



National Association of College and University Attorneys
Presents:

Pregnancy Discrimination Updates

Webinar

October 19, 2022

12:00 PM – 2:00 PM Eastern
11:00 AM – 1:00 PM Central
10:00 AM – 12:00 PM Mountain
9:00 AM – 11:00 AM Pacific

Presenters:

Bindu Jayne
Swarthmore College

Melissa Carleton
Bricker & Eckler

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Pregnancy Discrimination Updates



Bindu Jayne currently serves as the Title IX Coordinator at Swarthmore College, where she is charged with coordinating the College’s centralized review, investigation, and resolution of reports of sexual assault and harassment and gender-based inequity. For over a decade, Bindu has worked in the equity and diversity space in higher education at such institutions as the University of Delaware, Appalachian State University, and Rowan University. In those positions, she oversaw offices responsible for responding to allegations of harassment and discrimination, providing educational opportunities about a variety of social justice initiatives, and creating inclusive campuses for students, faculty, and staff. Prior to her work in higher education, she began her legal career as an associate in the Philadelphia office of Morgan Lewis. Bindu received a B.A. from Cornell University, magna cum laude, and a J.D. from the University of Pennsylvania Law School.



Melissa Carleton is an attorney, consultant, and investigator for college and universities across the country. She works with senior staff, student affairs, academic affairs, and human resources to anticipate problems when possible and solve problems when they arise. She is frequently called to work on cases involving civil rights, especially under Title IX and Section 504. She also handles shared governance and accreditation disputes.

Materials

NACUA Resources

Natasha Baker and Lauren Hartz, [Dobbs v. Jackson and What It Means for Higher Education](#) (NACUANOTE, August 4, 2022)

Natasha Baker, Lauren Gresh, and Ann O’Leary, [The Legal Implications of Dobbs for College and University Clients](#) (NACUA Briefing, August 10, 2022) (available to NACUA members only)

Cases

[Dobbs v. Jackson Womens’ Health Organization](#), 597 U.S. ___ (2022)

[Bostock v. Clayton County, Georgia](#), 590 U.S. ___ (2022)

Code of Federal Regulations & Proposed Regulations

[29 U.S.C. 8](#) – FAIR LABOR STANDARDS ACT

[29 CFR § 1604.4\(a\)](#) – Discrimination Against Married Women in Employment Prohibited

[29 CFR § 1604.7](#) – Pre-employment inquiries as to sex

[29 CFR § 1604.10](#) – Employment policies relating to pregnancy and childbirth

[29 CFR Pt. 825](#) – THE FAMILY AND MEDICAL LEAVE ACT OF 1993

[34 CFR § 106.12](#) – Educational institutions controlled by religious organizations

[34 CFR § 106.21](#) – Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

[34 CFR § 106.40](#) – Discrimination on the Basis of Marital or Parental Status in Education Programs and Activities Prohibited

[34 C.F.R. § 106.57](#) – Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

U.S. Department of Education, [Notice of Proposed Rulemaking on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance](#)

U.S. Department of Education, [Summary of Major Provisions of the Department of Education's Title IX Notice of Proposed Rulemaking](#) (see page 9 for provision related to discrimination based on pregnancy or related conditions)

Resolution Agreements

[Rivertown School of Beauty](#) #04-15-2363 (2019)

[Salt Lake Community College](#) #08-22-2001 (2022)

[Fresno City College](#) #09-18-2013 (2018)

[Northeastern University](#) #01-19-2158 (2020)

[Chicago State University](#) #05-17-2414 (2018)

[University of Maine at Fort Kent](#) #01-17-2317 (2020)

[Hill College](#) #06-15-2089 (2017)



NACUA NOTES

National Association of College and University Attorneys August 4, 2022 | Vol. 20 No.12

CRUCIAL CASE SUMMARY

TOPIC:

***Dobbs v. Jackson* and What It Means for Higher Education**

AUTHORS:

Natasha J. Baker^[1] and Lauren J. Hartz^[2]

INTRODUCTION:

On June 24, 2022, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*. The Court held that the U.S. Constitution does not grant a right to abortion, overturning *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.^[3] The *Dobbs* decision and the resulting response from state legislatures has immediate and wide-ranging effects across the country, including for institutions of higher education, which are now confronting a host of novel legal issues.

