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EEOC		
[redacted]		Date June 25, 2015

SUBJECT: EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues

PURPOSE: This transmittal covers the issuance of the Enforcement Guidance on Pregnancy Discrimination and Related Issues. This document provides guidance regarding the Pregnancy Discrimination Act and the Americans with Disabilities Act as they apply to pregnant workers.

EFFECTIVE DATE: Upon receipt.

EXPIRATION DATE: This Notice will remain in effect until rescinded or superseded.

OBSOLETE DATA: This Enforcement Guidance supersedes the Enforcement Guidance on Pregnancy Discrimination and Related Issues dated July 14, 2014. Most of this revised guidance remains the same as the prior version, but changes have been made to Sections I B.1 (Disparate Treatment), and I C.1 (Light Duty) in response to the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*, --- U.S. ---, 135 S.Ct. 1338 (2015). Section I A.5 of the July 14, 2014 guidance has also been deleted in response to *Young*.

ORIGINATOR: Office of Legal Counsel.

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ENFORCEMENT GUIDANCE:

PREGNANCY DISCRIMINATION AND RELATED ISSUES

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PREGNANCY DISCRIMINATION AND RELATED ISSUES

OVERVIEW OF STATUTORY PROTECTIONS

Pregnancy Discrimination Act

Congress enacted the Pregnancy Discrimination Act (PDA) in 1978 to make clear that discrimination based on pregnancy, childbirth, or related medical conditions is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (Title VII).[1] Thus, the PDA extended to pregnancy Title VII's goals of "'[achieving] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.'"[2]

By enacting the PDA, Congress sought to make clear that "[p]regnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working."[3] The PDA requires that pregnant employees be treated the same as non-pregnant employees who are similar in their ability or inability to work.[4]

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[1] The text of the PDA is as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions 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, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(k).

[2] *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 288 (1987) (*quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971)).

[3] S. Rep. No. 95-331, at 4 (1977), *as reprinted in* Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources), at 41 (1980). The PDA was enacted to supersede the Supreme Court's decisions in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (excluding pregnancy-related disabilities from disability benefit plans did not constitute discrimination based on sex absent indication that exclusion was pretext for sex discrimination), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (policy of denying sick leave pay to employees disabled by pregnancy while providing such pay to employees disabled by other non-occupational sickness or injury does not violate Title VII unless the exclusion is a pretext for sex discrimination).

[4] *California Fed. Sav. & Loan Ass'n*, 479 U.S. at 290.

Fundamental PDA Requirements

1) An employer[5] may not discriminate against an employee[6] on the basis of pregnancy, childbirth, or related medical conditions; and
2) Women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons not so affected but similar in their ability or inability to work.

In the years since the PDA was enacted, charges alleging pregnancy discrimination have increased substantially. In fiscal year (FY) 1997, more than 3,900 such charges were filed with the Equal Employment Opportunity Commission (EEOC) and state and local Fair Employment Practices Agencies, but in FY 2013, 5,342 charges were filed.

In 2008, a study by the National Partnership for Women & Families found that pregnancy discrimination complaints have risen at a faster rate than the steady influx of women into the workplace.[7] This suggests that pregnant workers continue to face inequality in the workplace.[8] Moreover, the study found that much of the increase in these complaints has been fueled by an increase in charges filed by women of color. Specifically, pregnancy discrimination claims filed by women of color increased by 76% from FY 1996 to FY 2005, while pregnancy discrimination claims overall increased 25% during the same time period.

The issues most commonly alleged in pregnancy discrimination charges have remained relatively consistent over the past decade. The majority of charges include allegations of discharge based on pregnancy. Other charges include allegations of disparate terms and conditions of employment based on pregnancy, such as closer scrutiny and harsher discipline than that administered to non-pregnant employees, suspensions pending receipt of medical

[5] The term "employer" in this document refers to any entity covered by Title VII, including labor organizations and employment agencies.

[6] Use of the term "employee" in this document includes applicants for employment or membership in labor organizations and, as appropriate, former employees and members.

[7] Nat'l Partnership for Women & Families, *The Pregnancy Discrimination Act: Where We Stand 30 Years Later* (2008), *available at* http://qualitycarenow.nationalpartnership.org/site/DocServer/Pregnancy_Discrimination_Act_-_Where_We_Stand_30_Years_L.pdf?docID=4281 (last visited May 5, 2014).

[8] While there is no definitive explanation for the increase in complaints, and there may be several contributing factors, the National Partnership study indicates that women today are more likely than their predecessors to remain in the workplace during pregnancy and that some managers continue to hold negative views of pregnant workers. *Id.* at 11.

releases, medical examinations that are not job related or consistent with business necessity, and forced leave.[9]

Americans with Disabilities Act (ADA)

Title I of the ADA protects individuals from employment discrimination on the basis of disability, limits when and how an employer may make medical inquiries or require medical examinations of employees and applicants for employment, and requires that an employer provide reasonable accommodation for an employee or applicant with a disability.[10] While pregnancy itself is not a disability, pregnant workers and job applicants are not excluded from the protections of the ADA. Changes to the definition of the term "disability" resulting from enactment of the ADA Amendments Act of 2008 (ADAAA) make it much easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA.[11] Reasonable accommodations available to pregnant workers with impairments that constitute disabilities might include allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a work station, or to use a stool; altering how job functions are performed; or providing a temporary assignment to a light duty position.

Part I of this document provides guidance on Title VII's prohibition against pregnancy discrimination. It describes the individuals to whom the PDA applies, the ways in which violations of the PDA can be demonstrated, and the PDA's requirement that pregnant employees be treated the same as employees who are not pregnant but who are similar in their ability or inability to work (with a particular emphasis on light duty and leave policies). Part II addresses the impact of the ADA's expanded definition of "disability" on employees with pregnancy-related impairments, particularly when employees with pregnancy-related impairments would be entitled to reasonable accommodation, and describes some specific accommodations that may help pregnant workers. Part III briefly describes other requirements unrelated to the PDA and the ADA that affect pregnant workers. Part IV contains best practices for employers.

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[9] Studies have shown how pregnant employees and applicants experience negative reactions in the workplace that can affect hiring, salary, and ability to manage subordinates. *See* Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359 (2008)*; see also* Stephen Benard, *Written Testimony of Dr. Stephen Benard*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/2-15-12/benard.cfm (last visited April 29, 2014) (discussing studies examining how an identical woman would be treated when pregnant versus when not pregnant);Sharon Terman, *Written Testimony of Sharon Terman*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/2-15-12/terman.cfm (last visited April 29, 2014)*;* Joan Williams, *Written Testimony of Joan Williams*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm (last visited April 29, 2014) (discussing the types of experiences reported by pregnant employees seeking assistance from advocacy groups).

[10] 42 U.S.C. § 12112.

[11] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). The expanded definition of "disability" under the ADA also may affect the PDA requirement that pregnant workers with limitations be treated the same as employees who are not pregnant but who are similar in their ability or inability to work by expanding the number of non-pregnant employees who could serve as comparators where disparate treatment under the PDA is alleged.

I. THE PREGNANCY DISCRIMINATION ACT

A. PDA Coverage

In passing the PDA, Congress intended to prohibit discrimination based on "the whole range of matters concerning the childbearing process,"[12] and gave women "the right . . . to be financially and legally protected before, during, and after [their] pregnancies."[13] Thus, the PDA covers all aspects of pregnancy and all aspects of employment, including hiring, firing, promotion, health insurance benefits, and treatment in comparison with non-pregnant persons similar in their ability or inability to work.

