New Legal Protections for Pregnant and Parenting Employees and Students:

Is Your Campus Ready?

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Thompson & Horton LLP

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Program Agenda

1

Brief overview of current laws that address pregnancy and related rights of employees in higher ed and K-12 schools

2

Identify gaps in current law and how the Pregnant Workers Fairness Act of 2022 and the PUMP Act fill the gaps

3

Describe current and proposed Title IX rules on pregnant and parenting students

4

Provide practical guidance for complying and reducing legal risk

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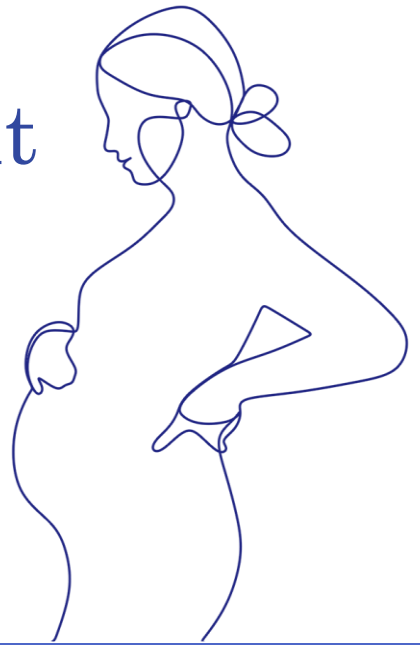
The Legal Landscape

Discrimination Against Pregnant Employees

- Since 1978, a patchwork of federal laws has provided certain legal protections for pregnant employees and those with related medical conditions.
- Although these laws provide valuable rights, they do not cover all conditions, and they do not apply to all pregnant workers. Two new laws are designed to fill in these gaps.

The Legal Landscape

- Between 2016 and 2020, pregnancy-related lawsuits in federal court increased by 67 percent.
- And yet, in the years since 2015, more than two-thirds of plaintiffs asserting accommodation claims in federal court lost their cases, a result attributed in part to a Supreme Court case that made it harder for plaintiffs to prevail.



"Analysis: Bump in Pregnancy Filings Continues in 2021," Bloomberg Law (July 9, 2021); Congressional Research Service, "Pregnancy and Labor: An Overview of Federal Laws Protecting Pregnant Workers," at 12-13 (June 17, 2021).

The Legal Landscape

U.S. Equal Employment Opportunity Commission

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Press Release
11-29-2022

Circle K to Pay $8 Million to Resolve EEOC Disability, Pregnancy, and Retaliation Charges

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NEWS

Jury awards $3 million to UT engineering professor in pregnancy, sex discrimination suit

Megan Menchaca
Austin American-Statesman

Published 10:27 a.m. CT March 15, 2022

A jury has awarded more than $3 million to a University of Texas engineering professor who argued that the university discriminated against her based on her sex and pregnancy

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The Legal Landscape

- **More women are working:** Sixty years ago, fewer than 50 percent of women worked during their first pregnancies, and most stopped working well before the ninth month. Today, more than two-thirds work during their first pregnancy and often through the final month of pregnancy.

- In addition, more women are giving birth in their late 30s and 40s. Advanced maternal age is associated with higher risk pregnancies.

Centers for Disease Control, National Vital Statistics Report, "Births: Final Data for 2021" (Jan. 2023), *available at* https://www.cdc.gov/nchs/data/nvsr/nvsr72/nvsr72-01.pdf; U.S. Census Bureau, Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008 (October 2011); P. Cavazos-Rehg et al, "Maternal age and risk of labor and delivery complications," Maternal & Child Health Journal at 2 (2015).

The Legal Landscape

Federal Register / Vol. 88, No. 6 / Tuesday, January 10, 2023

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

[EEOC–2022–0006]

Draft Strategic Enforcement Plan

AGENCY: U.S. Equal Employment Opportunity Commission.

ACTION: Request for information and comment.

SUMMARY: The U.S. Equal Employment Opportunity Commission (EEOC) seeks public comments on a Draft Strategic Enforcement Plan for 2023—2027 as part of its strategic planning process.

DATES: Comments must be received by February 9, 2023.

ADDRESSES: Submit comments electronically to the Federal

- Updates the emerging and developing issues priority to include employment discrimination associated with (1) the COVID–19 pandemic and other threats to public health, (2) violations of the newly enacted Pregnant Workers Fairness Act of 2022, and (3) technology-related employment discrimination; and

- Preserves access to the legal system by focusing on overly broad waivers, releases, non-disclosure agreements, or

The Legal Landscape

Discrimination Against Pregnant Students

- Title IX of the Education Amendments of 1972 prohibits sex discrimination in education programs and activities of entities that receive federal funds.
- Although Title IX regulations have addressed pregnant and parenting students since 1975, compliance has been inconsistent. In 2022, the Department of Education proposed substantial revisions to the regulations.

The Legal Landscape

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION IV

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ATLANTA, GA 30303-8927

REGION IV
ALABAMA
FLORIDA
GEORGIA
TENNESSEE

VIA EMAIL ONLY TO jhawkins@troy.edu

January 26, 2023

Jack Hawkins, Jr., Ph.D.
Chancellor
Troy University
216 Adams Administration Building
Troy, AL 36082

Re: OCR Complaint # 04-21-2060

Dear Chancellor Hawkins:

This letter is to advise you of the outcome of the complaint filed by Complainant [redacted content] on December 2, 2020, with the U.S. Department of Education, Office for Civil Rights (OCR) against Troy University. The Complainant alleged discrimination on the basis of pregnancy.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C.

"OCR has a concern that the University did not make reasonable and responsive adjustments in response to the Complainant's pregnancy-related requests. At the time of the incidents at issue here, the University provided pregnant students no information, either in its 2020-2021 Student Handbook or on its website about how students could seek adjustments related to pregnancy, and one professor interviewed by OCR had not received training regarding Title IX's application to pregnant students. … Moreover, the Title IX Coordinator did not consistently intervene when the Complainant contacted him …."

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The Legal Landscape

- **Teen pregnancy:** The birth rate for teenage girls in the U.S. has dropped 67 percent since 2007. Still, in 2021, teens (ages 15–19) gave birth to 146,973 babies. Pregnant teens have the "highest odds" of significant complications with increased risk of multiple adverse outcomes.

- Teen parents are less likely to complete high school and are more likely to be financially insecure. While Title IX has had an overall positive impact on pregnant teens, generally leading to greater educational attainment than 50 years ago, the need for educational programs and services continues.

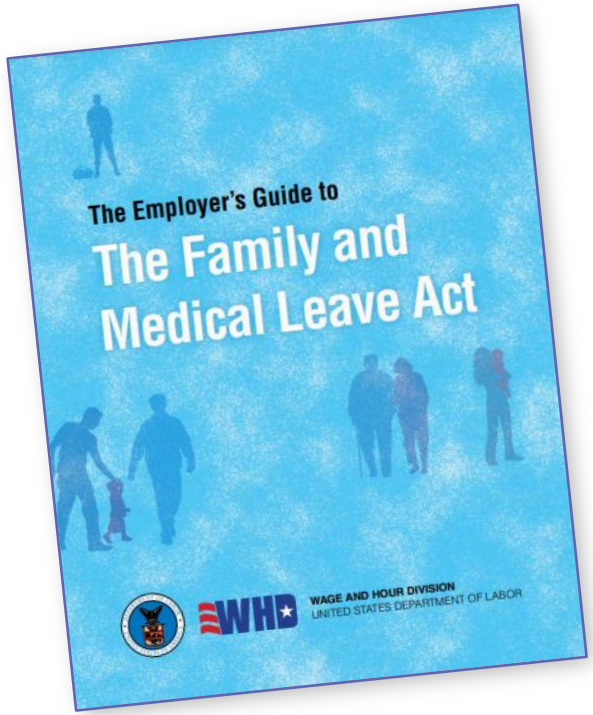
D. Sandler, U.S. Census Bureau, "The Timing of Teenage Births: Estimating the Effect on High School Graduation and Later Life Outcomes," June 2017, https://www2.census.gov/ces/wp/2016/CES-WP-16-39R.pdf; M. Guldi, "Title IX and the Education of Teen Mothers," Economics of Education Review (Dec. 2016); U.S. Dep't of Educ., "Supporting the Academic Success of Pregnant and Parenting Students" (2013), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.html; . Eliner et al, "Maternal and Neonatal Complications in Teen Pregnancies: A Comprehensive Study of 661,062 Patients," Journal of Adolescent Health at 922-27 (June 2022).