This NACUA Crucial Case Summary will briefly summarize the *Dobbs* decision, provide an overview of the current state of the law as of the date of publication, and highlight near-term issues for institutions of higher education to consider as the legal landscape shifts.

DISCUSSION:

Dobbs v. Jackson Women's Health Organization addressed a challenge to the constitutionality of a Mississippi law that bans abortions (with limited exceptions) after the fifteenth week of pregnancy. The challenger, Jackson Women's Health Organization, filed suit to block the state from enforcing the law. Mississippi lost in the trial court and appellate courts before petitioning

for review in the U.S. Supreme Court. The Court granted Mississippi's petition, agreeing to decide whether all pre-viability bans on elective abortions violate the U.S. Constitution.

In a decision issued on June 24, 2022, a five-justice majority voted to overturn its precedent and reject the constitutional right to abortion recognized in *Roe* and *Casey*. Justices Thomas, Gorsuch, Kavanaugh, and Barrett joined Justice Alito's majority opinion. Chief Justice Roberts agreed that Mississippi's law should be upheld but would have stopped short of overruling *Roe*.^[4]

Two of the justices who joined the majority opinion wrote separately to clarify their understanding of the decision's scope and impact. Justice Kavanaugh emphasized that the Court's opinion does not outlaw abortion throughout the country and does not allow states to ban their residents from traveling across state lines to obtain an abortion, nor to punish residents who obtained an abortion prior to the Court's decision.^[5] Justice Thomas expressed his view that the logic of the Court's decision extends to other constitutional rights the Court has recognized like the rights to contraception (*Griswold v. Connecticut*), same-sex intimacy (*Lawrence v. Texas*), and same-sex marriage (*Obergefell v. Hodges*).^[6]

In a joint dissent, Justices Breyer, Sotomayor, and Kagan warned that the Court's decision will have far-reaching impact on the "liberty and equality of women" across America and will severely damage the legitimacy of the Court.^[7]

I. The Status of Access to Abortion in the United States in 2022

Dobbs means that abortion will now be governed primarily by state law. Institutions will need to evaluate existing and proposed state laws and consider certain federal preemption questions to ensure compliance in each location where they operate.

As of July 2022, approximately half of states restrict abortion based on laws in place before *Roe*, "trigger laws" that took effect following the Supreme Court's decision in June, and/or recently enacted legislation limiting access. In 20 states and the District of Columbia, abortion access is expected to remain accessible and in some cases expand.^[8] The federal government's immediate response to *Dobbs* has included efforts to ensure access to FDA-approved abortion medication, clarify that medical facilities must provide abortion care in emergency situations under federal law, and protect sensitive health information, among other measures.^[9] This federal guidance raises additional legal issues about potential conflicts between state and federal directives that will need to be analyzed by institutions that provide healthcare to employees, students, or others.

In states with abortion bans, the bans vary in several important respects that will directly affect institutions:

- **Individuals subject to liability.** Some state laws that criminalize abortion specifically target medical providers,^[10] but most aim liability broadly at "any person," "every person," or "a person" who performs, attempts to perform, induces, or attempts to induce an abortion through a medical procedure or the provision of medication.^[11] Those who assist in any of the aforementioned activities may be liable as "aiders and abettors."^[12]
- **Enforcement mechanisms.** While most laws create only criminal penalties for abortions performed in violation of the statute, several states include civil causes of action, which grant private individuals and state attorneys general standing to sue individuals.^[13]

- **Travel bans.** Some states may seek to expand the reach of their laws to target abortions that occur out-of-state. Issues of interstate travel, interstate commerce, and the recognition of state laws by other states in the context of these abortion laws are unsettled.[\[14\]](#)
- **Scope of ban for surgical versus medication abortions.** Although some state laws are unclear, it is anticipated that states will argue that their restrictions prohibit both surgical and medication abortions. In addition, some states have enacted laws that impose heightened criminal liability on those who provide patients with medication to induce abortion. Attorney General Merrick Garland has discouraged states from enacting such laws, arguing that medication abortion is in the purview of the federal government.[\[15\]](#) Generally, the federal government has jurisdiction over prescription medicine, but states have jurisdiction over the practice of medicine. Thus, this fight is expected to head to the courts and will impact institutions offering medical and prescription services.

In addition, many public institutions will need to consider budget restrictions for abortion services and to review these restrictions as they evolve.

II. The Challenges and Risks for Institutions of Higher Education

Institutions of higher education face new challenges and significant legal risks as they navigate this changing legal environment. While a full summary is beyond the scope of this NACUANOTE, immediate and urgent issues for consideration are identified below.