Extent of PDA Coverage

Title VII, as amended by the PDA, prohibits discrimination based on the following:

- **Current Pregnancy**
- **Past Pregnancy**
- **Potential or Intended Pregnancy**
- **Medical Conditions Related to Pregnancy or Childbirth**

1. Current Pregnancy

The most familiar form of pregnancy discrimination is discrimination against an employee based on her current pregnancy. Such discrimination occurs when an employer refuses to hire, fires, or takes any other adverse action against a woman because she is pregnant, without regard to her ability to perform the duties of the job.[14]

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[12] H.R. Rep. No. 95-948, 95th Cong., 2d Sess. 5, *reprinted in* 5 U.S.C.C.A.N. 4749, 4753 (1978).

[13] 124 Cong. Rec. 38574 (daily ed. Oct. 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA).

[14] *See, e.g., Asmo v. Keane, Inc.*, 471 F.3d 588, 594-95 (6th Cir. 2006) (close timing between employer's knowledge of pregnancy and the discharge decision helped create a material issue of fact as to whether employer's explanation for discharging plaintiff was pretext for pregnancy discrimination); *Palmer v. Pioneer Inn Assocs., Ltd*., 338 F.3d 981, 985 (9th Cir. 2003) (employer not entitled to summary judgment where plaintiff testified that supervisor told her that he withdrew his job offer to plaintiff because the company manager did not want to hire a pregnant woman); *cf. Cleveland Bd. of Educ. v. LeFleur*, 414 U.S. 642 (1974) (state rule requiring pregnant teachers to begin taking leave four months before delivery due date and not return until three months after delivery denied due process).

a. Employer's Knowledge of Pregnancy

If those responsible for taking the adverse action did not know the employee was pregnant, there can be no finding of intentional pregnancy discrimination.[15] However, even if the employee did not inform the decision makers about her pregnancy before they undertook the adverse action, they nevertheless might have been aware of it through, for example, office gossip or because the pregnancy was obvious. Since the obviousness of pregnancy "varies, both temporally and as between different affected individuals,"[16] an issue may arise as to whether the employer knew of the pregnancy.[17]

EXAMPLE 1
Knowledge of Pregnancy

When Germaine learned she was pregnant, she decided not to inform management at that time because of concern that such an announcement would affect her chances of receiving a bonus at the upcoming anniversary of her employment. When she was three months pregnant, Germaine's supervisor told her that she would not receive a bonus. Because the pregnancy was not obvious and the evidence indicated that the decision makers did not know of Germaine's pregnancy at the time of the bonus decision, there is no reasonable cause to believe that Germaine was subjected to pregnancy discrimination.

b. Stereotypes and Assumptions

Adverse treatment of pregnant women often arises from stereotypes and assumptions about their job capabilities and commitment to the job. For example, an employer might refuse to hire a pregnant woman based on an assumption that she will have attendance problems or leave her job after the child is born.

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[15] *See, e.g., Prebilich-Holland v. Gaylord Entm't Co*., 297 F.3d 438, 444 (6th Cir. 2002) (no finding of pregnancy discrimination if employer had no knowledge of plaintiff's pregnancy at time of adverse employment action); *Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997, 1006 (7th Cir. 2000) (claim of pregnancy discrimination "cannot be based on [a woman's] being pregnant if [the employer] did not know she was"); *Haman v. J.C. Penney Co.*, 904 F.2d 707, 1990 WL 82720, at *5 (6th Cir. 1990) (unpublished) (defendant claimed it could not have discharged plaintiff due to her pregnancy because the decision maker did not know of it, but evidence showed plaintiff's supervisor had knowledge of pregnancy and had significant input into the termination decision).

[16] *Geraci v. Moody-Tottrup, Int'l, Inc*., 82 F.3d 578, 581(3d Cir. 1996).

[17] *See, e.g., Griffin v. Sisters of Saint Francis, Inc.*, 489 F.3d 838, 844 (7th Cir. 2007) (disputed issue as to whether employer knew of plaintiff's pregnancy where she asserted that she was visibly pregnant during the time period relevant to the claim, wore maternity clothes, and could no longer conceal the pregnancy). Similarly, a disputed issue may arise as to whether the employer knew of a past pregnancy or one that was intended. *See Garcia v. Courtesy Ford, Inc.*, 2007 WL 1192681, at *3 (W.D. Wash. Apr. 20, 2007) (unpublished) (although supervisor may not have been aware of plaintiff's pregnancy at time of discharge, his knowledge that she was attempting to get pregnant was sufficient to establish PDA coverage).

Employment decisions based on such stereotypes or assumptions violate Title VII.[18] As the Supreme Court has explained, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[19] Such decisions are unlawful even when an employer relies on stereotypes unconsciously or with a belief that it is acting in the employee's best interest.

EXAMPLE 2
Stereotypes and Assumptions

Three months after Maria told her supervisor that she was pregnant, she was absent several days due to an illness unrelated to her pregnancy. Soon after, pregnancy complications kept her out of the office for two additional days. When Maria returned to work, her supervisor said her body was trying to tell her something and that he needed someone who would not have attendance problems. The following day, Maria was discharged. The investigation reveals that Maria's attendance record was comparable to, or better than, that of non-pregnant co-workers who remained employed. It is reasonable to conclude that her discharge was attributable to the supervisor's stereotypes about pregnant workers' attendance rather than to Maria's actual attendance record and, therefore, was unlawful.[20]

[18] *See, e.g., Asmo v. Keane, Inc*., 471 F.3d at 594-95 (manager's silence after employee announced that she was pregnant with twins, in contrast to congratulations by her colleagues, his failure to discuss with her how she planned to manage her heavy business travel schedule after the twins were born, and his failure even to mention her pregnancy during the rest of her employment could be interpreted as evidence of discriminatory animus and, thus, a motive for plaintiff's subsequent discharge); *Laxton v. Gap Inc*., 333 F.3d 572, 584 (5th Cir. 2003) (where supervisor negatively reacted to news of plaintiff's pregnancy and expressed concern about having others fill in around time of the delivery date, it was reasonable to infer that supervisor harbored stereotypical presumption about plaintiff's inability to fulfill job duties as result of her pregnancy); *Wagner v. Dillard Dep't Stores, Inc*., 17 Fed. Appx. 141, 149 (4th Cir. 2001) (unpublished) (evidence did not support defendant's stereotypical assumption that plaintiff could not or would not come to work because of her pregnancy or in the wake of the anticipated childbirth); *Maldonado v. U.S. Bank*, 186 F.3d 759, 768 (7th Cir.1999) (employer could not discharge pregnant employee "simply because it 'anticipated' that she would be unable to fulfill its job expectations"); *Duneen v. Northwest Airlines, Inc*., 132 F.3d 431, 436 (8th Cir. 1998) (evidence of discrimination shown where employer assumed plaintiff had pregnancy-related complication that prevented her from performing her job and therefore decided not to permit her to return to work).

[19] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

[20] These facts were drawn from the case of *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378 (1st Cir. 1998). The court in *Troy* found the jury was not irrational in concluding that stereotypes about pregnancy and not actual job attendance were the cause of the discharge. *See also* Joan Williams, *Written Testimony of Joan Williams, supra* note 9 (discussing examples of statements that may be evidence of stereotyping).

