



**Accommodations for Pregnant and Nursing Students,  
Student-Employees and Employees  
January 17 and 18, 2024**

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## Our Presenters



Follow us on LinkedIn to stay up to date!



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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>.

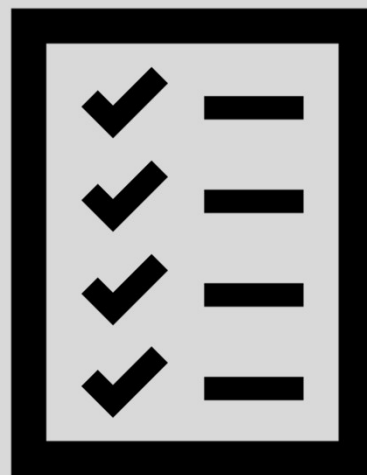
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## Day 1 Aspirational Agenda

Focusing on *Current* impacts to Higher Education



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

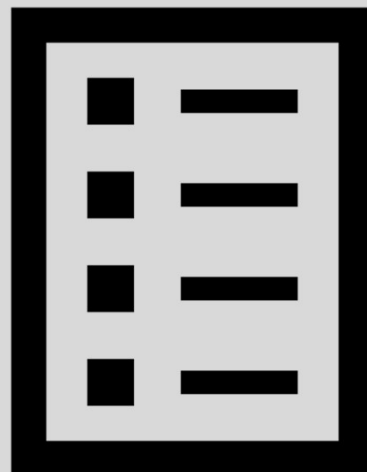


## Day 2 Aspirational Agenda

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
<b>Receipts</b>	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
<b>Resolutions</b>	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
<b>Resolutions By Type</b>													
<b>Settlements</b>	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%
<b>Withdrawals w/Benefits</b>	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%
<b>Administrative Closures</b>	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%
<b>No Reasonable Cause</b>	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%
<b>Reasonable Cause</b>	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%
<b>Successful Conciliations</b>	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%
<b>Unsuccessful Conciliations</b>	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%
<b>Merit Resolutions</b>	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%
<b>Monetary Benefits (Millions)*</b>	\$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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## 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/turnover 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 1



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 2



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 3



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 4



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 5



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**

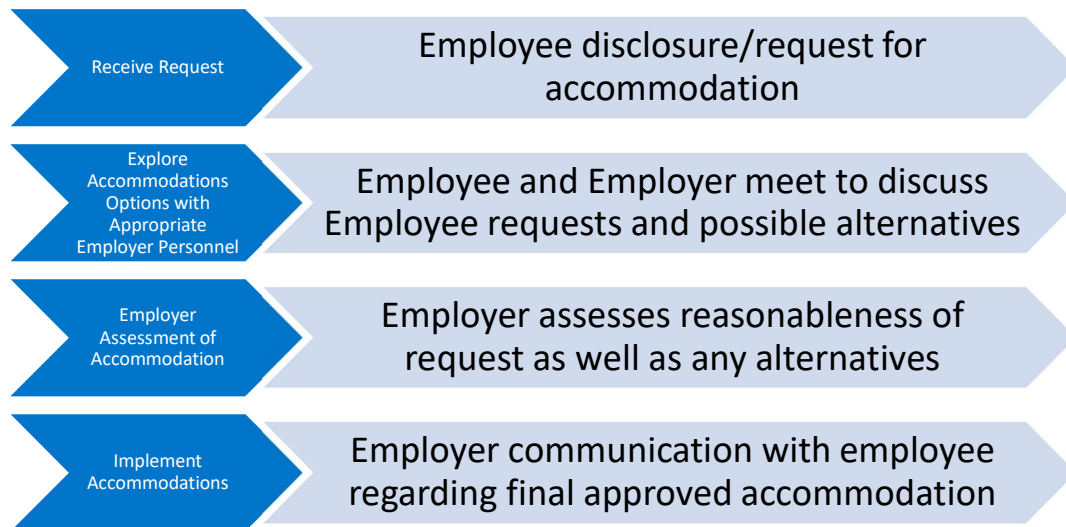
[About EEOC](#) ▾ [Employees & Job Applicants](#) ▾ [Employers / Small Business](#) ▾ [Federal Sector](#) ▾

