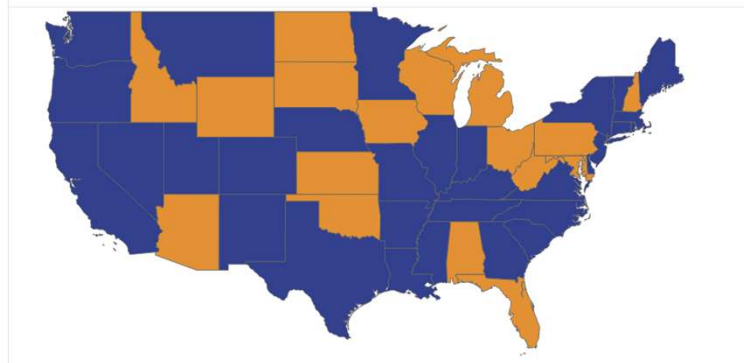
- Fewer states and territories have incorporated lactation/nursing protections.
- Source:
<https://www.dol.gov/agencies/wb/pregnancy>

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



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Best Practices: How do we support employees effectively?

- Pre-Natal Work Accommodations
- Parental Leave
- Lactation

Assessing Accommodations



How to assess request for accommodation for pre-natal health concerns, parental leave, and lactation.

- Does the person have a disability? If so, provide reasonable accommodations as determined through the interactive process.
- Is the person a pregnant employee? If so, provide reasonable accommodations as determined through the interactive process.
- Does the concern qualify as a serious health condition? If so, an employee may be entitled to FMLA leave.
- Does the concern require leave? If FMLA does not apply, look to your institution's policies for employees..
- Do we accommodate similar temporary needs for non-pregnant people? If so, do what you have done previously.
- If none of these things apply, does your institution have other policies that may provide some assistance?
- If absolutely nothing else applies, what action would be consistent with your institutional ethic of care?

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Student-Employees



- 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)?

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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.

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Learn from Others...

Slattery v. Houchul



**State law barring employer discrimination for birth control/abortion
61 F.4th 278 (2nd Cir. 2023)**

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EEOC v. Wal-Mart Stores East



Equal Emp. Opportunity Comm'n v. Wal-Mart Stores E., L.P., 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 (re-evaluation occurred at 90 days)
- 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 TVII/the PDA
- The court applied a test developed in *Young v. UPS*, 575 U.S. 206, 135 S. Ct. 1338, 191 L. Ed. 2d 279 (2015)
 - 1) Plaintiff is in a protected class 2) Plaintiff sought accommodation 3) Employer did not accommodate the employee 4) Other employees with a similar inability to work were accommodated.
 - Then, Defendant must allege 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.

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EEOC v. Ryan's Pointe Houston



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

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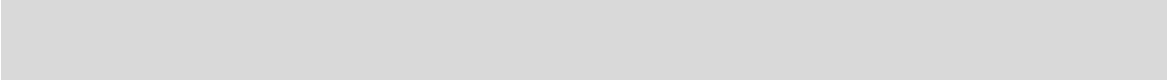
Kande v. Luminis Health Doctors Cmnty. Med. Ctr.



**Termination and the Pregnancy Discrimination Act/Title VII
Case No. 8:21-cv-01262 (D. Maryland, Mar. 13, 2023)**

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SK23



QUESTIONS?



SK23 Add another case
Stryffeler, Kylie, 1/13/2024

Audience Poll



Please let us know who is participating today!

- A. Title IX Team
- B. Human Resources
- C. Student Affairs
- D. Faculty
- E. Other Staff

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From yesterday



Employees:

- FLSA/PUMP
- PWFA
- ADA/505
- FMLA
- TITLE IX
- PDA/TITLE VII

These laws are specific to employment and these protections do not translate over to students.

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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).