EXAMPLE 3
Stereotypes and Assumptions

Darlene, who is visibly pregnant, applies for a job as office administrator at a campground. The interviewer tells her that July and August are the busiest months of the year and asks whether she will be available to work during that time period. Darlene replies that she is due to deliver in late September and intends to work right up to the delivery date. The interviewer explains that the campground cannot risk that she will decide to stop working earlier and, therefore, will not hire her. The campground's refusal to hire Darlene on this basis constitutes pregnancy discrimination.

2. Past Pregnancy

An employee may claim she was subjected to discrimination based on past pregnancy, childbirth, or related medical conditions. The language of the PDA does not restrict claims to those based on current pregnancy. As one court stated, "It would make little sense to prohibit an employer from firing a woman during her pregnancy but permit the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place."[21]

A causal connection between a claimant's past pregnancy and the challenged action more likely will be found if there is close timing between the two.[22] For example, if an employee was discharged during her pregnancy-related medical leave (i.e., leave provided for pregnancy or recovery from pregnancy) or her parental leave (i.e., leave provided to bond with and/or care for a newborn or adopted child), and if the employer's explanation for the discharge is not believable, a violation of Title VII may be found.[23]

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[21] *Donaldson v. Am. Banco Corp., Inc*., 945 F. Supp. 1456, 1464 (D. Colo. 1996)*; see also Piraino v. Int'l Orientation Res., Inc*., 84 F.3d 270, 274 (7th Cir. 1996) (rejecting "surprising claim" by defendant that no pregnancy discrimination can be shown where challenged action occurred after birth of plaintiff's baby); *Pacourek v. Inland Steel* Co., 858 F. Supp. 1393, 1402 (N.D. Ill. 1994) (quoting Legislative History of the PDA at 124 Cong. Rec. 38574 (1978)) ("[T]he PDA gives a woman 'the right . . . to be financially and legally protected before, during, and after her pregnancy.'").

[22] *See, e.g., Neessen v. Arona Corp.*, 2010 WL 1731652, at *7 (N.D. Iowa Apr. 30, 2010) (plaintiff was in PDA's protected class where defendant allegedly failed to hire her because, at the time of her application, she had recently been pregnant and given birth).

[23] *See, e.g., Shafrir v. Ass'n of Reform Zionists of Am.*, 998 F. Supp. 355, 363 (S.D.N.Y. 1998) (allowing plaintiff to proceed with pregnancy discrimination claim where she was fired during parental leave and replaced by non-pregnant female, supervisor had ordered plaintiff to return to work prior to end of her leave knowing she could not comply, and supervisor allegedly expressed doubts about plaintiff's desire and ability to continue working after having child).

EXAMPLE 4
Unlawful Discharge During Pregnancy or Parental Leave

Shortly after Teresa informed her supervisor of her pregnancy, he met with her to discuss alleged performance problems. Teresa had consistently received outstanding performance reviews during her eight years of employment with the company. However, the supervisor now for the first time accused Teresa of having a bad attitude and providing poor service to clients. Two weeks after Teresa began her pregnancy-related medical leave, her employer discharged her for poor performance. The employer produced no evidence of customer complaints or any other documentation of poor performance. The evidence of outstanding performance reviews preceding notice to the employer of Teresa's pregnancy, the lack of documentation of subsequent poor performance, and the timing of the discharge support a finding of unlawful pregnancy discrimination.

A lengthy time difference between a claimant's pregnancy and the challenged action will not necessarily foreclose a finding of pregnancy discrimination if there is evidence establishing that the pregnancy, childbirth, or related medical conditions motivated that action.[24] It may be difficult to determine whether adverse treatment following an employee's pregnancy was based on the pregnancy as opposed to the employee's new childcare responsibilities. If the challenged action was due to the employee's caregiving responsibilities, a violation of Title VII may be established where there is evidence that the employee's gender or another protected characteristic motivated the employer's action.[25]

3. Potential or Intended Pregnancy

The Supreme Court has held that Title VII "prohibit[s] an employer from discriminating against a woman because of her capacity to become pregnant."[26] Thus, women must not be

[24] *See Solomen v. Redwood Advisory Co.*, 183 F. Supp. 2d 748, 754 (E.D. Pa. 2002) ("a plaintiff who was not pregnant at or near the time of the adverse employment action has some additional burden in making out a prima facie case").

[25] For a discussion of disparate treatment of workers with caregiving responsibilities, *see* Section I B.1.b., *infra*; the EEOC's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.html (last visited May 5, 2014); and the EEOC's *Employer Best Practices for Workers with Caregiving Responsibilities*, *available at* http://www.eeoc.gov/policy/docs/caregiver-best-practices.html (last visited May 5, 2014).

[26] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 206 (1991); *see also Kocak v. Cmty. Health Partners of Ohio*, 400 F.3d 466, 470 (6th Cir. 2005) (plaintiff "cannot be refused employment on the basis of her potential pregnancy"); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) ("Potential pregnancy . . . is a medical condition that is sex-related because only women can become pregnant.").

discriminated against with regard to job opportunities or benefits because they might get pregnant.

a. Discrimination Based on Reproductive Risk

An employer's concern about risks to the employee or her fetus will rarely, if ever, justify sex-specific job restrictions for a woman with childbearing capacity.[27] This principle led the Supreme Court to conclude that a battery manufacturing company violated Title VII by broadly excluding all fertile women -- but not similarly excluding fertile men -- from jobs in which lead levels were defined as excessive and which thereby potentially posed hazards to unborn children.[28]

The policy created a facial classification based on sex, according to the Court, since it denied fertile women a choice given to fertile men "as to whether they wish[ed] to risk their reproductive health for a particular job."[29] Accordingly, the policy could only be justified if the employer proved that female infertility was a bona fide occupational qualification (BFOQ).[30] The Court explained that, "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents."[31]

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[27] *Johnson Controls*, 499 U.S. at 206.

[28] *Id*. at 209.

[29] *Id.* at 197; *see also Spees v. James Marine, Inc*., 617 F.3d 380, 392-94 (6th Cir. 2010) (finding genuine issue of material fact as to whether employer unlawfully transferred pregnant welder to tool room because of perceived risks of welding while pregnant); *EEOC v. Catholic Healthcare West*, 530 F. Supp. 2d 1096, 1105-07 (C.D. Cal. 2008) (hospital's policy prohibiting pregnant nurses from conducting certain medical procedures was facially discriminatory); *Peralta v. Chromium Plating & Polishing*, 2000 WL 34633645 (E.D.N.Y. Sept. 15, 2000) (unpublished) (employer violated Title VII when it instructed plaintiff that she could not continue to pack and inspect metal parts unless she provided letter from doctor stating that her work would not endanger herself or her fetus).

[30] *Johnson Controls*, 499 U.S. at 200. For a discussion of the BFOQ defense, *see* Section I B.1.c., *infra*.

[31] *Id*. at 206.

b. Discrimination Based on Intention to Become Pregnant

Title VII similarly prohibits an employer from discriminating against an employee because of her intention to become pregnant.[32] As one court has stated, "Discrimination against an employee because she intends to, is trying to, or simply has the potential to become pregnant is . . . illegal discrimination."[33] In addition, Title VII prohibits employers from treating men and women differently based on their family status or their intention to have children.