[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 6



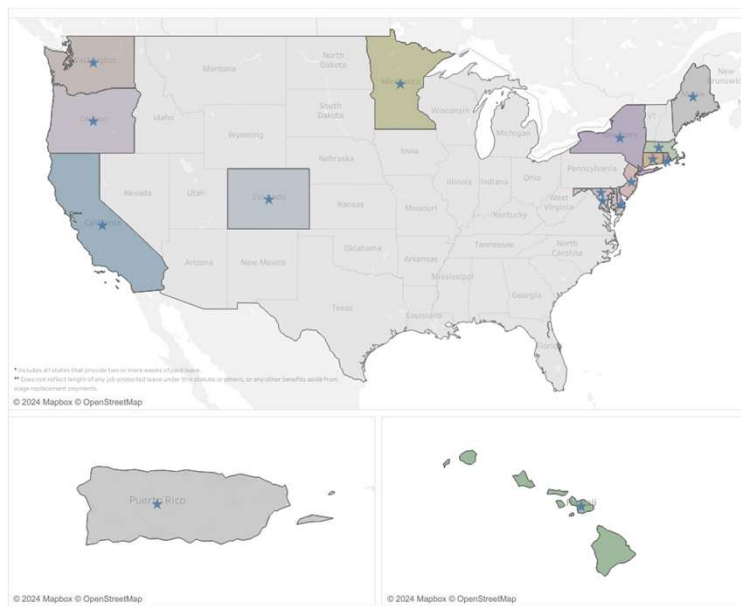
A pregnant employee asks to use FMLA time as a result of their recent diagnosis of Hyperemesis gravidarum (HG). Could the employee use FMLA time prior to the birth of their child to take time off for HG?

- 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 7



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. It depends?

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## Open discussion:



The office space for your IT department is “open format” and there is not a dedicated space in the building. 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

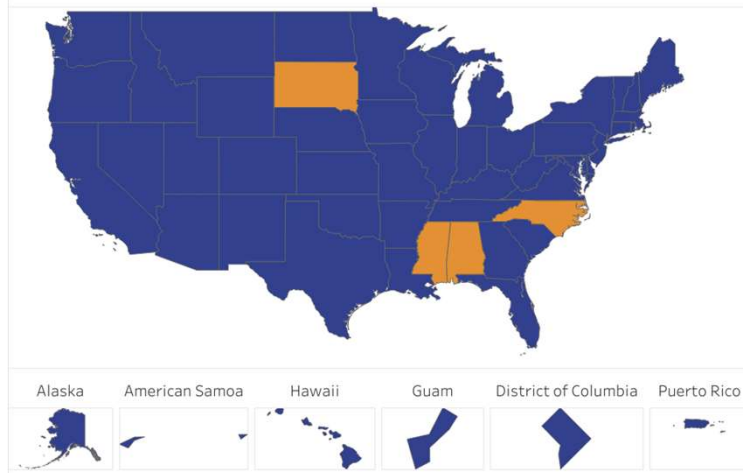
- Almost every state and territory with the exception of South Dakota, North Carolina, Alabama and Mississippi.
- Source:  
<https://www.dol.gov/agencies/wb/pregnancy>