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Student Parents on Campus



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

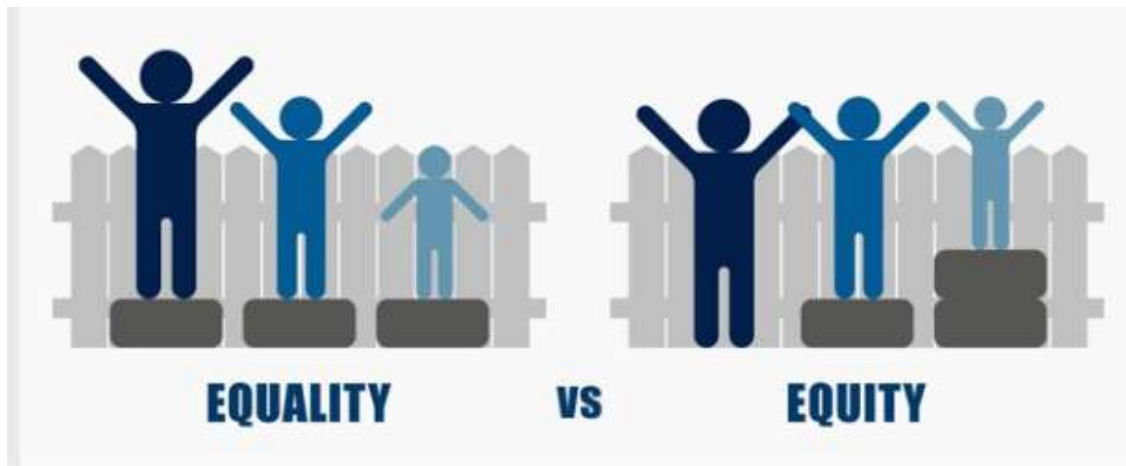
Source: Institute for Women's Policy Research analysis of data from the U.S. Department of Education, National Center for Education Statistics, 2015-16 National Postsecondary Student Aid Study (NPSAS:16).

"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>

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Title IX is an Equity Statute



65

Think about your ethic of care



- What do you think are the top values of your institution's community?
- Do you think institutional values align between administration, faculty and staff?
- What about students?
- What about the town or city around your institution?
- How does support of pregnant and parenting students fit into this ethic?

66

Title IX (1 of 2)



- 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.”

67

Title IX (2 of 2)



- 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)*

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Discriminatory Prohibition for Students



- 34 C.F.R § 106.40 (a)
- A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

69

Prohibition Against Exclusion of Students



- 34 C.F.R § 106.40(b)(1)
- A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

70

Hypothetical



A student in a chemistry class reports that they are three months pregnant. The instructor states that the student must obtain a letter from their doctor stating that they are able to attend chemistry classes. Is this permissible?

- A. Yes
- B. No
- C. I don't know

71

Students - Health Certifications?



- 34 C.F.R § 106.40(b)(2)
- A recipient **may require** such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation **so long as** such a certification **is required of all students for other physical or emotional conditions** requiring the attention of a physician.

72

Hypothetical



A student is enrolled in a flag football class (yes, they exist) to satisfy a physical-education credit requirement. The student informs their instructor that they are pregnant. The department immediately removes the student from the flag football class and enrolls them in a low impact exercise class. Is this permissible under Title IX?

- A. Yes
- B. No
- C. I don't know

73

Students - Separate Programs?



- 34 C.F.R § 106.40(b)(3)
- A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely **voluntary** on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the **separate portion is comparable to that offered to non-pregnant students.**

74

Hypothetical



- Jessica – add disability/ada/504 hypo

75

Temporary Disabilities (Title IX)



- 34 C.F.R § 106.40(b)(4)
- A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

**We will discuss disability laws momentarily, but note that “temporary disabilities” generally aren’t protected by Section 504/ADA.

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ADA/504 Refresher



- Applies to employees, students, and visitors
- Protects individuals with disabilities
- Qualified individuals with disabilities receive protection from discrimination
- Reasonable accommodations may be requested
 - Institution must engage in an interactive process to determine what accommodations are reasonable
 - Medical documentation to support accommodations may be requested
- Must be able to perform essential functions either with/without reasonable accommodations
- 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!

CK20
SK32

77

Leaves of Absence



- 34 C.F.R § 106.40(b)(5)
- In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, **a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.**

78

SK30 add student specific components
Stryffeler, Kylie, 1/15/2024

SK32 @Jessica
Stryffeler, Kylie, 1/15/2024

Non-Discrimination on the Basis of Sex in Admissions **Bricker Graydon**

(1 of 2)

- 34 C.F.R § 106.21(c): Recipients
 1. Shall not *apply any rule* concerning the **actual or potential parental, family, or marital status of a student or applicant** which treats persons differently on the basis of sex. . .
 2. Shall not discriminate against or exclude any person on the **basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom.** . .

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Non-Discrimination on the Basis of Sex in Admissions **Bricker Graydon**

(2 of 2)

- 34 C.F.R § 106.21(c): Recipients
 3. Shall treat **disabilities** related to **pregnancy, childbirth, termination of pregnancy, or recovery therefrom** in the **same manner** and under the **same policies as any other temporary disability or physical condition**
 4. Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss or “Mrs.” (unless asked of both sexes and results are not used for a discriminatory purpose)

80

SK31

Labs and other “dangerous” settings



81

Hypothetical



A student lives in the residence halls and reports that they will give birth to a child during the academic year. Does the university have to allow the child to live in the residence halls?