Because Title VII prohibits discrimination based on pregnancy, employers should not make inquiries into whether an applicant or employee intends to become pregnant. The EEOC will generally regard such an inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.[34]

EXAMPLE 5
Discrimination Based on Intention to Become Pregnant

Anne, a high-level executive who has a two-year-old son, told her manager she was trying to get pregnant. The manager reacted with displeasure, stating that the pregnancy might interfere with her job responsibilities. Two weeks later, Anne was demoted to a lower paid position with no supervisory responsibilities. In response to Anne's EEOC charge, the employer asserts it demoted Anne because of her inability to delegate tasks effectively. Anne's performance evaluations were consistently outstanding, with no mention of such a concern. The timing of the demotion, the manager's reaction to Anne's disclosure, and the documentary evidence refuting the employer's explanation make clear that the employer has engaged in unlawful discrimination.

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[32] For examples of cases finding evidence of discrimination based on an employee's stated or assumed intention to become pregnant, see *Walsh v. National Computer Sys, Inc*., 332 F.3d 1150, 1160 (8th Cir. 2003) (judgment and award for plaintiff claiming pregnancy discrimination upheld where evidence included the following remarks by supervisor after plaintiff returned from parental leave: "I suppose you'll be next," in commenting to plaintiff about a co-worker's pregnancy; "I suppose we'll have another little Garrett [the name of plaintiff's son] running around," after plaintiff returned from vacation with her husband; and "You better not be pregnant again!" after she fainted at work); *Santiago-Ramos v. Centennial P.R. Wireless Corp*., 217 F.3d 46, 55-6 (1st Cir. 2000) (manager's expressions of concern about the possibility of plaintiff having a second child, along with other evidence of sex bias and lack of evidence supporting the reasons for discharge, raised genuine issue of material fact as to whether explanation for discharge was pretextual).

[33] *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1401 (N.D. Ill.1994); *see also Batchelor v. Merck & Co., Inc*., 651 F. Supp. 2d 818, 830-31(N.D. Ind. 2008) (plaintiff was member of protected class under PDA where her supervisor allegedly discriminated against her because of her stated intention to start a family); *Cleese v. Hewlett-Packard Co*., 911 F. Supp. 1312, 1317-18 (D. Or. 1995) (plaintiff, who claimed defendant discriminated against her because it knew she planned to become pregnant, fell within PDA's protected class).

[34] See Section II, *infra*, for information about prohibited medical inquiries under the ADA.

c. Discrimination Based on Infertility Treatment

Employment decisions related to infertility treatments implicate Title VII under limited circumstances. Because surgical impregnation is intrinsically tied to a woman's childbearing capacity, an inference of unlawful sex discrimination may be raised if, for example, an employee is penalized for taking time off from work to undergo such a procedure.[35] In contrast, with respect to the exclusion of infertility from employer-provided health insurance, courts have generally held that exclusions of all infertility coverage for all employees is gender neutral and does not violate Title VII.[36] Title VII may be implicated by exclusions of particular treatments that apply only to one gender.[37]

d. Discrimination Based on Use of Contraception

Depending on the specific circumstances, employment decisions based on a female employee's use of contraceptives may constitute unlawful discrimination based on gender and/or pregnancy. Contraception is a means by which a woman can control her capacity to become pregnant, and, therefore, Title VII's prohibition of discrimination based on potential pregnancy

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[35] *See Hall v. Nalco Co.*, 534 F.3d 644, 648-49 (7th Cir. 2008) (employee terminated for taking time off to undergo in vitro fertilization was not fired for gender-neutral condition of infertility but rather for gender-specific quality of childbearing capacity); *Pacourek*, 858 F. Supp. at 1403-04 (plaintiff stated Title VII claim where she alleged that she was undergoing in vitro fertilization and her employer disparately applied its sick leave policy to her).

Employment decisions based on infertility also may implicate the Americans with Disabilities Act, since infertility that is, or results from, an impairment may be found to substantially limit the major life activity of reproduction and thereby qualify as a disability. For further discussion regarding coverage under the ADA, see Section II, *infra*.

[36] *See Saks v. Franklin Covey, Inc.*, 316 F.3d 337, 346 (2d Cir. 2003) ("[i]nfertility is a medical condition that afflicts men and women with equal frequency"); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) ("because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral," it does not violate Title VII); *cf. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 198 (1991) (finding that employer's policy impermissibly classified on the basis of gender and childbearing capacity "rather than fertility alone").

In *Krauel*, the Eighth Circuit also rejected the plaintiff's argument that exclusion of benefits for infertility treatments had an unlawful disparate impact on women since the plaintiff did not provide statistical evidence showing that female plan participants were disproportionately harmed by the exclusion. 95 F.3d at 681; *see also Saks*, 316 F.3d at 347 (exclusion of surgical impregnation procedures does not discriminate against female employees since such procedures are used to treat both male and female infertility, and therefore, infertile male and female employees are equally disadvantaged by exclusion).

[37] *See, e.g., Commission Decision on Coverage of Contraception* (Dec. 14, 2000) (because prescription contraceptives are available only for women, employer's explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion), *available at* http://www.eeoc.gov/policy/docs/decision-contraception.html (last visited May 5, 2014).

necessarily includes a prohibition on discrimination related to a woman's use of contraceptives.[38] For example, an employer could not discharge a female employee from her job because she uses contraceptives.[39]

Employers can violate Title VII by providing health insurance that excludes coverage of prescription contraceptives, whether the contraceptives are prescribed for birth control or for medical purposes.[40] Because prescription contraceptives are available only for women, a health insurance plan facially discriminates against women on the basis of gender if it excludes

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[38] *Id.; see also Cooley v. DaimlerChrysler Corp*., 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003) ("[A]s only women have the potential to become pregnant, denying a prescription medication that allows women to control their reproductive capacity is necessarily a sex-based exclusion."); *Erickson v. Bartell Drug Co*., 141 F. Supp. 2d 1266, 1271-72 (W.D. Wash. 2001) (exclusion of prescription contraceptives from employer's generally comprehensive prescription drug plan violated PDA). The Eighth Circuit's assertion in *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 942 (2007), that contraception is not "related to pregnancy" because "contraception is a treatment that is only indicated prior to pregnancy" is not persuasive because it is contrary to the *Johnson Controls* holding that the PDA applies to potential pregnancy.

[39] The Religious Freedom Restoration Act (RFRA) provides for religious exemption from a federal law, even if the law is of general applicability and neutral toward religion, if it substantially burdens a religious practice and the government is unable to show that its application would further a compelling government interest and is the least restrictive means of furthering the interest. 42 U.S.C. § 2000bb-1. In a case decided in June 2014, *Burwell v. Hobby Lobby Stores, Inc., et al.*, --- U.S. ---, 134 S.Ct. 2751 (2014), the Supreme Court ruled that the Patient Protection and Affordable Care Act's contraceptive mandate violated the RFRA as applied to closely held family for-profit corporations whose owners had religious objections to providing certain types of contraceptives. The Supreme Court did not reach the question whether owners of such businesses can assert that the contraceptive mandate violates their rights under the Constitution's Free Exercise Clause. This enforcement guidance explains Title VII's prohibition of pregnancy discrimination; it does not address whether certain employers might be exempt from Title VII's requirements under the First Amendment or the RFRA.

