



Pregnancy Discrimination Updates

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Disclaimers

- We cannot give you legal advice in this forum, but we are happy to answer questions and point you to resources.
- We expect this area to evolve significantly due to case law, enforcement actions, and proposed regulations. Continue to monitor the situation for legal developments.
- Content warning: During the second half of this program, we will be discussing a scenario involving a student abortion.

Agenda

- Nuts & Bolts of Pregnancy Discrimination Laws and Regulations
 - Students
 - Employees
- Scenarios
- Q&A
- Post-*Dobbs* Landscape
- Scenarios
- Q&A

General Principles

- Are you requiring someone to do something different because they are pregnant?
- If you had a non-pregnant person ask for the same accommodation or leave in any other circumstance, would you grant it to them?
- Pregnant people generally maintain autonomy to choose how to navigate their education/employment. Have they given informed consent?

Students – Title IX

- 34 C.F.R. 106.21(c) - admissions
- 34 C.F.R. 106.40
 - (a) - marital or parental status
 - (b)(1) - non-discrimination
 - (b)(2) - health certifications
 - (b)(3) - separate programs
 - (b)(4) - temporary disabilities
 - (b)(5) - leaves of absence

Students - Admissions

Recipient:

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, or establish or follow any rule or practice which so discriminates or excludes;*
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; and*
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.”*

Students – Marital or Parental Status

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.

- Rivertown School of Beauty, September 2019

Students – Non-discrimination

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.

- Salt Lake Community College, June 2022
- Fresno City College, April 2018
- Northeastern University, January 2020

Students – Health Certificates

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.

- Chicago State University, March 2018
- Rivertown School of Beauty, September 2019

Students – Separate Programs

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.

Students – Temporary Disabilities (Title IX)

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.

- Salt Lake Community College, June 2022
- University of Maine at Fort Kent, October 2020
- Hill College, June 2017

Students – Temporary Disabilities (ADA/504)

- Section 504 provides that a qualified person with a disability may not be excluded from participation in, be denied the benefits of, or otherwise subject to discrimination in any postsecondary aids, benefits, or services on the basis of disability.
 - "Although a normal, healthy pregnancy is generally not considered a disability, a pregnant student may become temporarily disabled and thus entitled to the same right and protections of other students with a temporary disability." Salt Lake Community College OCR Letter, June 2022

Students – Leaves of Absence

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.

- Salt Lake Community College, June 2022
- Chicago State University, March 2018
- Hill College, June 2017
- Fresno City College, April 2018
- Northeastern University, January 2019

Employees – Title IX (1 of 2)

- 34 C.F.R. 106.57:
 - Don't use potential marital, pregnancy, 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 against or exclude from employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom

Employees – Title IX (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.”

Employees – Title VII - Marriage

- “[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).

Job Applicants – Title VII

- 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?
 - What about Mx. as an honorific?

Title VII & Pregnancy Discrimination

- 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 cause 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.

Pregnancy Discrimination Act

- Already integrated into the Title VII regulations, above
- 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

Is it a Disability?

- The Americans with Disabilities Act and Section 504 will apply where a pregnancy- or childbirth-related concern substantially limits one or more major life activities
- Where this is the case, use the interactive process to determine whether the accommodations requested by the employee are reasonable

Does it qualify for FMLA?

- If the employee is eligible for FMLA leave, they may take up to 12 workweeks in a 12-month period for:
 - Birth/adoption [even if no **serious health condition!**]
 - 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 the job
- (There are also military-related leave provisions that don't apply to our topic today.)

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.

Fair Labor Standards 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 employer must express milk
- Employers must provide a private space other than a bathroom – shielded from view, and free from intrusions
- Breaks do not have to be paid (unless employees are provided paid breaks generally)
- Breaks must be provided “as frequently as needed” for the purpose

I'm Pregnant – and I Need Some Help!

Does the concern qualify as a disability?

- Use interactive process
- Provide reasonable accommodations

Does the concern qualify as a serious health condition?

- Employee may be entitled to FMLA leave
- Students may use leave policy

Do we accommodate similar temporary needs?

- Do what you would do for a non-pregnant person with the same need
- Don't discriminate!

Does the person still need help?

- Are there other policies that apply?
- What does your institutional ethic of care suggest is appropriate?

Shared Responsibility – who needs to know what?

- Issues related to pregnancy may be initially brought to the attention of:
 - Faculty members
 - Academic advisor/dean
 - Academic program coordinator/dean
 - Disability Services staff
 - Human Resources
 - Department Chair/College Dean
 - Title IX Coordinator
- Are you confident that the intake person would know to consult with other office, namely Title IX, Disability Services, Academic-side of the house?
 - Training issue!
 - Great situation for a tabletop exercise

Scenario #1 – Nancy the Nursing Student

- Nancy is a student in your institution's nursing program.
- Your nursing program is a four-year program that requires the completion of classwork and clinical experiences
- Nancy becomes pregnant and is placed on bed rest in April of her sophomore year.
- Nancy's due date is October 1st.

Scenario #1 – Questions

- If Nancy can't physically be in class in May, is there a way to keep her on track with graduation?
- If Nancy's clinical assignment starts in September, is there a way to keep her on track with graduation?
- Who needs to be involved in the discussion about Nancy's options?
- What factors should the institution consider in determining what can be offered?
- What information will Nancy want to make decisions?