Pregnant & Nursing Employees: *Overview of Existing Law*

Existing Legal Protections

- Family & Medical Leave Act
- Americans with Disabilities Act and Section 504 of the Rehabilitation Act
- Title IX
- Fair Labor Standards Act (non-exempt workers)
- Pregnancy Discrimination Act

Family & Medical Leave Act



Provides workers with 12 weeks of unpaid leave during a 12-month period and provides job protection. 29 C.F.R. part 825.

Can be used for the birth or care of a newborn child or adopted child; care of the employee's spouse, son, daughter, or parent with a serious health condition; and treatment of the employee's own serious health condition (including prenatal care). (Also provides certain benefits to military families.)

Does not require workplace accommodations.

Family & Medical Leave Act

- **Additionally, approximately 40 percent of American workers do not qualify for coverage under the FMLA at all.**
- Eligible employees must have worked 1,250 hours during the preceding 12 months.
- FMLA applies only to private employers with 50 or more employees and federal, state, and local governments, including public schools and colleges.

Congressional Research Service, "Pregnancy and Labor: An Overview of Federal Laws Protecting Pregnant Workers," at 17 n.158 (June 17, 2021).

Americans with Disabilities Act

Reasonable Accommodations for Disabled Workers

- Employers must provide a "**reasonable accommodation**" to workers with a **disability** unless providing the accommodation would impose an "**undue hardship**." *Similar requirement under Section 504 of the Rehabilitation Act, which applies to institutions that receive federal funds.*
- The worker must be able to perform the **"essential functions"** of the job, with or without reasonable accommodation.

EEOC, "The ADA: Your Responsibilities as an Employer," *available at* https://www.eeoc.gov/publications/ada-your-responsibilities-employer; EEOC, "Enforcement Guidance on Pregnancy Discrimination and Related Issues" (June 2015), *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IIB.

Americans with Disabilities Act

Pregnancy is not a "disability."

- A **disability** is a physical or mental impairment that **substantially limits** a major life activity. A major life activity includes physical actions such as walking and performing manual tasks, but the phrase also includes major bodily functions (*e.g.*, respiratory, circulatory, reproductive functions).
- **A "normal" pregnancy is not a disability under the ADA.**

Americans with Disabilities Act

But pregnancy-related disabilities are covered.

- Pregnancy-related disabilities ***are*** covered.
  - **Examples:** Anemia, sciatica, carpal tunnel syndrome, gestational diabetes, high blood pressure, nausea that can cause severe dehydration, abnormal heart rhythms, swelling in the legs due to limited circulation, depression, anxiety.
- Common, but not severe, pregnancy-related conditions typically are not covered.

Americans with Disabilities Act

Interactive Process

- Employer and employee must engage in an **interactive process** to determine a reasonable accommodation.
- If the employee's disability or need for accommodation are not obvious or known, the employer may require **medical documentation** to establish the existence of a disability and how the requested accommodation(s) will assist the individual in performing the essential functions of the job.
- **Employers are not required to eliminate an essential job function as an accommodation.**

Americans with Disabilities Act

Undue Hardship

The school/institution of higher education must provide a reasonable accommodation unless doing so imposes an **undue hardship**, which is an action requiring "**significant difficulty or expense**." A hardship may be financial or operational.

- Courts will analyze the expense and difficulty of compliance against the institution's size, financial resources, type of operations, structure and functions of the workforce, impact of the accommodation on the facility, among other factors.

Fair Labor Standards Act

- **Lactation at work:** Since 2010, the Fair Labor Standards Act has required employers to provide non-exempt (hourly) employees with reasonable break time to express breast milk for one year after birth of the child.
  - **The law did not apply to faculty or others who were exempt from the FLSA as professionals or administrators.**
  - **And no compensatory damages for violations.**

Pregnancy Discrimination Act

A Very Brief History

1964: Congress passed Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of "sex."

1976: Supreme Court held that Title VII did not cover pregnancy discrimination. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

1978: Congress amended Title VII, defining sex discrimination to include **"pregnancy, childbirth, or related medical conditions."** Women "shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work…"

Pregnancy Discrimination Act

"Related Medical Conditions"

- **"Related medical conditions"** includes lactation, infertility treatments, post-partum depression, and abortion, among other conditions. *See* EEOC, "Enforcement Guidance on Pregnancy Discrimination and Related Issues" (June 25, 2015); Congressional Research Service, "Pregnancy and Labor: An Overview of Federal Laws Protecting Pregnant Workers," at 8 (June 17, 2021); *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008).
- **"A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion."** EEOC, "Questions and Answers on the Pregnancy Discrimination Act," 29 C.F.R. pt.1604 app. (1979).

Pregnancy Discrimination Act

- Prohibits **discrimination and harassment** based on:
  - Current pregnancy
  - Medical conditions related to pregnancy or childbirth
  - Past pregnancy
  - Potential or intended pregnancy
- **But no affirmative duty to provide workplace accommodations**

EEOC, "Enforcement Guidance on Pregnancy Discrimination and Related Issues" (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA4c.

Pregnancy Discrimination Act

No Affirmative Duty to Accommodate

- The PDA is phrased in terms of ***equal treatment*** – treat pregnant women with a work limitation the way you would treat non-pregnant employees with a similar work limitation. *See generally Young v. UPS*, 575 U.S. 206 (2015).
- In effect, employers may "treat pregnant women as badly as they treat similarly affected but nonpregnant employees." *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994).

Pregnancy Discrimination Act

Young v. UPS, 575 U.S. 206 (2015)

Company refused to accommodate a pregnant delivery driver's restrictions on lifting. Company did accommodate non-pregnant employees who temporarily lost their driving privileges due to accidents or other administrative reasons.

Peggy Young

- **Held:** Although finding that the PDA does not guarantee accommodations, the Supreme Court held that a pregnant employee could pursue a claim based on evidence of disparate treatment of pregnant employees as compared to similarly situated, temporarily disabled non-pregnant employees. The Court's test focused on whether a large percentage of non-pregnant workers were treated better and whether the employer's reason for differential treatment was "a 'pretext' for discrimination."

Pregnancy Discrimination Act

- *Young* challenged pregnant workers to identify comparator employees who were treated better. Courts "struggled" with *Young*, and employers faced "great uncertainty" about accommodations. Congressional Research Service, "Pregnancy and Labor: An Overview of Federal Laws Protecting Pregnant Workers," at 12-13 (June 17, 2021).

- *Equal Employment Opportunity Commission v. Wal-Mart Stores East L.P.*, 46 F.4th 587 (7th Cir. 2022) – Holding under *Young v. UPS* that a Wal-Mart policy did not violate the PDA when it provided light duty to employees who were injured on the job but did not provide light duty to pregnant employees and employees who were injured outside of work.

Pregnancy Discrimination Act

Congressional Record

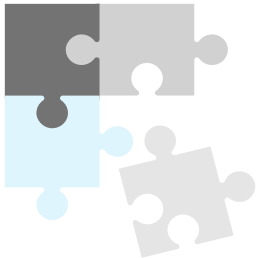
"After *Young*, over two-thirds of women still lost their Pregnancy Discrimination Act pregnancy accommodation claims in court, mostly because they were unable to find a suitable comparator under the *Young* comparator framework. Pregnant workers need immediate relief to remain healthy and on the job. Pregnant workers should not have to muster evidence and identify someone else at work to get their own medically necessary accommodation…."

Senator Bob Casey on the Pregnant Workers Fairness Act

CONGRESSIONAL RECORD (Dec. 22, 2022)

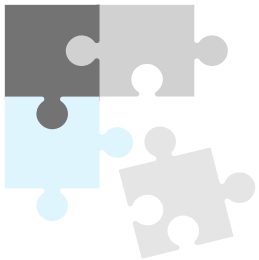
Pregnant Workers Fairness Act of 2022

Filling in the Gaps



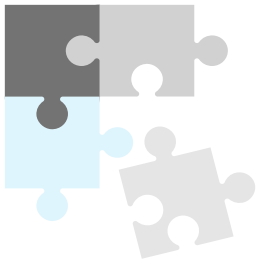
- The Pregnant Workers Fairness Act was enacted in December 2022 to fill in gaps in the Pregnancy Discrimination Act.
- **Effective date is June 27, 2023.**
- The EEOC will begin accepting charges on June 27, 2023.
- Existing law will apply to conduct occurring prior to June 27, 2023.
- **The PWFA does not replace or alter more generous state laws.**

Filling in the Gaps



- PWFA applies to private and public sector employers with at least 15 employees.
- EEOC will issue proposed rules for public comment. Final rules due December 2023.
- Until then, the EEOC has posted informal guidance: "What You Should Know About the Pregnant Workers Fairness Act," https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act.