[40] *See, e.g., Commission Decision on Coverage of Contraception, supra* note 37*; see also* Section 2713(a)(4) of the Public Health Service Act, as amended by the Patient Protection and Affordable Care Act, PL 111-148, 124 Stat. 119 (2010) (requiring that non-grandfathered group or individual insurance coverage provide benefits for women's preventive health services without cost sharing). On August 1, 2011, the Health Resources and Services Administration released guidelines requiring that contraceptive services be included as women's preventive health services. These requirements became effective for most new and renewed health plans in August 2012. 26 C.F.R. § 54.9815-2713T(b)(1); 29 C.F.R. § 2590.715-2713(b)(1); 45 C.F.R. § 147.130(b)(1) (plans and insurers must cover a newly recommended preventive service starting with the first plan year that begins on or after the date that is one year after the date on which the new recommendation is issued). The Departments of Treasury, Labor, and Health and Human Services issued regulations clarifying the criteria for the religious employer exemption from contraceptive coverage, accommodations with respect to the contraceptive coverage requirement for group health plans established or maintained by eligible organizations (and group health insurance coverage provided in connection with such plans), and student health insurance coverage arranged by eligible organizations that are institutions of higher education. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39869 (July 2, 2013) (to be codified at 26 C.F.R. Part 54; 29 C.F.R. Parts 2510 and 2590; 45 C.F.R. Parts 147 and 1560). *But see supra* note 39.

prescription contraception but otherwise provides comprehensive coverage.[41] To comply with Title VII, an employer's health insurance plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy.[42] For example, if an employer's health insurance plan covers preventive care for medical conditions other than pregnancy, such as vaccinations, physical examinations, prescription drugs that prevent high blood pressure or to lower cholesterol levels, and/or preventive dental care, then prescription contraceptives also must be covered.

4. Medical Condition Related to Pregnancy or Childbirth

a. In General

Title VII prohibits discrimination based on pregnancy, childbirth, or a related medical condition. Thus, an employer may not discriminate against a woman with a medical condition relating to pregnancy or childbirth and must treat her the same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth, or related medical conditions.[43]

EXAMPLE 6
Uniform Application of Leave Policy

Sherry went on medical leave due to a pregnancy-related condition. The employer's policy provided four weeks of medical leave to employees

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[41] *See Commission Decision on Coverage of Contraception, supra* note 37; *Erickson*, 141 F. Supp. 2d at 1272 ("In light of the fact that prescription contraceptives are used only by women, [defendant's] choice to exclude that particular benefit from its generally applicable benefit plan is discriminatory.").

[42] *See supra* note 37. The Commission disagrees with the conclusion in *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007), that contraception is gender-neutral because it applies to both men and women. *Id.* at 942. The court distinguished the EEOC's decision on coverage of contraception by noting that the Commission decision involved a health insurance policy that denied coverage of prescription contraception but included coverage of vasectomies and tubal ligations while the employer in *Union Pacific* excluded all contraception for women and men, both prescription and surgical, when used solely for contraception and not for other medical purposes. However, the EEOC's decision was not based on the fact that the plan at issue covered vasectomies and tubal ligations. Instead, the Commission reasoned that excluding prescription contraception while providing benefits for drugs and devices used to prevent other medical conditions is a sex-based exclusion because prescription contraceptives are available only for women. *See also Union Pacific*, 479 F.3d at 948-49 (Bye, J., dissenting) (contraception is "gender-specific, female issue because of the adverse health consequences of an unplanned pregnancy"; therefore, proper comparison is between preventive health coverage provided to each gender).

[43] *See, e.g., Miranda v. BBII Acquisition*, 120 F. Supp. 2d 157, 167 (D. Puerto Rico 2000) (finding genuine issue of fact as to whether plaintiff's discharge was discriminatory where discharge occurred around one half hour after plaintiff told supervisor she needed to extend her medical leave due to pregnancy-related complications, there was no written documentation of the process used to determine which employees would be terminated, and plaintiff's position was not initially selected for elimination).

> who had worked less than a year. Sherry had worked for the employer for only six months and was discharged when she did not return to work after four weeks. Although Sherry claims the employer discharged her due to her pregnancy, the evidence showed that the employer applied its leave policy uniformly, regardless of medical condition or sex and, therefore, did not engage in unlawful disparate treatment.[44]

Title VII also requires that an employer provide the same benefits for pregnancy-related medical conditions as it provides for other medical conditions.[45] Courts have held that Title VII's prohibition of discrimination based on sex and pregnancy does not apply to employment decisions based on costs associated with the medical care of employees' offspring.[46] However, taking an adverse action, such as terminating an employee to avoid insurance costs arising from the pregnancy-related impairment of the employee or the impairment of the employee's child, would violate Title I of the ADA if the employee's or child's impairment constitutes a

[44] The facts in this example were drawn from the case of *Kucharski v. CORT Furniture Rental,* 342 Fed. Appx. 712, 2009 WL 2524041 (2d Cir. Aug. 19, 2009) (unpublished). Although the plaintiff in *Kucharski* did not allege disparate impact, an argument could have been made that the restrictive medical leave policy had a disparate impact on pregnant workers. For a discussion of disparate impact, see Section I B.2., *infra*.

If the employer made exceptions to its policy for non-pregnant workers who were similar to Sherry in their ability or inability to work, denying additional leave to Sherry because she worked for the employer for less than a year would violate the PDA. *See* Section I C., *infra*. Additionally, if the pregnancy-related condition constitutes a disability within the meaning of the ADA, then the employer would have to make a reasonable accommodation of extending the maximum four weeks of leave, absent undue hardship, even though the employee has been working for only six months. *See* Section II B., *infra*.

[45] For a discussion of the PDA's requirements regarding health insurance, see Section I C.4., *infra*.

[46] *Fleming v. Ayers & Assocs.*, 948 F.2d 993, 997 (6th Cir. 1991) ("It seems to us obvious that the reference in the Act to 'women affected by . . . related medical conditions' refers to related medical conditions of the pregnant women, not conditions of the resulting offspring. Both men and women are 'affected by' medical conditions of the resulting offspring."); *Barnes v. Hewlett Packard Co*., 846 F. Supp. 442, 445 (D. Md.1994) ("There is, in sum, a point at which pregnancy and immediate post-partum requirements - clearly gender-based in nature-end and gender-neutral child care activities begin.").

"disability" within the meaning of the ADA.[47] It also might violate Title II of the Genetic Information Nondiscrimination Act (GINA)[48] and/or the Employee Retirement Income Security Act (ERISA).[49]

b. Discrimination Based on Lactation and Breastfeeding

There are various circumstances in which discrimination against a female employee who is lactating or breastfeeding can implicate Title VII. Lactation, the postpartum production of milk, is a physiological process triggered by hormones.[50] Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination.[51] For example, a manager's statement that an employee

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[47] *See* 42 U.S.C. § 12112(b)(3), (4); Appendix to 29 C.F.R. § 1630.15(a) ("The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate non-discriminatory reason justifying disparate treatment of an individual with a disability."); EEOC *Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance* (June 8, 1993), *available at* http://www.eeoc.gov/policy/docs/health.html (last visited May 5, 2014) ("decisions about the employment of an individual with a disability cannot be motivated by concerns about the impact of the individual's disability on the employer's health insurance plan")*; see also Trujillo v. PacifiCorp*, 524 F.3d 1149, 1156-57 (10th Cir. 2008) (employees raised inference that employer discharged them because of their association with their son whose cancer led to significant healthcare costs); *Larimer v. Int'l Bus. Machs. Corp*., 370 F.3d 698, 700 (7th Cir. 2004) (adverse action against employee due to medical cost arising from disability of person associated with employee falls within scope of associational discrimination section of ADA).