A. Potential Liability for College and University Employees

A wide range of campus employees, including student employees, may now face legal liability in some states for actions that previously would have been permissible. This liability is not limited to healthcare professionals who provide or facilitate abortion care; through aiding and abetting statutes, for example, liability could potentially extend to peer or residential advisors who share information about reproductive healthcare resources, offices that provide emergency funding for students to obtain abortion care, or institutions that discourage or bar staff from reporting individuals known or suspected to have sought an abortion.

Under several state laws, individuals involved in the provision of abortion care face civil and criminal liability for their role.[\[16\]](#) Institutions should develop and provide clear training to those individuals about what care is permitted or barred by state law, with attention to nuances like care or referrals that may cross state lines, services advertised or referenced on institution-hosted websites, and more. Institutions should also clarify the scope of their indemnification agreements for healthcare providers and the consequences of unauthorized or illegal care.

Aiding and abetting laws may extend liability beyond healthcare professionals to other personnel who assist in activities that violate state-specific bans. An individual can be liable for criminal aiding and abetting liability, civil aiding and abetting liability, or both, depending on the state. Some prosecutors and litigants may use general state laws that prohibit aiding and abetting, while others may rely on state laws specific to the abortion context.[\[17\]](#) Thus, for example, institutions or employees seeking to help students travel may be accused of aiding and abetting unlawful abortion, which would test defenses based on the constitutional right to travel discussed in Justice Kavanaugh's concurring opinion.[\[18\]](#)

Some states are considering enacting Racketeer Influenced and Corrupt Organizations (RICO) statutes to criminalize actions by individuals and organizations that assist individuals in seeking an abortion. These provisions, such as in the model law drafted by the National Right to Life Committee, would impose liability for mailing abortion pills or providing a website with guidance on how to obtain an abortion, and would create liability for any person or entity that regularly assisted individuals with accessing an abortion.[\[19\]](#)

Institutions will need to craft guidance for employees across departments and functions to help them understand the parameters of the current and developing civil and criminal state laws where the institution is located (and where the employee is located, in the event of remote work or where employees may live in nearby states), as well as the implications of assisting students or employees who are located in states (or seek care in states) with abortion bans.

B. Value Statements and Campus Activism

Many institutions are confronting challenging questions about whether and how to communicate with their campus communities about the Court's decision and corresponding state laws.[\[20\]](#) Institutions should consider carefully the political ramifications. When institutions take a stance that is contrary to state lawmakers, they should be prepared for potential fallout through targeted enforcement efforts, unwelcome legislation, and an increasingly critical view of the institution and its mission and activities by elected officials and their constituents. Institutions that speak in favor of the decision or resulting state laws may have constituencies who disagree with the institution's position. At the same time, staying silent may lead to a backlash from students or employees who expect their schools and employers to take a position. Students and employees may also weigh an institution's stance on abortion access, or the practical healthcare coverage of abortions, in determining whether or not to attend or work at an institution. All results must be weighed and analyzed before taking an official stance.

Employees may speak out about abortion and may criticize their employer's action or inaction in response to *Dobbs*. Before making any response to that expression, public institutions should consider the free speech rights of employees (as should private institutions in California subject to statutory restrictions). Institutions should also consider the concerted activity rights of employees under the National Labor Relations Act or state law equivalents, particularly as to criticism about modified healthcare benefits.

As students return to campus this fall, institutions can expect increased student activism and heated campus debate. Institutions may see a corresponding uptick in notifications to bias response teams or complaints of harassment or discrimination on both sides of the abortion debate. Institutions will need to carefully consider free speech rights, antidiscrimination laws, and campus policies as they navigate issues like harassing or disruptive expression or escalating tension between students or student groups.

C. Data Privacy

Institutions collect and maintain a vast array of data about prospective and enrolled students, employees, participants in research trials, and more. Such data could be sought by prosecutors or civil litigants vested with private attorney general powers as they seek to build cases. Beyond health records and counseling notes, prosecutors and litigants could seek admissions materials, requests for accommodations, emergency funding applications, email, text and messaging communications, student activity involvement and campus affiliations, and more. For employees, additional information like search histories, location data, travel records, or health information

stored on institution-provided smartphones or computers could be the subject of subpoenas or warrants. If revealed, these sources of information also could expose institutions or their personnel to liability, for example, by identifying institutional personnel who provided assistance to an individual seeking an abortion.