Filling in the Gaps



- The PWFA does not amend the PDA but is a stand-alone statute that borrows from the Americans with Disabilities Act and Title VII.
- **The PWFA applies only to accommodations.**
  - Requires an "interactive process" – similar to the ADA but with important modifications.
- **Traditional pregnancy discrimination claims will still be brought under the Pregnancy Discrimination Act (*e.g.*, hiring, firing, harassment, disparate impact).**

Affirmative Duty to Accommodate

- Must provide reasonable accommodations for the **known limitations** related to the **pregnancy, childbirth, or related medical conditions** of a qualified employee unless the accommodation would impose an **"undue hardship."**

- Cannot deny employment opportunities to avoid having to make reasonable accommodations.

- Prohibits "adverse action" because the employee requested or used a reasonable accommodation.

Not Limited to Disabilities

- Unlike the ADA, the PWFA applies to conditions or limitations that do not rise to the level of a **disability**.
- PWFA applies to a "physical or mental **condition** related to, affected by, or arising out of pregnancy, childbirth, or related medical condition."
  - *Example*: female police officer cannot fit into her bulletproof vest; secretary needs a different desk.

Essential Job Functions

The new law requires employers to temporarily set aside an essential job function unless it is an undue hardship.

Three-part test:

1) Is the employee unable to perform an essential job function "for a temporary period"?
2) Will the employee be able to perform "the essential function … in the near future"? ***and***
3) Can the employer reasonably accommodate "the inability to perform the essential function" without undue hardship?

Interactive Process

- Employer and employee will discuss options that would permit the employee to continue working.
- Employer may request medical documentation if needed to understand the condition and to assist in tailoring an effective accommodation.
- Cannot require the employee to accept an accommodation except one "arrived at through the interactive process."
- Cannot compel an involuntary leave (even if paid) or compel a reduced schedule *if another reasonable accommodation is available*.

Common Accommodations

- **Physical well-being:** Flexible or longer breaks to drink water, eat, rest, or use the restroom; sitting instead of standing; standing instead of sitting.
- **Proximity and access:** Different workstation, closer parking space, access to elevator.
- **Equipment:** a stool or chair to sit on, a rolling cart to carry things, a different desk, a larger uniform; adding a lock to a room to create a lactation space.
- **Modification of duties:** No climbing ladders, no heavy lifting, no late-night driving, no strenuous activity or exposure to dangerous chemicals.
- **Adjustment of workplace rules:** Allow eating or drinking when otherwise prohibited; allow attendance at a meeting via Zoom.
- **Modification of schedule:** Later start time, longer lunch break, limit on hours worked per day, time off for prenatal appointments, stop the tenure clock.
- **Reassignment, temporary transfer, or telework**

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Sources: American College of Obstetricians and Gynecologists, Committee Opinion, "Employment Considerations During Pregnancy and the Postpartum Period," (April 2018), *available at* https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period

Accommodation Issues for Teachers

"I was a classroom teacher and **all I needed was to go to the bathroom** which I thought was a reasonable request to ask but you can imagine in a high school with more than 1,000 kids, to get coverage, **I was often told 'well you just had your break' or 'we only have two more periods before time for lunch.'** And thinking that I have to go right now was just something that I just dealt with which led to further complications with **bladder issues…**"

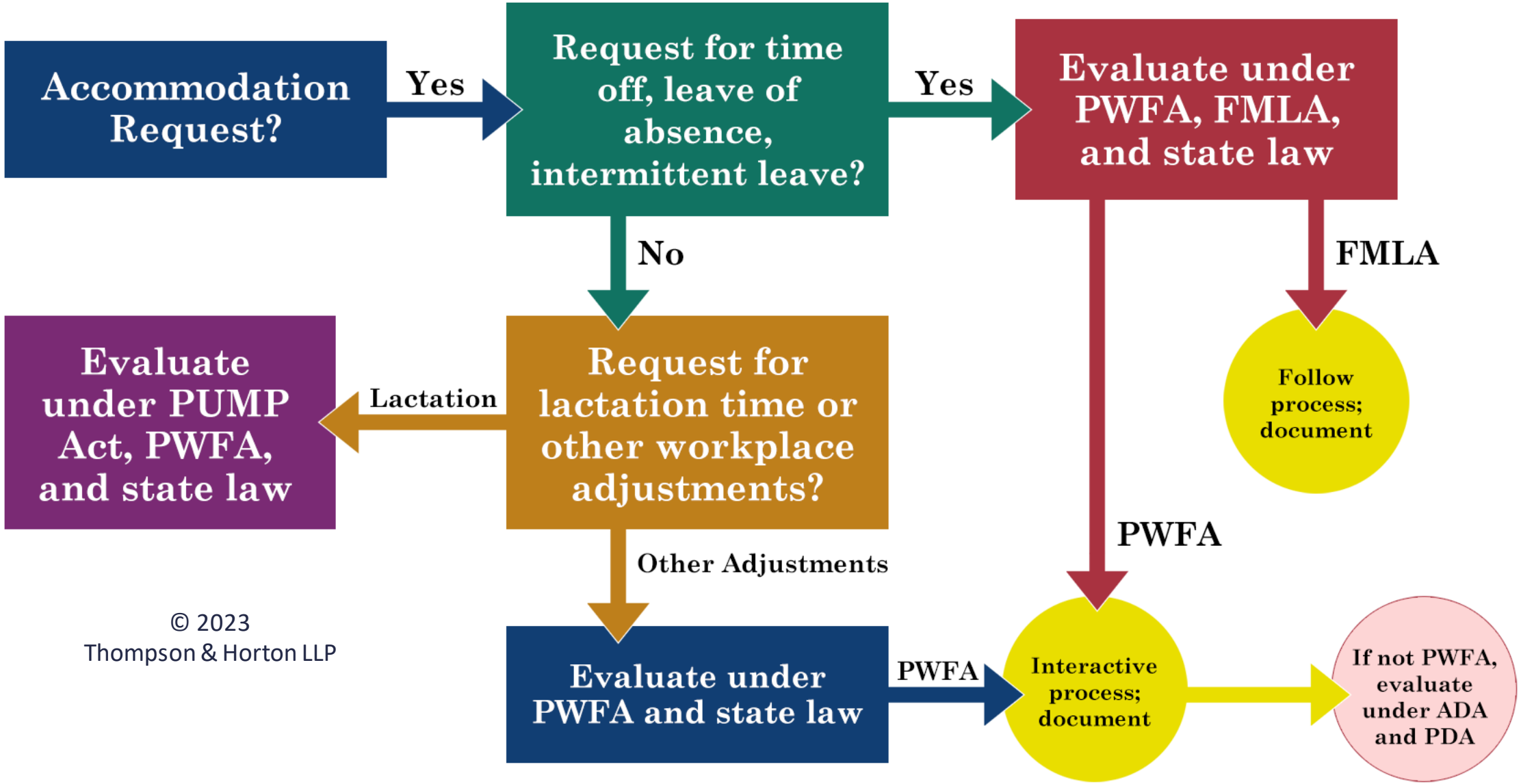
U.S. Rep. Jahana Hayes
House Committee on Education and Labor, Report 116-494, the Pregnant Workers Fairness Act (Sept. 8, 2020)

Analysis Will Be Job Specific

- Faculty member with morning sickness who needs to arrive late?
- Librarian who cannot lift heavy books?
- I.T. technician who cannot bend over or stoop?
- School bus driver who cannot drive to a game at night?

- Crossing guard with morning sickness who needs to arrive late?
- Special education aide who cannot lift a 40-pound child?
- Athletic trainer who cannot bend over or stoop?
- Police officer who cannot drive at night?

Potentially Overlapping Obligations



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Legal Remedies

- Requires exhaustion of administrative remedies through the EEOC (just like Title VII)
- Monetary damages (subject to a cap)
- Punitive damages (but not against public entities)
- Reasonable attorney's fees and costs if the plaintiff prevails in court

"Good Faith Efforts" Defense

A person who sues for a violation of the PWFA may not recover damages if the employer demonstrates "**good faith efforts**" to identify a reasonable accommodation that would not cause an undue hardship on the employer.

Proper documentation is key.
Front-line supervisors must avoid on-the-fly email discussions with employees about requested accommodations.

Retaliation and Coercion

- **Retaliation:** Prohibits retaliation against any employee because they opposed acts prohibited by the PWFA, made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing
- **Coercion and interference:** It is "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of such individual having exercised or enjoyed, or on account of such individual having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected" by the PWFA.

The PWFA and Abortion

After passage of the PWFA in December 2022, the EEOC reiterated that discrimination based on having an abortion would violate the Pregnancy Discrimination Act.