[48] Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff *et seq*., prohibits basing employment decisions on an applicant's or employee's genetic information. Genetic information includes information about the manifestation of a disease or disorder in a family member of the applicant or employee (i.e., family medical history). It also includes genetic tests such as amniocentesis and newborn screening tests for conditions such as Phenylketonuria (PKU). The statute prohibits discriminating against an employee or applicant because of his or her child's medical condition. *See* 42 U.S.C. §§ 2000ff-(3) (defining "family member"), 2000ff-(4) (defining "genetic information"); 29 C.F.R. § 1635.3(a)-(c) (definitions of "family member," "family medical history," and "genetic information"), 1635.4 (prohibited practices under GINA). Employment decisions based on high health care costs resulting from an employee's current pregnancy-related medical conditions do not violate GINA, though they may violate the ADA and the PDA.

[49] *Fleming*, 948 F.2d at 997 (ERISA makes it unlawful to discharge or otherwise penalize a plan participant or beneficiary for exercising his or her rights under the plan).

[50] *See generally* ARTHUR C. GUYTON, TEXTBOOK OF MED. PHYSIOLOGY 1039-40 (2006) (describing physiological processes by which milk production occurs).

[51] *EEOC v. Houston Funding II, Ltd*., 717 F.3d 425 (5th Cir. 2013) (lactation is a related medical condition of pregnancy for purposes of the PDA, and an adverse employment action motivated by the fact that a woman is lactating clearly imposes upon women a burden that male employees need not suffer).

was demoted because of her breastfeeding schedule would raise an inference that the demotion was unlawfully based on the pregnancy-related medical condition of lactation.[52]

To continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk,[53] a nursing mother will typically need to breastfeed or express breast milk using a pump two or three times over the duration of an eight-hour workday.[54] An employee must have the same freedom to address such lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions. For example, if an employer allows employees to change their schedules or use sick leave for routine doctor appointments and to address non-incapacitating medical conditions,[55] then it must allow female employees to change their schedules or use sick leave for lactation-related needs under similar circumstances.

Finally, because only women lactate, a practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is facially sex-based. For

[52] Whether the demotion was ultimately found to be unlawful would depend on whether the employer asserted a legitimate, non-discriminatory reason for it and, if so, whether the evidence revealed that the asserted reason was pretextual.

[53] *Overcoming Breastfeeding Problems*, U.S. NAT'L LIBRARY OF MED., http://www.nlm.nih.gov/medlineplus/ency/article/002452.htm (last visited May 5, 2014); *see also,* DIANE WIESSINGER, THE WOMANLY ART OF BREASTFEEDING 385 (8th ed. 2010).

[54] *Breastfeeding,* U.S. DEP'T OF HEALTH & HUMAN SERVS., http://www.womenshealth.gov/breastfeeding/going-back-to-work/ (last visited May 5, 2014).

[55] The Commission disagrees with the conclusion in *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991) (table), that protection of pregnancy-related medical conditions is "limited to incapacitating conditions for which medical care or treatment is usual and normal." The PDA requires that a woman affected by pregnancy, childbirth, or related medical conditions be treated the same as other workers who are similar in their "ability or inability to work." Nothing limits protection to incapacitating pregnancy-related medical conditions. *See Notter v. North Hand Prot.*, 1996 WL 342008, at *5 (4th Cir. June 21, 1996) (unpublished) (concluding that PDA includes no requirement that "related medical condition" be "incapacitating," and therefore medical condition resulting from caesarian section delivery was covered under PDA even if it was not incapacitating).

example, it would violate Title VII for an employer to freely permit employees to use break time for personal reasons except to express breast milk.[56]

Aside from protections under Title VII, female employees who are breastfeeding also have rights under other laws, including a provision of the Patient Protection and Affordable Care Act that requires employers to provide reasonable break time and a private place for hourly employees who are breastfeeding to express milk.[57] For more information, see Section III C., *infra*.

[56] *See Houston Funding II, Ltd*., 717 F.3d at 430. The Commission disagrees with the decision in *Wallace v. Pyro Mining Co.,* 789 F. Supp. at 869, which, relying on *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), concluded that denial of personal leave for breastfeeding was not sex-based because it merely removed one situation from those for which leave would be granted. *Cf. Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 310-11 (S.D.N.Y. 1999) (discrimination based on breastfeeding is not cognizable as sex discrimination as there can be no corresponding subclass of men, i.e., men who breastfeed, who are treated more favorably). As explained in *Newport News Shipbuilding Co. v. EEOC*, 462 U.S. 669 (1983), when Congress passed the PDA, it rejected not only the holding in *Gilbert* but also the reasoning. Thus, denial of personal leave for breastfeeding discriminates on the basis of sex by limiting the availability of personal leave to women but not to men. *See also Allen v. Totes/Isotoner*, 915 N.E. 2d 622, 629 (Ohio 2009) (O'Connor, J., concurring) (concluding that gender discrimination claims involving lactation are cognizable under Ohio Fair Employment Practices Act and rejecting other courts' reliance on *Gilbert* in evaluating analogous claims under other statutes, given Ohio legislature's "clear and unambiguous" rejection of *Gilbert* analysis).

[57] Pub. L. No. 111-148, amending Section 7 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207.

c. Abortion

Title VII protects women from being fired for having an abortion or contemplating having an abortion.[58] However, Title VII makes clear that an employer that offers health insurance is not required to pay for coverage of abortion except where the life of the mother would be endangered if the fetus were carried to term or medical complications have arisen from an abortion.[59] The statute also makes clear that, although not required to do so, an employer is permitted to provide health insurance coverage for abortion.[60] Title VII would similarly prohibit adverse employment actions against an employee based on her decision not to have an abortion. For example, it would be unlawful for a manager to pressure an employee to have an abortion, or not to have an abortion, in order to retain her job, get better assignments, or stay on a path for advancement.[61]

B. Evaluating PDA-Covered Employment Decisions

Pregnancy discrimination may take the form of disparate treatment (pregnancy, childbirth, or a related medical condition is a motivating factor in an adverse employment action) or disparate impact (a neutral policy or practice has a significant negative impact on women affected by pregnancy, childbirth, or a related medical condition, and either the policy or practice is not job related and consistent with business necessity or there is a less discriminatory alternative and the employer has refused to adopt it).

1. Disparate Treatment

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[58] 42 U.S.C. § 2000e(k). *See Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 34 (1979) ("An employer cannot discriminate in its employment practices against a woman who has had or is contemplating having an abortion."); H.R. Conf. Rep. No. 95-1786, at 4 (1978), *as reprinted in* 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766 ("Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."); *see also, Doe v. C.A.R.S. Protection Plus, Inc*., 527 F.3d 358, 364 (3d Cir. 2008), *cert. denied*, 129 S.Ct. 576 (2008) (PDA prohibits employer from discriminating against female employee because she has exercised her right to have an abortion); *Turic v. Holland Hospitality, Inc*., 85 F.3d 1211, 1214 (6th Cir. 1996) (discharge of pregnant employee because she contemplated having abortion violated PDA).

[59] 42 U.S.C. § 2000e(k) ("This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.").

[60] *Id.*

[61] *Velez v. Novartis Pharmaceuticals Corp*., 244 F.R.D. 243 (S.D.N.Y. 2007) (declaration by a female employee that she was encouraged by a manager to get an abortion was anecdotal evidence supporting a class claim of pregnancy discrimination).

The PDA defines discrimination because of sex to include discrimination because of or on the basis of pregnancy. As with other claims of discrimination under Title VII, an employer will be found to have discriminated on the basis of pregnancy if an employee's pregnancy, childbirth, or related medical condition was all or part of the motivation for an employment decision. Intentional discrimination under the PDA can be proven using any of the types of evidence used in other sex discrimination cases. Discriminatory motive may be established directly, or it can be inferred from the surrounding facts and circumstances.