Scenario #2 – Professor Patty

- Professor Patty becomes pregnant during her fourth year and gives birth at the beginning of October in her fifth year.
- Patty elects to take FMLA leave for twelve weeks after the birth of her child.
- Patty returns to work at the beginning of the Spring semester.

Scenario #2 – Questions

- How do you handle Patty’s classes in the Fall semester? Can the institution demand that Patty does not teach? Can the institution demand that Patty *does* teach (assuming no medical concerns)?
- When Patty goes up for tenure, the Tenure Committee recommends no tenure, in large part because she “took a 12-week sabbatical [e.g. maternity leave] and did not make any progress on her research.”
 - You have the initial draft of the denial on your desk. What are your options?
- Patty petitions the Faculty Senate to consider adding an extension to the tenure clock for professors that take leaves of absence prior to becoming eligible for tenure. Is this feasible?



Questions?

A Summer Timeline

- June 14, 2022 – OCR Resolution Agreement re: pregnant student (Salt Lake Community College)
- June 23, 2022 – Title IX’s 50th anniversary; release of proposed rules providing additional protections for pregnant students and employees
- June 24, 2022 – *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. ____ (2022) – Supreme Court overrules *Roe v. Wade* and *Planned Parenthood v. Casey*, finding there is no constitutional right to an abortion
- June 26, 2022 – NACUA’s Annual Conference opens!

Proposed Rules (Not Final!)

- Generally – broadens the non-discrimination protections
- Adds definitions of Family Status and Pregnancy or Related Conditions (34 C.F.R. 106.2)
- Imposes an obligation to provide information about rights upon notice of pregnancy (34 C.F.R. 106.40(b)(2))
- Expands right to reasonable modifications for students because of pregnancy or related conditions (34 C.F.R. 106.40(b)(4))
- Gives lactating students the ability to access lactation spaces (FLSA already requires for employees) (34 C.F.R. 106.57(e))

Impacts of *Dobbs*

- NACUA has wonderful resources (written and recorded) on this for those who want a deep dive into the many implications of this case
- For our purposes, more pregnant people results in:
 - More requests for leave
 - More requests for accommodations
 - More questions about protections for students and employees who experience termination of pregnancy
- How does the Title IX religious exemption figure into these matters?

Religious Exemptions

- Title IX provides an exemption from its mandates to the extent that such mandates conflict with the religious tenets of an institution. See 34 C.F.R. 106.12.
- Title VII provides that religious employers can choose to employ members of its own faith. See 42 U.S.C. 2000e-1.
 - *Bostock v. Clayton County* - "Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society ... But **how these doctrines protecting religious liberty interact with Title VII are questions for future cases too.**"

Situational Awareness

- What does your website state about pregnancy and abortion? Is it consistent? Is it legal?
- What funding does your institution provide, if any, in relation to abortion access? Consider insurance, travel funds, leave banks, etc.
- What communications, if any, will be imparted regarding statements on abortion in the context of employment with the institution?
- Will you develop any housing accommodations or alternative education programs for pregnant students?

Handling Accommodations

- Which office should handle accommodations requests?
 - Disability Services?
 - Title IX?
 - Human Resources?
 - Other?

Intro to Scenario

- We are about to embark on an issue-spotting exercise.
- There are not black-and-white answers to many of the issues raised by the scenario.
- As you know, this is a continuously evolving area of the law that has not been fully tested in the courts.

Scenario – Sarah Student

- Sarah Student has just found out that she is pregnant.
- Sarah does not want to carry the pregnancy to term.
- Sarah is past the point in her pregnancy where abortion is legal in your state.
- Your state permits abortions prior to six weeks' gestation and after that point, no abortions are permitted.
 - Residents can be arrested for procuring, providing, or aiding and abetting the procurement of an abortion after six weeks.
 - Your attorney general has indicated that residents of your state who obtain abortions out of state, or aid and abet others in doing so, will be prosecuted.

Procuring the Abortion

- Sarah manages to obtain an out-of-state abortion with the help of several on-campus resources:
 - Sarah's RA introduces her to someone in the other state that she can stay with
 - The institution's on-campus Women's Resource Center provides travel funding to the other state
 - The institution's Student Health Center nurse practitioner provided the name of the doctor that will perform abortions on out-of-state patients
- What concerns do we have about each of these situations, if any?

Make-Up Work

- Sarah returns to campus several days after her procedure. Unfortunately, it caused her to miss a mid-term examination.
- Professor Patty will not permit Sarah to make-up the examination.
- What concerns do we have, if any?

Make-Up Work Revisited

- Sarah returns to campus several days after her procedure. Unfortunately, it caused her to miss a mid-term examination.
- Professor Patty will not permit Sarah to make-up the examination *because to do so would violate Professor Patty's religion.*
- What concerns do we have, if any?

Social Media Firestorm

- Sarah's roommate finds out about the abortion and posts on social media, which starts an on-campus debate about abortion.
- A national political group picks up on the story and discovers that the institution's employees played a role in procurement of the abortion.
- This becomes a national news story.
- The President would like to write a statement to address the matter.
- What are your thoughts about approach?

Conclusion & Takeaways

- Keep watch on case law, federal legislation, state legislation, and trends in prosecution on a nationwide basis.
- Consider training for employees to help them issue-spot and ask appropriate questions before potential liability (criminal or civil) arises.
- Schedule tabletop exercises for staff involved in decision-making to ensure smooth communications.



Questions?

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