Institutions should work closely with their offices of institutional research and/or related functions to identify potentially sensitive information within the data that are collected and maintained. Next, institutions should consider how the data could be used by law enforcement to prosecute or investigate potential violations of state laws and should develop policies on how they will respond to requests, which may include additional protections for confidential information like health records. Finally, with respect to such records, institutions should review the applicable privileges under state law, their exceptions, and any legislative efforts to amend those privileges.

D. Admissions and Retention Considerations

Dobbs will also have ripple effects across student admissions. Admissions officers will need guidance about whether and how they can consider information related to an applicant's experience with abortion or conviction for abortion-related offenses. For example, questions may arise about whether an applicant's disclosure in an admissions essay regarding an abortion can be used by admissions personnel to pursue legal action in states with citizen enforcement laws. Guidance for applicants also may be necessary if institutions determine that their receipt of information from an applicant about his or her experience with abortion creates legal risk for the applicant or the institution that cannot be managed effectively. As institutions work through these challenges and develop appropriate guidance, they should consider data privacy for education records of applicants who do not enroll, which is not covered by FERPA.

Institutions may wish to revisit policies related to excused absences and parental leave as well as emergency funding sources for pregnant students seeking abortions to reduce the likelihood that pregnancy will interrupt education and to determine what remains permissible under state law.

E. Title IX Compliance

The day before the *Dobbs* decision, the Department of Education announced its proposed Title IX regulations, which would enhance protections and accommodations for pregnant and parenting students and employees at colleges and universities.^[21] Among other changes, the regulations would clarify that the definition of sex-based discrimination encompasses discrimination based on pregnancy and related conditions (which includes termination of pregnancy) and would expand accommodations for pregnancy and related conditions. Institutions will need to consider how compliance obligations and data privacy considerations would intersect.

In anticipation of a potential increase in pregnant and parenting students, institutions will also need to review their obligations under existing and proposed regulations and prepare for potential modifications to, for example, campus facilities (for appropriate lactation spaces and housing) and employment policies (for reasonable break times). As the proposed regulations are modified and finalized, institutions should also track additional provisions that may be introduced in response to *Dobbs*.^[22]

F. Employee and Student Health Benefits

Many major employers have already taken steps to provide continued access to reproductive healthcare. Institutions likewise may consider implementing measures to help their students and employees who are facing restricted access to reproductive healthcare. Potential measures, where permitted by law, include providing (1) employee benefits for out-of-state travel to access abortion providers; (2) relocation assistance to employees to move from a state that restricts abortion access to a state that provides abortion access; (3) access to family planning services; and (4) insurance coverage that includes family planning. Institutions taking these steps should consult with counsel to consider and mitigate the kind of aiding and abetting risks that these steps could create, and they should consider preemption arguments pertaining to the federal Employee Retirement Income Security Act of 1974 (ERISA).^[23]

CONCLUSION:

To manage legal risk for institutions and their students and employees, careful review of institutional practices and procedures is warranted now, with corresponding training to ensure compliance. As state and federal laws governing abortion continue to evolve, NACUA will provide additional resources on this topic to assist its members with understanding and evaluating their changing legal obligations.

END NOTES:

[1] Natasha J. Baker is the Managing Attorney of Novus Law Firm in California. She focuses on higher education law, with an emphasis on faculty labor relations, employment law, student affairs, strategic institutional partnerships, and governance issues. She is a past member of the NACUA Board of Directors. She frequently speaks for NACUA, the Council of Independent Colleges, and other higher education associations. Most recently, she co-envisioned and co-presented a pop-up discussion group at NACUA's Annual Conference on this topic.

[2] Lauren J. Hartz is a partner in the Appellate and Supreme Court Practice at Jenner & Block LLP in Washington, DC. She serves as a core member of the firm's Education group, representing colleges and universities in high-profile litigation related to campus speech, sexual misconduct, employment discrimination, COVID-19 response, and more. She also counsels clients on affirmative action and faculty diversity and conducts sensitive internal investigations. She thanks Jenner & Block's [Post-Dobbs Task Force](#) for its contributions to this Note, as well as Summer Associate Tess A. Bissell.

[3] *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022).

[4] *Id.* at 2315-16 (Roberts, C.J., concurring).