The PDA further provides that discrimination on the basis of pregnancy includes failure to treat women affected by pregnancy "the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work." Employer policies that do not facially discriminate on the basis of pregnancy may nonetheless violate this provision of the PDA where they impose significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification.[62]

As with any other charge, investigators faced with a charge alleging disparate treatment based on pregnancy, childbirth, or a related medical condition should examine the totality of evidence to determine whether there is reasonable cause to believe the particular challenged action was unlawfully discriminatory. All evidence should be examined in context, and the presence or absence of any particular kind of evidence is not dispositive.

Evidence indicating disparate treatment based on pregnancy, childbirth, or related medical conditions includes the following:

- An explicit policy[63] or a statement by a decision maker or someone who influenced the challenged decision that on its face demonstrates pregnancy bias and is linked to the challenged action.
    - In *Deneen v. Northwest Airlines, Inc.*,[64] a manager stated the plaintiff would not be rehired "because of her pregnancy complication." This statement directly proved pregnancy discrimination.[65]

[62] *See Young v. United Parcel Serv., Inc.*, --- U.S. ---, 135 S.Ct. 1338, 1354-55 (2015); *see also* Section I C., *infra*.

[63] *See, e.g., Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 197-98 (1991) (employer's policy barring all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure exceeding certain threshold, facially discriminated against women based on their capacity to become pregnant).

[64] 132 F.3d 431, 436 (8th Cir. 1998).

- Close timing between the challenged action and the employer's knowledge of the employee's pregnancy, childbirth, or related medical condition.

    - In *Asmo v. Keane, Inc.*,[66] a two-month period between the time the employer learned of the plaintiff's pregnancy and the time it decided to discharge her raised an inference that the plaintiff's pregnancy and discharge were causally linked.[67]

- More favorable treatment of employees of either sex[68] who are not affected by pregnancy, childbirth, or related medical conditions but are similar in their ability or inability to work.

    - In *Wallace v. Methodist Hospital System*,[69] the employer asserted that it discharged the plaintiff, a pregnant nurse, in part because she performed a medical procedure without a physician's knowledge or consent. The plaintiff produced

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[65] *See also Maldonado v. U.S. Bank*, 186 F.3d 759, 766 (7th Cir.1999) (company vice president's remark to plaintiff that she was being fired "due to her condition" on the day after the plaintiff informed the vice president of her pregnancy directly proved pregnancy discrimination); *Sheehan v. Donlen Corp*., 173 F.3d 1039, 1044-45 (7th Cir. 1999) (supervisor's comment when discharging pregnant plaintiff that the discharge would hopefully give her time at home with her children and his similar comment the following day proved discrimination despite manager's lack of specific statement that plaintiff's pregnancy was reason for discharge); *Flores v. Flying J., Inc*., 2010 WL 785969, at *3 (S.D. Ill. Mar. 4, 2010) (manager's alleged statement to plaintiff on her last day of employment that she could no longer work because she was pregnant raised material issue of fact as to whether discharge was due to pregnancy discrimination).

[66] 471 F.3d 588, 593-94 (6th Cir. 2006).

[67] *Compare with Gonzalez v. Biovail Corp. Int'l*, 356 F. Supp. 2d 68, 80 (D. Puerto Rico 2005) (temporal link between discharge and plaintiff's pregnancy was too far removed to establish claim where discharge occurred six months after plaintiff's parental leave ended). *See also Piraino v. Int'l Orientation Res., Inc*., 84 F.3d 270, 274 (7th Cir. 1996) (timing "suspicious" where less than two months after newly hired employee disclosed her pregnancy, defendant issued policy restricting maternity leave to employees who had worked at least one year); *Kalia v. Robert Bosch Corp*., 2008 WL 2858305, at *10 (E.D. Mich. Jul. 22, 2008) (unpublished) (plaintiff showed prima facie link between her pregnancy and discharge where supervisor started keeping written notes of issues with plaintiff the day after disclosure of pregnancy and discharge occurred the following month).

[68] *See EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 948 (10th Cir. 1992) (clear language of PDA requires comparison between pregnant and non-pregnant workers, not between men and women).

[69] 271 F.3d 212, 221 (5th Cir. 2001).

evidence that this reason was pretextual by showing that the employer merely reprimanded a non-pregnant worker for nearly identical misconduct.[70]

- Evidence casting doubt on the credibility of the employer's explanation for the challenged action.

    - In *Nelson v. Wittern Group*,[71] the defendant asserted it fired the plaintiff not because of her pregnancy but because overstaffing required elimination of her position. The court found a reasonable jury could conclude this reason was pretextual where there was evidence that the plaintiff and her co-workers had plenty of work to do, and the plaintiff's supervisor assured her prior to her parental leave that she would not need to worry about having a job when she got back. [72]

- Evidence that the employer violated or misapplied its own policy in undertaking the challenged action.

    - In *Cumpiano v. Banco Santander Puerto Rico*,[73] the court affirmed a finding of pregnancy discrimination where there was evidence that the employer did not enforce the conduct policy on which it relied to justify the discharge until the plaintiff became pregnant.[74]

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[70] The *Wallace* court nevertheless affirmed judgment as a matter of law for the employer because the plaintiff was unable to rebut the employer's other reason for the discharge, i.e., that she falsified medical records. *Id.* at 221-22; *see also Carreno v. DOJI, Inc.*, 668 F. Supp. 2d 1053, 1062 (M.D. Tenn. 2009) (plaintiff set forth prima facie case of pregnancy discrimination based in part on evidence that she was discharged while similarly situated non-pregnant co-workers were demoted and given opportunities to improve their behavior); *Brockman v. Avaya*, 545 F. Supp. 2d 1248, 1255-56 (M.D. Fla. 2008) (employer's motion for summary judgment denied because plaintiff, who was pregnant when she was discharged, was treated less favorably than non-pregnant female who replaced her).

[71] 140 F. Supp. 2d 1001 (S.D. Iowa 2001).

[72] *Id.* at 1008; *see also Zisumbo v. McLeodUSA Telecomm. Servs., Inc.*, 154 Fed. Appx. 715, 724 (10th Cir. 2005) (unpublished) (finding material issue of fact regarding employer's explanation for demoting pregnant worker where explanation it advanced in court was dramatically different than the one it asserted to EEOC); *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 403-04 (2d Cir. 1998) (evidence of pretext in discriminatory discharge claim under PDA included alleged statement by company president that an employer could easily get away with firing pregnant worker by stating the position was eliminated, president's alleged unfriendliness toward plaintiff following plaintiff's announcement of pregnancy, and plaintiff's discharge shortly before her scheduled return from maternity leave).

[73] 902 F.2d 148, 157-58 (1st Cir. 1990).

[74] *See also DeBoer v. Musashi Auto Parts*, 124 Fed. Appx. 387, 392-93 (6th Cir. 2005) (unpublished) (circumstantial evidence of pregnancy discrimination included employer's alleged failure to follow its disciplinary policy before demoting plaintiff).

- Evidence of an employer policy or practice that, although not facially discriminatory, significantly burdens pregnant employees and cannot be supported by a sufficiently strong justification.