EEOC, "Pregnancy Discrimination and Pregnancy-Related Disability Discrimination," *available at* https://www.eeoc.gov/pregnancy-discrimination).

The PWFA and Abortion

- Under the Pregnancy Discrimination Act, "related medical condition" includes abortion and recovery from abortion. *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008).
- The phrase "related medical condition" also is used in the Pregnant Workers Fairness Act.

See, e.g., National Women's Law Center, "Know Your Rights: Pregnant Workers Fairness Act" (March 2023), *available at* https://nwlc.org/resource/know-your-rights-pregnant-workers-fairness-act/; Society for Human Resources Management, "What You Need to Know About Pregnancy Discrimination and Accommodations," (March 2023), *available at* https://www.shrm.org/resourcesandtools/tools-and-samples/need-to-know/pages/pregnancy-discrimination-accommodations.aspx.

The PWFA and Religion

- The PWFA incorporates a religious exemption found in Title VII known as the Section 702(a) exemption. Section 702(a) enables religious organizations to give employment preference to members of their own religion. 42 U.S.C. 2000e–1(a). The exemption applies to institutions whose purpose and character are primarily religious. Courts generally have held that such organizations remain subject to Title VII's other prohibitions on discrimination on account of race, sex, etc.
- The PWFA does not reference Title VII's Section 703(e)(2) exemption, which states that schools, colleges, and universities may "hire and employ employees of a particular religion" if the entity is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or religious organization, or if the curriculum of the school "is directed toward the propagation of a particular religion."

Risk Management

RICE UNIVERSITY
Access, Equity and Equal Opportunity

- What resources are available to me as a pregnant and/or parenting student?
- What do I do if a student or employee tells me they're pregnant?
- How do I request accommodations for pregnancy-related complications?
- What do I do if a student tells me they need to miss class due to a pregnancy?
- What do reasonable accommodations for a parenting student look like?
- Can I ask a student to prove they're pregnant or provide a doctor's note?

Prevent delay and misinformation – and reduce the risk of claims – by creating a web-based resource for employees and supervisors.

Information for pregnant students

- What rights do I have as a student who is pregnant or experiencing related conditions?
- How do I access accommodations if there are medical complications with my pregnancy?
- How do I access accommodations if there are no medical complications with my pregnancy?
- If my expected delivery date is during finals or intersects with course-related deadlines, can I receive accommodations related to childbirth or postpartum recovery?

Information for pregnant employees

PWFA Compliance Checklist

PWFA Effective Date is June 27.

- ❑ Review and update board policies and procedures on pregnancy and parenting issues.
- ❑ Instead of expanding a disabilities policy, consider preparing a separate policy/procedure regarding pregnancy, lactation, and related conditions.
- ❑ Review and update *department-level* and *campus-level* handbooks.

PWFA Compliance Checklist

- ❑ Develop office forms and resources on pregnancy-related conditions and accommodations to enhance and expedite the interactive process.
- ❑ Evaluate which officials have compliance responsibilities. If shared responsibility, who has ultimate oversight for compliance?

PWFA Compliance Checklist

- ❑ **Schedule training now for June.** Use this opportunity to address pregnancy accommodations and to provide a refresher on prevention of pregnancy discrimination and harassment claims.

New Title IX Employment Rules Under Consideration

Title IX and Employees

The 2020 Title IX regulations address discrimination against employees, including discrimination based on "pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom." 34 C.F.R. 106.51- 105.57

- **Parental status:** Prohibits actions concerning "the potential marital, parental, or family status" of employees and applicants that treats persons differently on the basis of sex.

- **Temporary Disability:** Must treat temporary disabilities from pregnancy "as any other temporary disability for all job related purposes."

Similar to the Pregnancy Discrimination Act.

- **Leave:** If the institution does not have a leave policy for employees, or if the employee is not eligible for leave under the policy, the institution shall treat pregnancy and related conditions "as a justification for a leave of absence without pay for a reasonable period of time." Employee shall be reinstated to the same or comparable position.

Title IX – Anticipated Changes

Employment Rules

- **Current rule:** "*potential* marital, parental, or family status" of employee or applicant.

- **Current rule:** "*pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.*"

- **Proposed rule:** "*current, potential, or past* parental, family, or marital status" of employee or applicant.

- **Proposed rule:** shortened to "*pregnancy or related conditions.*"

Similar to "related medical conditions" in the PDA and PWFA.

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Title IX – Anticipated Changes

Employment Rules

- **Current rule:** Must treat pregnancy and related conditions "**and** any temporary disability" therefrom "as any other temporary disability for all job related purposes…."

- **Current rule:** No current rule on lactation.

- **Proposed rule:** Must "treat pregnancy or related conditions **or** any temporary disability resulting therefrom as any other temporary disability for all job-related purposes."

- **Proposed rule:** Must provide reasonable break time and space for employees to express breast milk or breastfeed "as needed." Space must be "clean," not a bathroom, shielded from view, free from intrusion.

Similar to PUMP Act (discussed below).

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Title IX – Anticipated Changes

Employment Rules

- **Proposed Title IX employment rules generally align with PWFA, PDA, and PUMP Act.**
- **But more generous employee remedies are available under PWFA, PDA, and the PUMP Act.**
  - Violations of Title IX regulations are not actionable in damages. *See Gebser v. Lago Vista ISD*, 524 U.S. 274, 291-292 (1998).
  - No emotional distress damages under Title IX. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S.Ct. 1562 (2022).
  - In some circuits, employees may not sue for employment discrimination under Title IX. Must use Title VII and follow EEOC process.

The PUMP Act

PUMP Act In A Nutshell

- The **PUMP Act** – *Providing Urgent Maternal Protections for Nursing Mothers Act* – amends the Fair Labor Standards Act which previously required lactation time for non-exempt (hourly) employees.
- Now **all** employees are entitled to "reasonable" break time "each time such employee has need to express the milk" for one year after birth of child.
- Applies to employees working remotely. Cannot monitor remote workers via a camera or security device during break time.

PUMP Act In A Nutshell

- Applies to employers with fewer than 50 employees unless it would be an undue hardship.
- Does not preempt more generous state laws.
- **No undue hardship exception for large employers.**

PUMP Act In A Nutshell

Break time is unpaid for hourly workers only if the employee is completely relieved from work duties.

- If an employee is pumping and checking email or listening to a Zoom meeting, the time is compensable.
- Under the FLSA, short rest periods (typically 20 minutes or less) count as hours worked. Bona fide meal periods (typically 30 minutes or more) generally are not compensable; employee must be relieved from duty.
- If other employees receive short paid breaks, nursing mothers must be compensated in the same way.

Source: U.S. Dep't of Labor, Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act, https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked

Policy Behind the Act

- American Academy of Pediatrics recommends breastfeeding for 12 months after birth. Improves health outcomes for the child.
- Breastfeeding mothers have a biological need to express breast milk at regular intervals. Denial of break time may result in pain, engorgement, leakage, clogged ducts, infections, or diminished milk supply.
- A healthier child may reduce employee absenteeism and use of sick leave to care for an ill child.
- Break time promotes retention of employees.

PUMP Act Remedies

Violations and Remedies

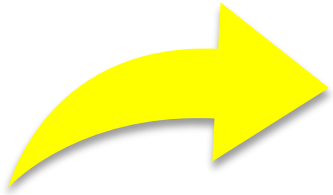
- May file a complaint with the DOL or file a private cause of action. DOL complaint not required before filing suit.
- Before filing suit, the employee must give the employer at least 10 days' notice that an adequate space has not been provided. Employer has an opportunity to cure.
  - Ten-day waiting period ***does not*** apply if the employee was terminated for requesting a lactation break or opposing the refusal or if the employer has indicated that it will not comply.
  - Proposed Title IX lactation rule does not reference a cure period.

PUMP Act Remedies

Violations and Remedies

- PUMP Act remedies include compensatory damages, reinstatement, promotion, lost wages (which can be doubled), recovery of economic losses resulting from the violation, and punitive damages against some employers.

- Approximately 30 states also have passed lactation laws with a variety of different requirements and remedies. https://www.dol.gov/agencies/wb/pregnant-nursing-employment-protections



Always verify if state or local law provides greater employee protections and remedies. PUMP Act does not preempt more generous state laws.

PUMPing Practicalities

- **What is a "reasonable" break?**
  - DOL states that a typical employee will need two to three breaks in a workday (15-20 minutes each)
  - Break time includes time to walk to the lactation room, set up, pump, clean up, and return to one's workstation
  - DOL recently found that an employer violated the law by making employees wait 20 minutes to pump.