### 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

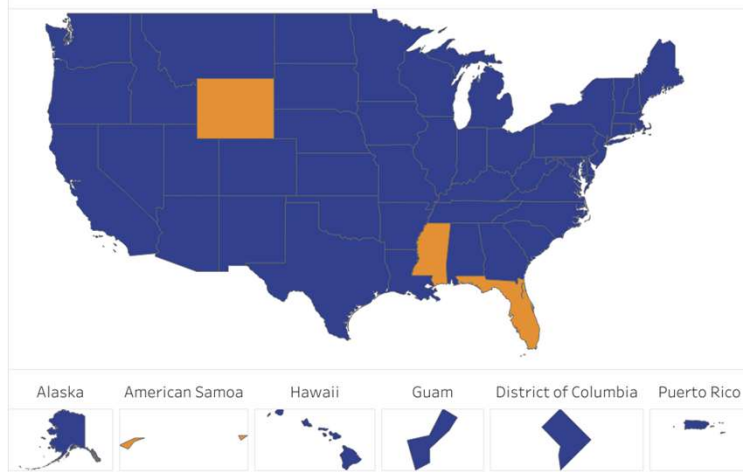
- All states and territories with the exception of Wyoming, Mississippi, Florida, and American Samoa.
- Source:  
<https://www.dol.gov/agencies/wb/pregnancy>

### 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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## States with Lactation Rights

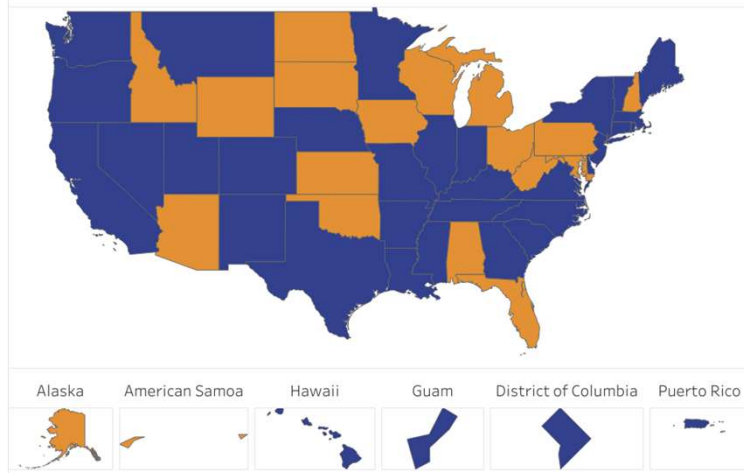
- Fewer states and territories have incorporated lactation/nursing protections.
- Source:  
<https://www.dol.gov/agencies/wb/pregnancy>

### 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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## 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.

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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



**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 employee[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.

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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)**

- 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

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## QUESTIONS?

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### Accommodating Pregnant and Nursing Students

- Data & Trends
- Overview of Current Federal Law
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## Audience Poll



Please let us know who is participating today!

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- E. Other Staff

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## Employees ≠ Students



### Employees:

- FLSA/PUMP
- PWFA
- FMLA
- PDA/TITLE VII

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

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## What applies to Students?



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

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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



“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.”

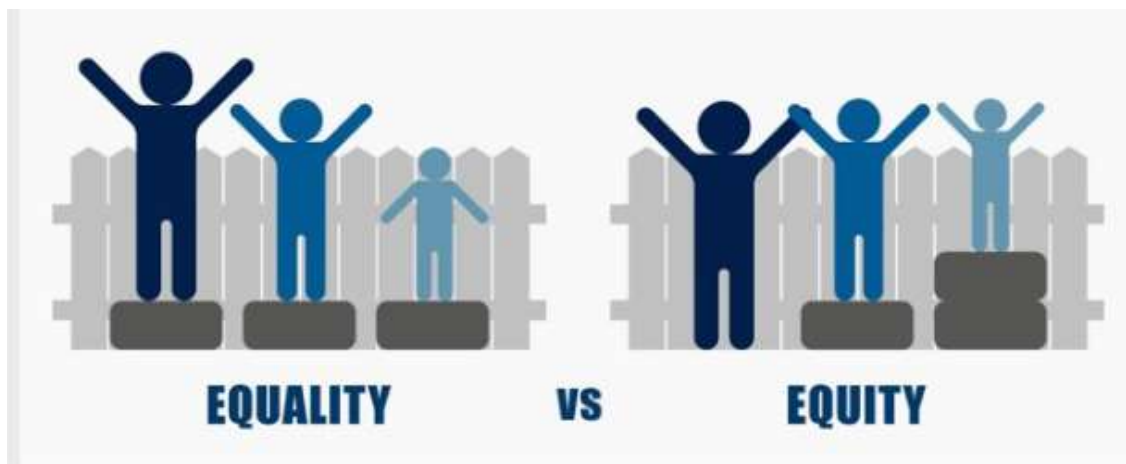
Field, K. (2022) Colleges brace for more pregnant and parenting students. <https://www.chronicle.com/article/colleges-brace-for-more-pregnant-and-parenting-students>

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).