- A. Yes
- B. No
- C. Maybe?

82

SK31 @jessica
Stryffeler, Kylie, 1/15/2024

Housing



- **Highly** fact specific – no easy answer. 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, guest policies.
- Look at your minors on campus policies – there could be many risks with infants on campus (e.g. what about exposing the child to illness—meningitis)

83

Athletics Q&A



- | | |
|--|---|
| <ul style="list-style-type: none"> • Can we require health certifications? • Can you prevent the student athlete from participating in team activities? • What if the student misses team activities? • Can we terminate aid to the athlete? • Can the student take a leave of absence? | <ul style="list-style-type: none"> • Do you require them of everyone? • No. Not unless the student's medical provider says it is unsafe. • If missed for medically necessary reason, then excused. • Not because of pregnancy. • Yes, allow them to return at same status they had before the leave began. Can they seek a waiver from the conference? |
|--|---|

84

HYPO



- Req for remote
- Or excessive missed absences

85

Madeline – Student



- Madeline is an x-ray tech student who is three months pregnant. She is due after the completion of a semester of clinicals.
- Can the institution require Madeline to submit to a medical examination to determine whether she can participate in the clinical?
- Can the institution require Madeline to submit a liability waiver regarding potential dangers to herself or the fetus?
- Can the institution require Madeline make up clinical hours missed due to prenatal appointments?
- If Madeline gives birth early, what are some things the institution could do to help Madeline finish her clinical and stay with the rest of her class?

86

Chandler - Student



- Chandler is a first year student and has intense morning sickness.
- Chandler stated she cannot get out of bed before 10:00 AM due to the nausea; but Chandler is currently enrolled in an 8:00 am Psych Class.
- What types of modifications might the institution consider to support Chandler and make sure Chandler doesn't miss too many classes?
- What if Chandler misses an exam? Participation Points?

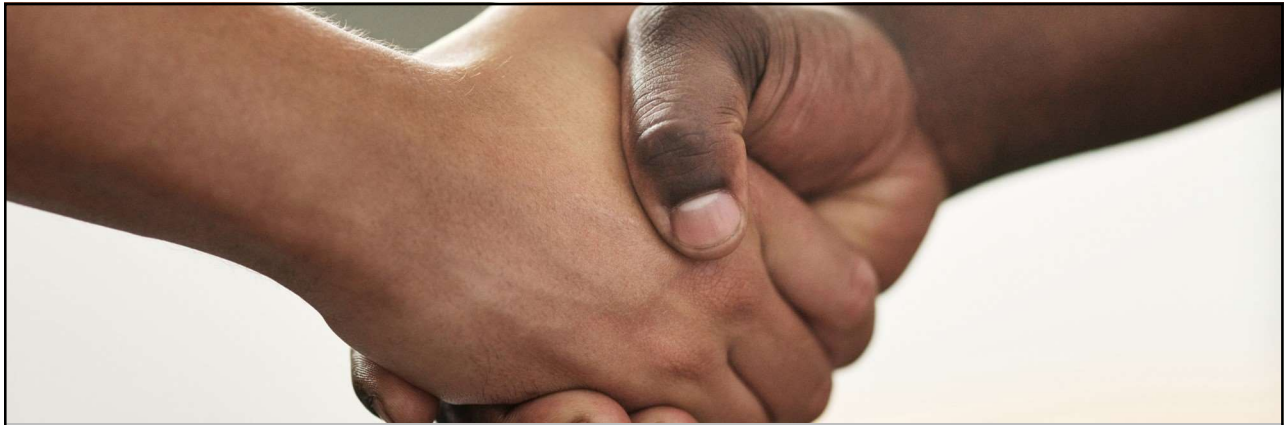
87

Monica – Student



- Monica is 8 months pregnant
- Monica is struggling to walk long distances, but the commuter lot is across campus from Monica's academic building
- What might the institution do to support Monica?

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OCR Findings and Resolution Agreements

- *Learn from Colleagues*

California Career College (February 2023)



- 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.

Rivertown School of Beauty (September 2019)

- Allegations:
 - School **POLICY** said:
 - No pregnant students in the esthetician program
 - Students dismissed at seven (7) months pregnant
 - Pregnancy-related appointments must be scheduled outside the school day (other appointments not restricted)
- Findings:
 - The policies were in violation of Title IX and were rescinded.
 - Student was provided a full refund.

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Troy University – January 2023 (1 of 2)

- OCR's Concerns:
 - 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.

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Troy University – January 2023 (2 of 2)



- 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."