U.S. Dep't of Labor, "Automaker Stellantis Agrees to Add Lactation Rooms, Amend its Break Policy for Nursing Mothers" (Feb. 8, 2023), *available at* https://www.dol.gov/newsroom/releases/whd/whd20230208.

PUMPing Location

- Lactation space must be private and free from intrusion. Cannot be a restroom.
- DOL has stated that the location must be "functional" for pumping. No *specific* requirement for a chair or table. But a functional space reasonably would include a chair, table, electric outlet, and adequate ventilation.
  - Proposed Title IX regulation also requires a "clean" space.
  - Cleaning wipes or a nearby sink and paper towels would assist with clean up.

PUMPing Practicalities

- The PUMP Act does not require designation of *permanent* lactation spaces (but always check state law). But space must be readily available when needed.
  - If employee works in her own office, she may choose to pump there if private and free from intrusion by others.
- The space can be a single-person room or multiple users. Multi-use room must allow for privacy (consider privacy screens, cubicles, and/or curtains).

PUMPing Practicalities

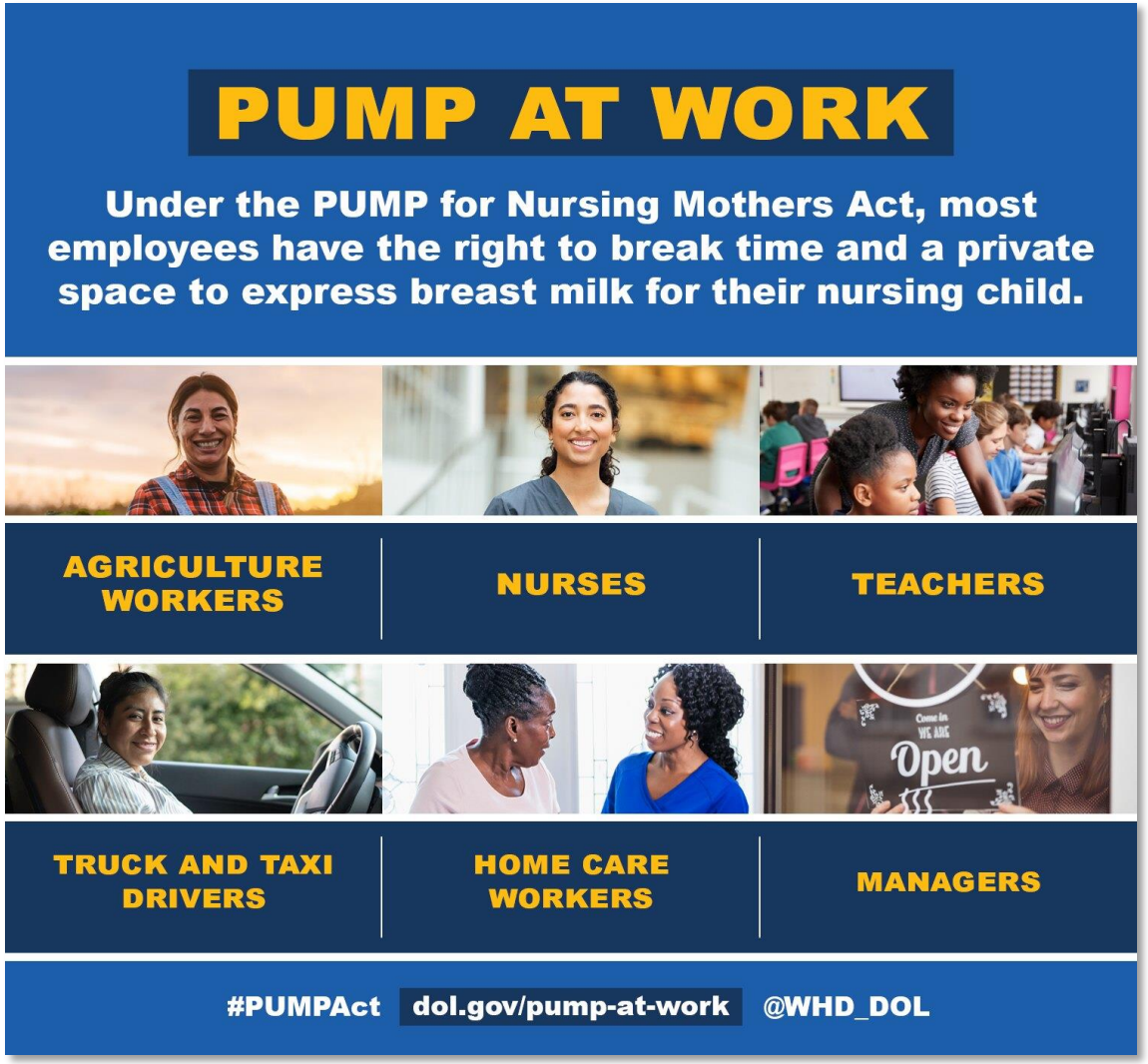
- The PUMP Act does not reference an "interactive process." But a report from the House Committee on Education and Labor envisions the following:
  - "Supervisors can also work with breastfeeding employees to develop schedules that meet their needs. For example, for teachers … this could mean taking scheduled breaks that are planned in advance."
  - "**[C]ommitment by school administration to provide a sub or floater teacher for employees who are breastfeeding is one of the keys to success.**" The report states teachers could use the school nurse's office, "part of a conference room, or a teacher resource room."

PUMPing Questions

- The payroll director would like to pump in her office, but there is no lock, and the intrusions are constant despite the sign taped to her door. She asks for installation of a lock on her door. **What do you do?**

PUMPing Questions

- Faculty member's baby turns one, so lactation rights under the PUMP Act expire. She asks for continued lactation breaks for three more months. **What do you do?**
- Maria and Sandy work at Smith Elementary. They previously exercised their lactation rights. Laura returns from maternity leave. Maria and Sandy are happy for her. But Laura's not breastfeeding. Maria and Sandy badger her and send numerous articles on breastfeeding using school email. "Don't you care about your baby's health?" **What do you do?**



Department of Labor Resources

- "Frequently Asked Questions: Pumping Breastmilk at Work," https://www.dol.gov/agencies/whd/nursing-mothers/faq

- Fact Sheet #7, "FLSA Protections for Employees to Pump Breast Milk at Work," https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers

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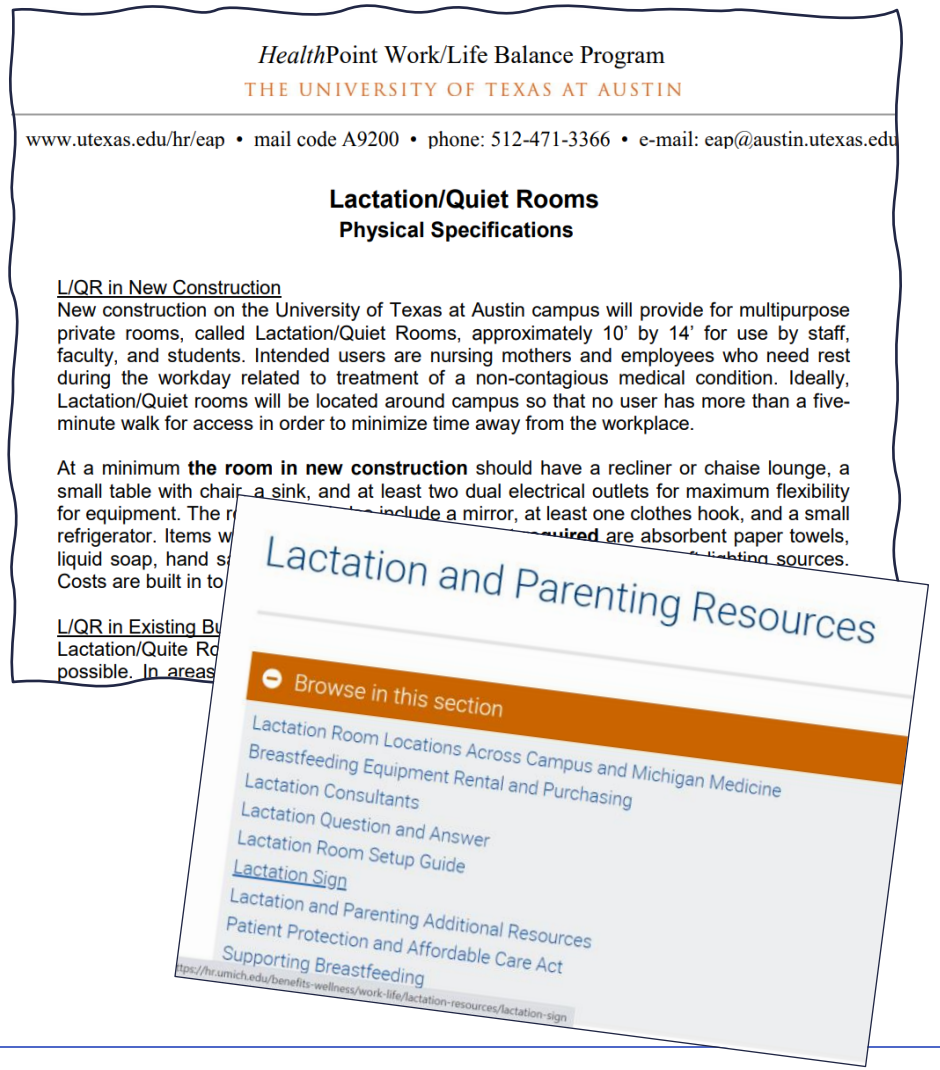
Best Practices & Lactation Laws