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## Title IX is an Equity Statute



66

## 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?

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## 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.”

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## 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.**

70

## 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.**

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## Hypothetical 8



A student in a radiology tech class reports that they are three months pregnant. Concerned about the student's exposure to harmful radiation, the instructor states that the student must obtain a letter from their doctor stating that they are able to attend radiology classes. Is this permissible?

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

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## 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.

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## Hypothetical 9



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 because of the potential for physical contact and enrolls them in a low impact exercise class. Is this permissible under Title IX?

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

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## 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.**

75

## Hypothetical 10



A pregnant student is experiencing swollen feet in the late weeks of pregnancy and requests to attend her Composition class remotely to avoid walking to and from class. The instructor denies this request on the basis that he denied a similar request last year for a student with a broken leg. Does the college have to grant the request?

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

76

## 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 conditions may not be protected by Section 504/ADA.

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## 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))

78

## ADA/504 Refresher



- 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)

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## Qualified Individual with a Disability (ADA)



42 USC 12131(2)

The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

80

## Essential to the Instruction (Section 504)



### 34 CFR 104.44(a) Academic Requirements

A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. **Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.** Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

81

## Fundamentally Alter (ADA)



### 42 USC 12182(b)(2)(A)

Discrimination includes

...

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

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## Undue Hardship (ADA)



42 USC 12111(10)

### (A) In general

The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

### (B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

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## ADA/504 Takeaways



- 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

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## Working with Stakeholders



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

85

## Hypothetical 11



Student Smith is enrolled in a teacher education program and is scheduled to student teach during the Spring 2024 semester. She is due to give birth in March 2024, and has been directed to take bed rest beginning in mid-January 2024. The Dean of the Teacher Education program has informed Student Smith that her only option is to complete her student teaching requirement another semester. Is the Dean correct?

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

86

## Back to Title IX...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.**

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## Hypothetical 12



A visibly pregnant applicant sits for an interview with the Dean of the College of Nursing as part of the application process. The Dean is concerned about the student's ability to push patients in wheelchairs and lift patients in hospital beds, which will be an early part of the curriculum. The Dean does not wish to make the applicant feel uncomfortable and had been trained not to ask questions about pregnancy during interviews, so rather than ask questions about their ability to perform certain functions, he decides to deny her admittance to the program for her own good. Did the Dean handle his concerns in a compliant way?

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

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## 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)

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## Accommodations for labs and other “dangerous” settings



- Fact specific – no bright line test. Must work closely with stakeholders (including faculty) to assess the following issues:
  - Fundamental Alteration (ADA)
  - Essential to the Instruction (Section 504)
  - Undue Burden (ADA)
- Consider accreditation
- Be flexible and INTERACTIVE
- Be consistent under similar circumstances
  - If the circumstances are different – and justify a different course of action – document the circumstances and course of action

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## Hypothetical 13



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?

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## Housing



- 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.

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## Hypothetical - Charlie



Charlie is an incoming freshman athlete on your institution's track and field team. Charlie has been offered a scholarship and is enrolled to start in the fall. Charlie informs the head coach that they can no longer participate in the fall season because they are pregnant and expecting to give birth during the season. Can your institution rescind the scholarship?

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

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## Hypothetical - Maria



Maria is a junior on volleyball team. Maria has a scholarship and recently became pregnant. Maria has missed some practices and appears fatigued. Can your institution require Maria to submit to a medical examination due to her pregnancy?