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Salt Lake Community College June 2022 (1 of 3)



- Complainant learned she was pregnant and informed her professor that she had missed or had been tardy to class as a result of morning sickness.
- Professor had an attendance policy → three late arrivals was one absence, a student that misses 20% of the class is not eligible to pass the class.
- Student requested the ability to turn in assignments late and to excuse her absences.
- Professor agreed to allow Student to miss some (but not all) of the classes, and would apply a penalty to late assignments.

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Salt Lake Community College

June 2022 (2 of 3)



- Student continued to struggle with morning sickness, and the Professor then advised the student to drop the class because her “health is more important than a class” and she “needed to take some responsibility for the things that were going on.”
- The Title IX Coordinator was contacted and then denied the student’s requests for academic adjustments because they would constitute “fundamental alterations” to the course. Title IX Coordinator said they corresponded with the instructor and dean but did not document those discussions.

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Salt Lake Community College

June 2022 (3 of 3)



- OCR Found:
 - The College failed to respond promptly and equitably to the Complainant’s complaint of pregnancy discrimination, in violation of Title IX.
 - The College failed to engage in an interactive process with the Complainant to determine the appropriate special services and/or academic adjustments to provide in light of her pregnancy, in violation of Title IX.
 - The College failed to respond promptly and equitably to the Complainant’s complaint of pregnancy discrimination, in violation of Title IX.
 - The College failed to engage in an interactive process with the Complainant to determine the appropriate special services and/or academic adjustments to provide in light of her pregnancy, in violation of Title IX.

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Litigation Updates

Quick Reminder



- The information considered by the Court will depend on how far along the case is at the time of the decision.
 - Motion to Dismiss
 - Motion for Summary Judgment
 - Jury Verdict
 - Appeal
- Also, some of these cases are from Jurisdictions outside of Michigan and have state law-elements (which do not apply to Michigan). Cases outside of Michigan *may* not be binding on Michigan, though they are in the 6th Circuit (same as Michigan) and could be persuasive

Taylor v. Univ. of Kentucky - 2023 WL 4289711 (E.D.Ky.) June 28, 2023



- **The Facts:**
 - Plaintiff Christine Dolin Taylor was a post-doctoral fellow.
 - Concerned with COVID, and its possible effects on her pregnancy, she sought an accommodation to avoid coming to campus and her laboratory.
 - The University said it could not accommodate her request for full-time remote status so Plaintiff's fellowship was extended three months to ensure Plaintiff's completion of the fellowship.
- **The Complaint:** Plaintiff alleged the University violated Title IX and the Kentucky Civil Rights Act.
- **The Outcome:**
 - On a motion for summary judgment
 - Some of her Title IX claims fail because they were brought outside the one-year statute of limitations and others because the University offered her a reasonable accommodation (which she rejected). Additionally, the Court said she did not suffer an adverse action, and there was no causal connection between her pregnancy and the alleged adverse action of forced leave.
 - Finally, the Court said Plaintiff was never an employee of the University and her employment-related discrimination claims fail for the same substantive reasons. (Plaintiff's offer letter designated her a student)

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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, despite being told two weeks before that she was “doing great.”
- **The Complaint:** Varlesi alleged pregnancy discrimination & retaliation
- **The Outcome:** Jury awarded the student \$849,000;
- **The Appeal:** the 6th Circuit affirmed the District Court and the Jury Award

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Takeaways



- Be open minded
- Be creative
- Document your work
- Show your work

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Looking to the future...more robust regulations?



June 2022 Proposed Title IX Regulations suggest changes to Regulation/codifications of guidance:

- Define Parental Status (biological, adoptive, foster and step parents, in loco parentis, legal custodian, actively seeking custody/adoption/guardianship)
- Define Pregnancy or Related Condition
 - 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 their related medical conditions.
- Impose requirement that the employee show a student how to connect to the TIXC
- Require Title IX Coordinator to provide information to students
- Requires Title IX Coordinator to provide reasonable modifications, leave of absence, lactation space, grievance procedures, separate but comparable voluntary programs.

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What should you be doing while we wait for new regulations?

- Gather stakeholders and identify current process
 - Access services
 - Title IX
 - Equity/Civil Rights
 - Student Affairs
 - Human Resources
 - General Counsel
- Brainstorm new processes (any sticking points between new and current?)
- Review current policies (anything violate Title IX on its face?)

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Final Thoughts

- The law sets the floor, not the ceiling.
- How you treat your students and employees figures not just into legal compliance, but also:
 - Retention
 - Recruiting
 - Public Relations
 - Donations
- What is both compliant and consistent with your institution's ethic of care?

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Thank You

Bricker
Graydon