- Involve facilities managers and identify existing buildings where lactation spaces can be created
- Incorporate lactation spaces into plans for new construction
- Create a dedicated webpage
  - Information for employees and supervisors



*Health*Point Work/Life Balance Program
THE UNIVERSITY OF TEXAS AT AUSTIN

www.utexas.edu/hr/eap • mail code A9200 • phone: 512-471-3366 • e-mail: eap@austin.utexas.edu

Lactation/Quiet Rooms
Physical Specifications

L/QR in New Construction
New construction on the University of Texas at Austin campus will provide for multipurpose private rooms, called Lactation/Quiet Rooms, approximately 10' by 14' for use by staff, faculty, and students. Intended users are nursing mothers and employees who need rest during the workday related to treatment of a non-contagious medical condition. Ideally, Lactation/Quiet rooms will be located around campus so that no user has more than a five-minute walk for access in order to minimize time away from the workplace.

At a minimum **the room in new construction** should have a recliner or chaise lounge, a small table with chair, a sink, and at least two dual electrical outlets for maximum flexibility for equipment. The r include a mirror, at least one clothes hook, and a small refrigerator. Items w uired are absorbent paper towels, liquid soap, hand s lighting sources. Costs are built in to

L/QR in Existing Bu
Lactation/Quite Ro
possible. In areas

Lactation and Parenting Resources

Browse in this section

Lactation Room Locations Across Campus and Michigan Medicine
Breastfeeding Equipment Rental and Purchasing
Lactation Consultants
Lactation Question and Answer
Lactation Room Setup Guide
Lactation Sign
Lactation and Parenting Additional Resources
Patient Protection and Affordable Care Act
Supporting Breastfeeding

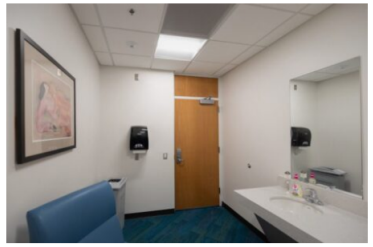
https://hr.umich.edu/benefits-wellness/work-life/lactation-resources/lactation-sign

Best Practices & Lactation Laws

Consider on-line reservations

NC State has 27 designated lactation rooms across multiple campuses. If you have questions or need assistance with lactation spaces on campus, please contact Lisa LaBarbera-Mascote. See Lactation Support Guidelines for information about the requirements for lactation spaces at NC State and guidelines regarding paid break time, as well as the NC Office of State Human Resources policy.

How to Reserve Lactation Rooms



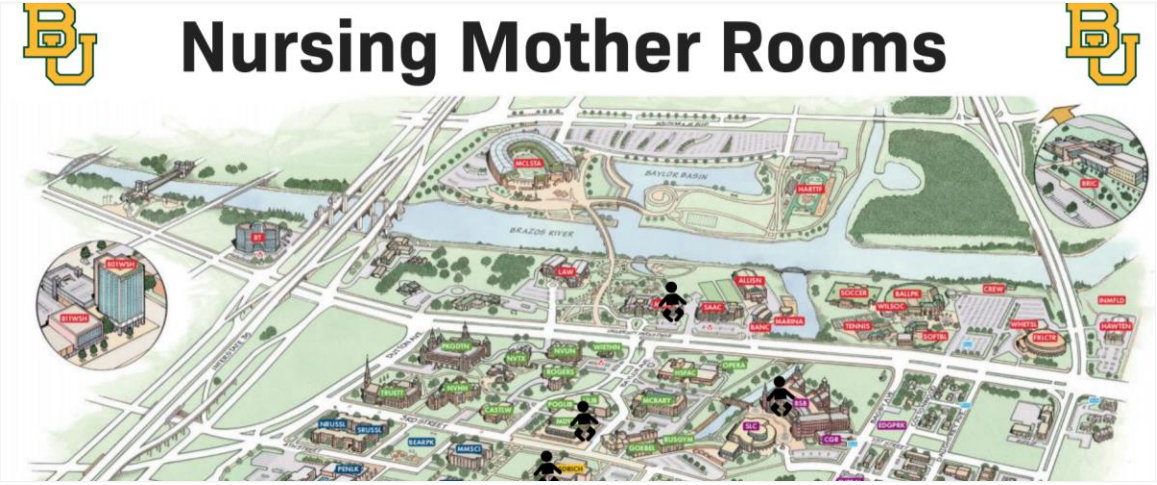
Reserving Lactation Rooms with Google Calendar

1. Sign into your Google Calendar account using your NC State email address and password.
2. Create a reservation on your calendar and click **Edit event** in the event window.
3. Fill in all the necessary information and then click on **Rooms, etc.** located on the right side.
4. If "show only available" is checked, uncheck it. Click on the building code for the lactation room you want to reserve. The lactation room should appear in the list.
5. Click on the room that you want to reserve.
6. Click **Save** to complete your reservation.

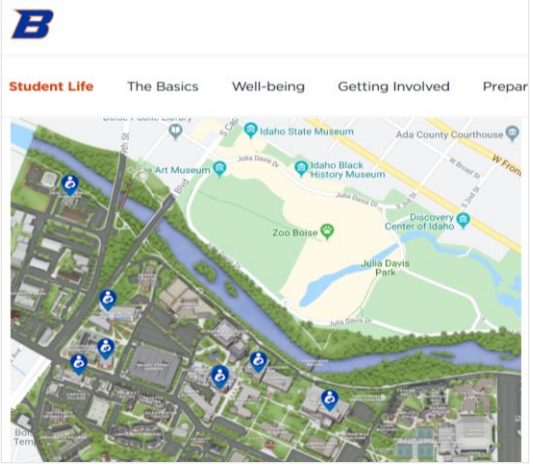
Reserving Lactation Rooms without Google Calendar

For spaces without a Google Calendar, or if you do not have an NC State Google account, reach out to the designated

North Carolina State



Baylor University



Boise State University

Map it out!

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PUMP Act Compliance Checklist

New Remedies Effective April 28

- Assess adequacy of current policies under the PUMP Act and state law. Two issues:
  - Creating lactation spaces
  - Managing break time
- Review/update procedures for exempt and non-exempt employees to request breaks and schedule use of lactation rooms. Reservation system?
- Develop forms for documenting approved breaks for lactation. Update timekeeping documents.

PUMP Act Compliance Checklist

- What should a supervisor do when an employee requests lactation space in a building that does not have one?
- Review/develop written lactation room standards (amenities, security, cleanliness).
- Evaluate feasibility of designating some permanent lactation rooms and identifying other locations that can be converted on short notice. Evaluate all campus buildings, *e.g.*, transportation, athletics, police department.
- **Higher ed:** Will employees and adult students share lactation space?

PUMP Act Compliance Checklist

- Evaluate which officials have compliance responsibilities. Do they work in different offices? Who has oversight? Who handles setting up a new lactation space in a building that currently does not have one?
- Update employee handbooks and department-level handbooks.
- Consider placing informational posters in restrooms, lounges, health offices
- Schedule training dates for supervisors, facilities managers, and others who will manage break requests or lactation spaces.

Title IX and Pregnant & Parenting Students

New Rules on the Horizon

Higher education and K-12 schools have significant obligations under current Title IX regulations relating to pregnant and parenting students. *See* Dep't of Education, "Discrimination Based on Pregnancy and Related Conditions: A Resource for Schools and Students" (October 2022); Dep't of Education, "Supporting the Academic Success of Pregnant and Parenting Students" (2013).

In June 2022, the Department of Education gave notice of proposed rule-making to amend the Title IX regulations, including the rules relating to parenting and pregnancy. The final rule may be released as soon as May 2023.