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

95

## Athletics Q&A



- |   |  |
|---|--|
| 1. Can we require health certifications for participation?                    | 1. If you require them of everyone.  |
| 2. Can you prevent the student athlete from participating in team activities? | 2. No. Not unless the student's medical provider says it is unsafe.  |
| 3. What if the student misses team activities?                                | 3. If missed for medically necessary reason, then excused.   |
| 4. Can we terminate aid to the athlete?                                       | 4. Not because of pregnancy.   |
| 5. Can the student take a leave of absence?                                   | 5. Yes, allow them to return at same status they had before the leave began. Can they seek a waiver from the conference? |

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## Madeline



- 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?

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## Chandler



- 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?

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## Monica



- 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?

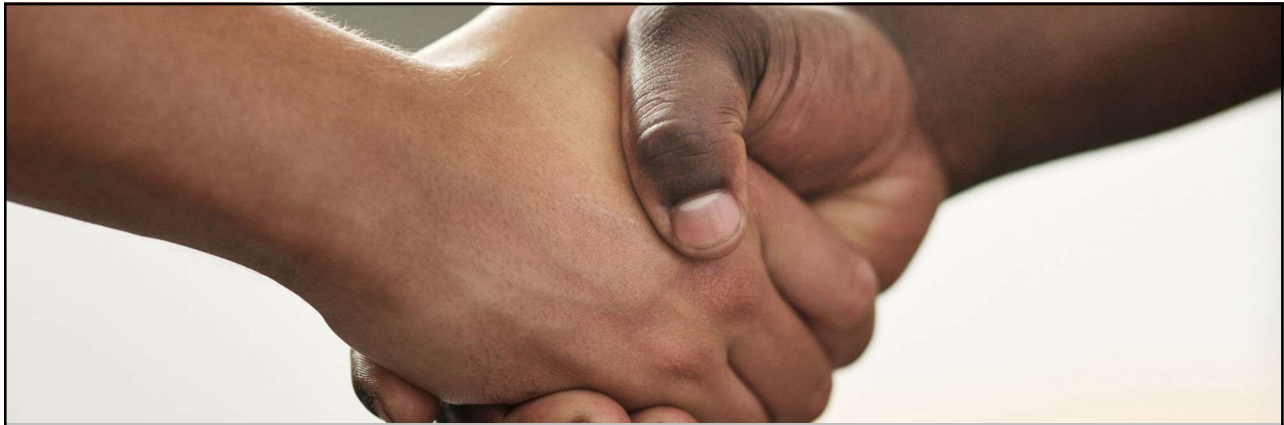
99

## Sofia



- Sofia recently had a child.
- The child has been ill and Sofia contacted the institution to request a leave of absence to care for her child.
- The institution does not have a policy for this type of leave.
- What might your institution consider?

100



## 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 clinical rotations
  - 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.

## 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 requests 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.

106

## 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.

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## 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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## 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
- Jurisdiction

**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 6<sup>th</sup> Circuit affirmed the District Court and the Jury Award

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**Khan v. Northwestern University**  
**879 F.3d 838 (7<sup>th</sup> 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.”

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## 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);

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## Takeaways



- Respond promptly
- Be open minded
- Document your work:
  - Communication with students
  - Communication with staff/faculty
  - Communication with the Title IX Coordinator
- Show your work → someone unfamiliar with the matter should be able to review the files and understand why/how decisions were made.
- 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.

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## Looking to the future...more robust regulations? (1 of 2)



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.

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## Looking to the future...more robust regulations? (2 of 2)



- Impose requirement that if an employee receives a disclosure that a student is pregnant → the employee inform student that the Title IX Coordinator is available & show the student how to connect to the Title IX Coordinator
- Require Title IX Coordinator to provide information to students about rights & available support
- 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?

- Follow current law/guidance/regulations! Are you currently complying with Title IX/ADA/504?
- Gather stakeholders and identify current process/procedures. Who is at the table?
  - Access services
  - Title IX
  - Equity/Civil Rights
  - Student Affairs
  - Human Resources
  - General Counsel
  - Parenting resource center (?)

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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**

The logo graphic for Bricker Graydon consists of a green square and a blue square overlapping, with a white arrow pointing from the green square to the blue square.