[5] *Id.* at 2305, 2310 (Kavanaugh, J., concurring).

[6] *Id.* at 2301 (Thomas, J., concurring).

[7] *Id.* at 2317 (Breyer, Kagan, & Sotomayor, JJ., dissenting).

[8] "[Tracking the States Where Abortion Is Now Banned](#)," *N.Y. Times* (July 18, 2022 updated).

[9] See, e.g., White House, [Executive Order on Protecting Access to Reproductive Healthcare Services](#) (July 8, 2022); [Letter](#) from Xavier Becerra to Health Care Providers (July 11, 2022).

[10] Fla. Stat. § 390.0111; Ga. Code Ann. § 16-12-141; N.D. Code § 14-02.7-05; Ohio R.C. § 2919.195; Utah Code Ann. §§ 76-7a-101, 76-7a-201; W. Va. Code § 61-2-8; Wyo. Code § 35-6-101 *et seq.*

[11] See, e.g., Ala. H.B. 314 § 4 (2019); Ark. Code Ann. § 5-61-404(a); Okla. Stat. tit. 21, § 861; S.D. Code § 22-71-51.

[12] Several laws specifically immunize pregnant women who obtain or attempt to obtain abortions from liability. See Ala. H.B. 314 § 5 (2019), Ariz. S.B. 1164 (2022), Ark. Code Ann. § 5-61-404(c)(1), Idaho Code § 18-622(5), Ky. H.B. 148, La. Stat. Ann. § 40:1061(H), Miss. S.B. 2391, Mo. Rev. Stat. § 188.017(2), Tenn. Code Ann. § 39-15-216(f); Tex. Health & Safety Code §§ 170A.003, 171.206(b). South Carolina and Wyoming's laws are distinctive in specifically imposing liability on the pregnant individual. See S.C. Code § 44-41-80(b) (providing that a person who solicits abortion medication or submits to a surgical abortion, unless necessary to save her life, is guilty of a misdemeanor punishable by imprisonment of up to two years or a fine of up to \$1,000); Wyo. Stat. Ann. § 35-6-101 *et seq.* (criminalizing “an act, procedure, device or prescription administered to or prescribed for a pregnant woman by any person with knowledge of the pregnancy, including the pregnant woman herself, with the intent of producing” the premature end of the pregnancy).

[13] Idaho S.B. 1309; La. Stat. Ann. § 40:1061.29; N.D. H.B. 1466, § 14-02.7-07 (2007); Ohio S.B. 23 (H); Okla. H.B. No. 4327; Tex. Health & Safety Code § 171.208(a)(1)–(3).

[14] Next term, the Court is scheduled to hear a major dormant commerce clause case—*National Pork Producers Council v. Ross*, No. 21-468 (U.S. 2022)—that could impact whether one state can forbid a citizen of that state from traveling and receiving a legal abortion in another state.

[15] Press Release, U.S. Dep’t of Justice, [Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women’s Health Organization*](#) (June 24, 2022).

[16] See, e.g., Okla. H.B. No. 4327; Tex. Health & Safety Code § 171.208(a)(1)–(3).

[17] See, e.g., Tex. Health & Safety Code § 171.208(a)(1)–(3).

[18] *Dobbs*, 142 S. Ct. at 2305, 2310 (Kavanaugh, J., concurring).

[19] [Memorandum](#) from James Bopp, Jr., NRLC General Counsel et al., to National Right to Life Committee et al. re: NRLC Post-Roe Model Abortion Law (June 15, 2022).

[20] See Michael T. Nietzel, “Universities Begin Officially Reacting To Supreme Court’s Overturning of *Roe v. Wade*,” *Forbes* (June 24, 2022); Josh Moody, “[How Religious Colleges View the *Dobbs* Decision](#),” *Inside Higher Ed* (June 28, 2022).

[21] Press Release, U.S. Dep’t of Educ., [The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment](#) (June 23, 2022).

[22] See Meghan Brink, “[Title IX Proposal Would Add Protections for Pregnant Students](#),” *Inside Higher Ed* (June 29, 2022).

[23] 29 U.S.C. § 1001 *et seq.*

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Pregnancy Discrimination Updates

October 19, 2022

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Amanda McLean
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October 19, 2022

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Webinar

Pregnancy Discrimination Updates

Melissa Carleton, Partner, Bricker & Eckler LLP
Bindu Jayne, Title IX Coordinator, Swarthmore College

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?



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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