Accommodations Required

- Under current rules, schools must provide reasonable accommodations, including modifying a grading policy. Instructors cannot refuse to allow a student to submit work after missing a deadline due to pregnancy or related conditions. If grading is based on attendance or participation, the student is allowed to earn the missed credits.
- U.S. Dep't of Education, "Discrimination Based on Pregnancy and Related Conditions" (October 2022), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/ocr-pregnancy-resource.pdf

Section 504 & Pregnancy

- In addition to Title IX, Section 504 of the Rehabilitation Act also imposes obligations. Although a "normal, healthy pregnancy is generally not considered a disability," pregnancy-related disabilities may be covered. OCR Complaint Reference No. 08-22-2021 (June 14, 2022).
- Schools must modify academic requirements to ensure no discrimination.
- But not required to eliminate or lower essential requirements of a program or activity or to make modifications that would result in a "fundamental" alteration of its programs or activities or would impose an undue financial or administrative burden.

Current Compliance Challenges

- Recent OCR rulings indicate that the agency is concerned about compliance even under the current rules.
- Because institutional obligations will expand under the new rules, the summer of 2023 will be an opportune time for K-12 schools and institutions of higher education to train school personnel.
  - Training is highly recommended before the fall semester even if the Department of Education delays release of the final rule.

Case Study #1

OCR Complaint No. 08-22-2021, Salt Lake Community College (June 14, 2021)

- Pregnant student sought adjustment to attendance policy and opportunity to turn in work late. Professor excused some absences but applied grade penalty to late work. Professor advised her to drop course; "health is more important than a class."
- Professor did not refer student to Title IX Coordinator.
- School website and student handbook provided inadequate information for pregnant students.

Case Study #1

- Student found her way to the Title IX Coordinator. Title IX Coordinator:
  - Did not document his conversations with the student or professor.
  - Did not document his conversation with the dean over whether the student's requests would create "fundamental alteration."
  - Did not discuss potential alternatives with student.
  - Denied student's requests but did not formally deny or explain.
- OCR found that College violated Title IX and Section 504. College failed to promptly respond to the student's complaint, failed to engage in a meaningful interactive process, and failed to excuse pregnancy-related absences. College's student handbook and website were inadequate.

Case Study #2

OCR Complaint No. 04-21-2060, Troy University (Jan. 26, 2023)

- Pregnant student sought accommodations. Missed some classes due to pregnancy and said she could not fit in the classroom desks. Was allowed to attend virtually but still had pregnancy-related absences and needed to make up work.
- Student handbook gave contact information for Title IX Office, but there were no institutional procedures for pregnancy accommodations.
- Student emailed professor that she was hospitalized with complications and asked about a make-up test. Professor agreed to some accommodations but was worried about "fairness" to other students. Professor asked the student to contact the Title IX Coordinator.

Case Study #2

- After numerous emails and conversations with the professor over accommodations, student gave birth. Professor asked Title IX Coordinator for guidance due to student's grades, poor attendance, failure to take exams, and failure to make up projects.
- OCR found inadequate follow-up by Title IX Coordinator and a failure to make reasonable adjustments or to provide students with information on how to obtain accommodations. Interactive process was inadequate.
- Accommodations were "ad hoc and uncoordinated" and depended on individual professors. It was "unclear" whether the university had provided training to faculty and staff.

Title IX: Anticipated Changes

- This portion of the presentation addresses proposed changes to the Title IX rules that may affect students who are pregnant or have related conditions.
- The full text of all the proposed changes is available at https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

Title IX: Anticipated Changes

- Keep in mind that these draft rules could be modified in the final rule-making process. For this reason, we are providing a general overview.
- Once the Department of Education releases the final rule, all institutions will need to carefully review the rule at that time.
- We will schedule a second webinar on Title IX and pregnancy after the final rule is released.

Title IX: Anticipated Changes

- **Current:** Schools can't have rules regarding a student's "***actual or potential***" parental, family, or marital status that treat students differently based on sex.
- **Proposed:** Schools can't have rules regarding a student's "current, potential, or past" parental, family, or marital status that treat students differently based on sex.

Title IX: Anticipated Changes

- **Current:** No discrimination or exclusion from education programs and activities on the basis of "***pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom***" unless the student requests to voluntarily participate in a separate program.

- **Proposed:** No discrimination on the basis of the student's current, potential, or past "***pregnancy or related conditions.***" A school "may permit a student based on pregnancy or related conditions to participate voluntarily in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions."

Title IX: Anticipated Changes

- **New Rule: Mandatory notification by employees**
  - When any school or higher ed employee "is informed of a student's pregnancy or related condition" by the student or "a person who has a legal right to act on behalf of the student," the employee must **"promptly"** tell the student or representative how to notify the Title IX Coordinator of the student's pregnancy or related conditions and must provide the Title IX Coordinator's contact information to the student or representative, unless the employee "reasonably believes" the Title IX Coordinator already knows.

Title IX: Anticipated Changes

- **New Rule: Intervention by Title IX Coordinator**
- If a student or the student's representative "notifies" the Title IX Coordinator about the student's pregnancy or related condition, the Title IX Coordinator must "promptly" inform the student/representative about the student's right to:
  - reasonable accommodations in programs, policies, and procedures;
  - voluntarily participate in a separate program, have access to a lactation space, and file grievances;
  - request a voluntary leave of absence for the period of time "deemed medically necessary" by the student's physician or "other healthcare provider." Student must be reinstated to the same academic status or extracurricular status.

Title IX: Anticipated Changes

- **New Rule: Mandatory training for all employees**
  - **"All employees"** must receive training on the mandatory pregnancy-related notification rule, on the school's obligation to address sex discrimination in its programs and activities, and the "scope of conduct" that constitutes sex discrimination under the rule, including sex-based harassment. 34 C.F.R. 106.8(d).

Title IX: Anticipated Changes

- **New Language on Program Modifications**
- "Reasonable modifications" due to pregnancy and related conditions must be provided "on an individualized and voluntary basis depending on the student's needs when necessary to prevent discrimination and ensure equal access to the recipient's education program or activity" unless the school can demonstrate that the modification would "fundamentally alter the program or activity."
- A fundamental alteration is a change that is "so significant that it alters the essential nature of the recipient's education program or activity."

"Fundamental" alteration language is similar to Section 504 rule.

Title IX: Anticipated Changes

- **New Language on Program Modifications**
  - Modifications can include changes in schedule or course sequence; extension time for coursework and rescheduling of tests and examinations; counseling; changes in physical space or supplies; a larger desk or footrest; elevator access; and other "appropriate changes to polices, practices, and procedures."
  - **Modifications must be "effectively implemented, coordinated, and documented *by the Title IX Coordinator*."**

Title IX: Anticipated Changes

- **Current:** May require a doctor's note certifying the student is "physically and emotionally" able to continue participation only if certification is requested of all students with physical or emotional conditions being treated by a physician.
- **Proposed:** May not require a certification from "a physician or other licensed healthcare provider" that the student is able to participate unless the "certified level of physical activity or health is necessary" for participation in the activity and all other students are required to provide a certification too.

Title IX: Anticipated Changes

- **Current (temporary disability):** A school 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 ...."

- **Proposed (temporary disability):** A school must treat pregnancy or related conditions or any temporary disability resulting therefrom in the manner and under the same policies as any other temporary disability **or physical condition** ...."

Title IX: Anticipated Changes

- **Current (leave of absence):** If the school does not maintain a leave policy for its students, or if the student does not qualify for leave under such a policy, the school must treat pregnancy and related conditions "as a justification for a leave of absence" so long as student's physician deems it medically necessary and must be reinstate student to the same status.

- **Proposed (leave of absence):** The school must allow the student a voluntary leave of absence "to cover, at minimum, the period of time deemed medically necessary by the student's physician or other licensed healthcare provider." "To the extent that a recipient maintains a leave policy for students that allows a greater period of time than the medically necessary period, the recipient must permit the student to take leave under that policy instead if the student so chooses." Upon return, the student "must be reinstated" to the same academic status and, "as practicable," to the same extracurricular status.

Title IX: Anticipated Changes

- **New Rule on Lactation and Breaks During Class**
- The school/college must ensure the availability of a lactation space, which must be a place other than a bathroom, that is clean, shielded from view, free from intrusions from others, and may be used for pumping or breastfeeding.
- Student is entitled to breaks during class to attend to "related health needs, expressing breast milk, or breastfeeding; intermittent medical appointments; access to online or other homebound education …."

Title IX Tune-Up

- ✓ Student handbooks and the school website should specifically describe the ***interactive process*** for student pregnancy-related accommodation requests.
- ✓ The webpage with pregnancy-related information should be easy to find.
- ✓ All employees need training on the mandatory notification rule. All faculty members, academic administrators, and program directors need training on accommodations and the interactive process.

Title IX Tune-Up

- ✓ Evaluate the feasibility of designating a deputy Title IX coordinator to serve as a specialist on pregnancy-related issues.
- ✓ The Title IX Coordinator should receive training on assessing and documenting whether a proposed accommodation would constitute a fundamental program alteration.

Title IX & Lactation

- **K-12 schools:** Develop specific policies, procedures, and forms to address the needs of teens who desire to pump or breastfeed at school. In addition to the Title IX Coordinator or deputy coordinator, consider involving counselors, social workers, and school nurses in facilitating this accommodation.
- Identify a lactation space for minors that ensures appropriate safety and security while respecting the privacy of student using the lactation space. Monitor to ensure no harassment from other students.

Title IX & Lactation

- **Higher education:** Consider a lactation space reservation system which will assist students who take classes in different buildings. "First-come, first-served" rooms may prevent some students from having timely access to a lactation space.
- Consider placing posters in restrooms, the student health center, counseling office, and on-campus childcare center if your institution has a childcare center.

Title IX & Lactation (K-12)

- **Missouri School Boards Association sample policy for K-12 students (excerpt):**
  - "Lactating students should contact the counselor, who will make arrangements with the student to create a schedule that results in the least amount of missed class time. Students will be allowed to make up work missed due to lactation activities. If it is not possible to make up the missed work, the student will be provided an alternative assignment."

Students and Lactation (K-12)

BACK TO SCHOOL

The teachers and staff are excited that you are coming back to school. We will do all we can to help you plan your day so that you can attend class and continue to breastfeed.

THINGS TO REMEMBER

1. You can succeed at breastfeeding while attending school.
2. Breastfeeding allows you to provide the food that is perfect for your baby. Your milk gives your baby the healthy start that will last a lifetime.
3. Practice pumping and giving bottles before returning to school.
4. Wait until your baby is four weeks old before giving bottles.
5. Talk to your school counselor or public health nurse for help and support.
6. Bring a cooler and bottles to store and carry milk.
7. Nurse your baby before you leave each morning.
8. Nurse your baby often at night and on weekends.

IMPORTANT CONTACT INFORMATION

School Public Health Nurse _____

School Social Worker _____

School Counselor _____

Resources:

Fairfax County WIC Program

www.fairfaxcounty.gov/hd/wic/

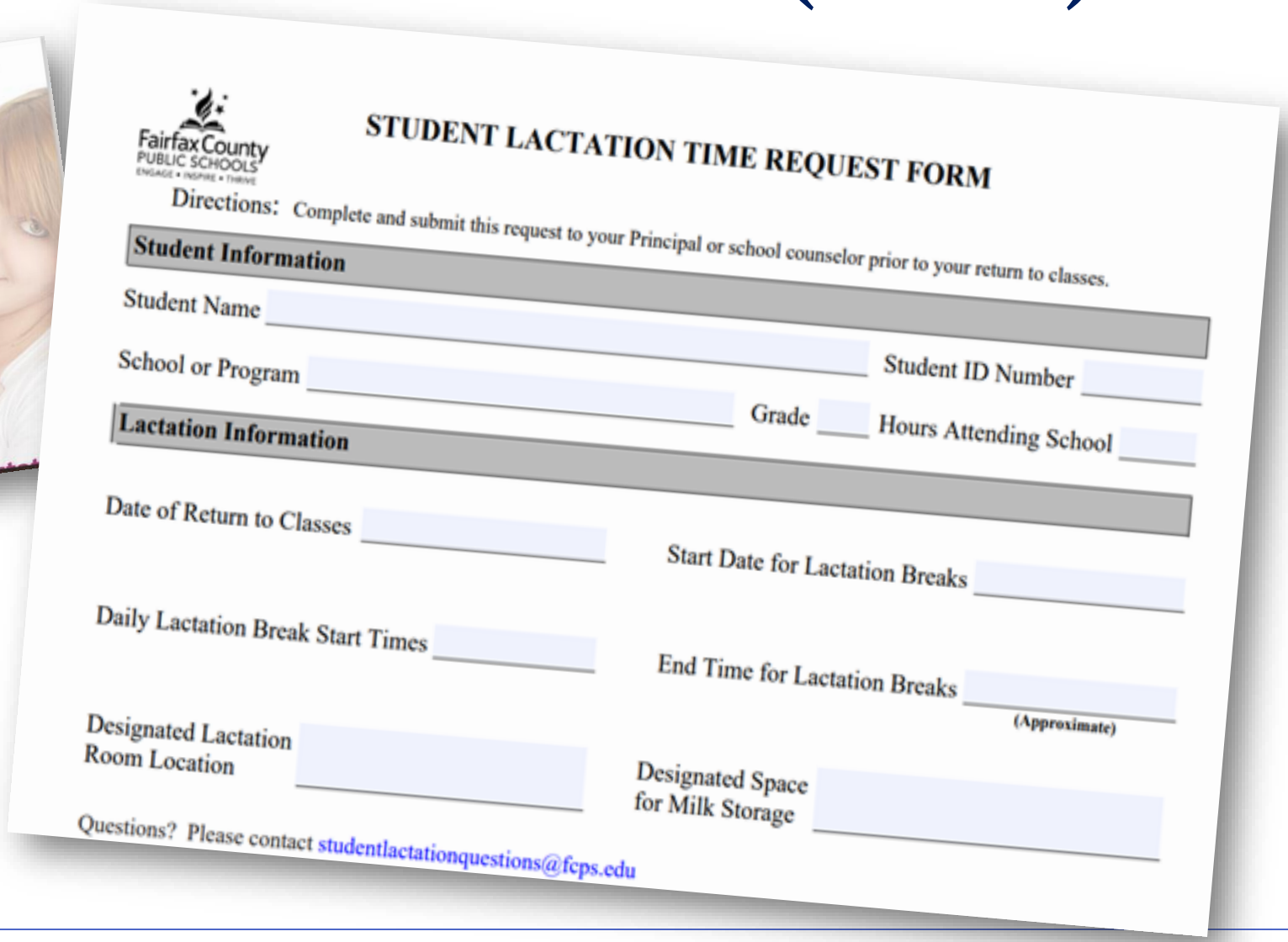
www.vdh.virginia.gov/livewell/programs/wicbreastfeeding/

www.womenshealth.gov/breastfeeding/index.html

https://wicworks.fns.usda.gov/breastfeeding

Scan QRC with your smartphone.

Fairfax County PUBLIC SCHOOLS ENGAGE • INSPIRE • THRIVE



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STUDENT LACTATION TIME REQUEST FORM

Directions: Complete and submit this request to your Principal or school counselor prior to your return to classes.

Student Information

Student Name _____

School or Program _____ Student ID Number _____

Grade ____ Hours Attending School _____

Lactation Information

Date of Return to Classes _____

Start Date for Lactation Breaks _____

Daily Lactation Break Start Times _____

End Time for Lactation Breaks _____ (Approximate)

Designated Lactation Room Location _____

Designated Space for Milk Storage _____

Questions? Please contact studentlactationquestions@fcps.edu

Sample forms from Fairfax County Public Schools

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Title IX and Abortion

- In October 2022, the Department of Education affirmed that Title IX prohibits imposing a penalty "on any person because the person is seeking or has received any benefit or service related to a legal abortion." U.S. Dep't of Education, "Discrimination Based on Pregnancy and Related Conditions" (October 2022); 20 U.S.C. 1688; L. Stanford, "Schools Must Protect Pregnant Students," Education Week (Aug. 1, 2022), *available at* https://www.edweek.org/leadership/schools-must-protect-pregnant-students-proposed-federal-rules-would-spell-out-how/2022/08

- Title IX does not "require or prohibit" any public or private entity "to provide or pay for any benefit or service" related to an abortion. 20 U.S.C. 1688.

Religious Exemption

- Title IX does not “apply to an educational institution which is controlled by a religious organization if the application of this subsection [nondiscrimination requirement] would not be consistent with the religious tenets of such organization.” 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a) (institution must identify which regulations "conflict with a specific tenet of the religious organization").

Final Reminders

- New PUMP Act remedies effective on April 28, 2023
- Pregnant Workers Fairness Act takes effect on June 27, 2023
- Final amended Title IX rules expected in May or June with an effective date as early as August 2023
- New EEOC regulations under the PWFA expected by December 2023

Thank you!

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Our Resources for Educators

Employment Law – https://educatedemployer.com/
Title IX Tips – https://titleixtips.com/
Special Education – https://spedlawspotlight.com/

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