    - In *Young v. United Parcel Serv., Inc.*,[75] the Court said that evidence of an employer policy or practice of providing light duty to a large percentage of nonpregnant employees while failing to provide light duty to a large percentage of pregnant workers might establish that the policy or practice significantly burdens pregnant employees. If the employer's reasons for its actions are not sufficiently strong to justify the burden, that will "give rise to an inference of intentional discrimination." [76]

a. Harassment

Title VII, as amended by the PDA, requires employers to provide a work environment free of harassment based on pregnancy, childbirth, or related medical conditions. An employer's failure to do so violates the statute. Liability can result from the conduct of a supervisor, co-workers, or non-employees such as customers or business partners over whom the employer has some control.[77]

Examples of pregnancy-based harassment include unwelcome and offensive jokes or name-calling, physical assaults or threats, intimidation, ridicule, insults, offensive objects or pictures, and interference with work performance motivated by pregnancy, childbirth, or related medical conditions such as breastfeeding. Such motivation is often evidenced by the content of the remarks but, even if pregnancy is not explicitly referenced, Title VII is implicated if there is other evidence that pregnancy motivated the conduct. Of course, as with harassment on any other basis, the conduct is unlawful only if the employee perceives it to be hostile or abusive and if it is sufficiently severe or pervasive to alter the terms and conditions of employment from the perspective of a reasonable person in the employee's position.[78]

Harassment must be analyzed on a case-by-case basis, by looking at all the circumstances in context. Relevant factors in evaluating whether harassment creates a work environment

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[75] --- U.S. ---, 135 S.Ct. 1338 (2015).

[76] *Id.* at 1354-55.

[77] For more detailed guidance on what constitutes unlawful harassment and when employers can be held liable for unlawful harassment, *see* EEOC Enforcement Guidance*: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html (last visited May 5, 2014); *Enforcement Guidance on Harris v. Forklift Sys., Inc.* (Mar, 8, 1994), *available at* http://www.eeoc.gov/policy/docs/harris.html (last visited May 5, 2014); EEOC *Policy Guidance on Current Issues of Sexual Harassment* (Mar. 19,1990), *available at* http://www.eeoc.gov/policy/docs/currentissues.html (last visited May 5, 2014); 29 C.F.R. § 1604.11.

[78] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Harassment may also violate Title VII if it results in a tangible employment action. To date, we are aware of no decision in which a court has found that pregnancy based harassment resulted in a tangible employment action.

sufficiently hostile to violate Title VII may include any of the following (no single factor is determinative):

- The frequency of the discriminatory conduct;
- The severity of the conduct;
- Whether the conduct was physically threatening or humiliating;
- Whether the conduct unreasonably interfered with the employee's work performance; and
- The context in which the conduct occurred, as well as any other relevant factor.

The more severe the harassment, the less pervasive it needs to be, and vice versa. Accordingly, unless the harassment is quite severe, a single incident or isolated incidents of offensive conduct or remarks generally do not create an unlawful hostile working environment. Pregnancy-based comments or other acts that are not sufficiently severe standing alone may become actionable when repeated, although there is no threshold number of harassing incidents that gives rise to liability.

EXAMPLE 7
Hostile Environment Harassment

Binah, a black woman from Nigeria, claims that when she was visibly pregnant with her second child, her supervisors increased her workload and shortened her deadlines so that she could not complete her assignments, ostracized her, repeatedly excluded her from meetings to which she should have been invited, reprimanded her for failing to show up for work due to snow when others were not reprimanded, and subjected her to profanity. Binah asserts the supervisors subjected her to this harassment because of her pregnancy status, race, and national origin. A violation of Title VII would be found if the evidence shows

that the actions were causally linked to Binah's pregnancy status, race, and/or national origin.[79]

b. Workers with Caregiving Responsibilities

After an employee's child is born, an employer might treat the employee less favorably not because of the prior pregnancy, but because of the worker's caregiving responsibilities. This situation would fall outside the parameters of the PDA. However, as explained in the Commission's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007),[80] although caregiver status is not a prohibited basis under the federal equal employment opportunity statutes, discrimination against workers with caregiving responsibilities may be actionable when an employer discriminates based on sex or another characteristic protected by federal law. For example, an employer violates Title VII by denying job opportunities to women -- but not men -- with young children, or by reassigning a woman recently returned from pregnancy-related medical leave or parental leave to less desirable work based on the assumption that, as a new mother, she will be less committed to her job. An employer also violates Title VII by denying a male caregiver leave to care for an infant but granting such leave to a female caregiver, or by discriminating against a Latina working mother based on stereotypes about working mothers and hostility towards Latinos generally.[81] An employer violates the ADA by treating a worker less favorably based on stereotypical

[79] These facts were drawn from the case of *Iweala v. Operational Technologies Services, Inc.*, 634 F. Supp. 2d 73 (D.D.C. 2009). The court in that case denied the employer's motion for summary judgment on the plaintiff's hostile environment claim. *See also Dantuono v. Davis Vision, Inc*., 2009 WL 5196151, at *9 (E.D.N.Y. Dec. 29, 2009) (unpublished) (finding material issue of fact as to hostile environment based on pregnancy where plaintiff alleged that manager, after learning of her intention to become pregnant, was "snippy" and "short" with her, "talked down" to her, "scolded" her, "bad mouthed" her to other executives, communicated through email rather than in person, and banished her from the manager's office when the manager was speaking with others); *Zisumbo,* 154 Fed. Appx. at 726-27 (overturning summary judgment for defendant on hostile environment claim where there was evidence that plaintiff's supervisor was increasingly rude and demeaning to her after learning of her pregnancy, frequently referred to her as "prego," told her to quit or "go on disability" if she could not handle the stress of her pregnancy, and demoted her for alleged performance problems despite her positive job evaluations); *Walsh v. National Computer Sys, Inc*., 332 F.3d 1150, 1160 (8th Cir. 2003) (affirming finding that plaintiff was subjected to hostile environment due to her potential to become pregnant where evidence showed supervisor's hostility towards plaintiff immediately following her maternity leave, supervisor made several discriminatory remarks regarding plaintiff's potential future pregnancy, and supervisor set more burdensome requirements for plaintiff as compared to co-workers).

[80] Detailed guidance on this subject is set forth in EEOC's Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, supra*, note 25.

[81] For further discussion of childcare leave issues, *see* Section I C.3., *infra*.

assumptions about the worker's ability to perform job duties satisfactorily because the worker also cares for a child with a disability.[82]

c. Bona Fide Occupational Qualification (BFOQ) Defense

In some instances, employers may claim that excluding pregnant or fertile women from certain jobs is lawful because non-pregnancy is a bona fide occupational qualification (BFOQ).[83] The defense, however, is an extremely narrow exception to the general prohibition of discrimination on the basis of sex. An employer who seeks to prove a BFOQ must show that pregnancy actually interferes with a female employee's ability to perform the job,[84] and the defense must be based on objective, verifiable skills required by the job rather than vague, subjective standards.[85]

Employers rarely have been able to establish a pregnancy-based BFOQ. The defense cannot be based on fears of danger to the employee or her fetus, fears of potential tort liability, assumptions and stereotypes about the employment characteristics of pregnant women such as their turnover rate, or customer preference.[86]

Without showing a BFOQ, an employer may not require that a pregnant worker take leave until her child is born or for a predetermined time thereafter, provided she is able to perform her job.[87]

2. Disparate Impact

Title VII is violated if a facially neutral policy has a disproportionate adverse effect on women affected by pregnancy, childbirth, or related medical conditions and the employer cannot

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[82] The ADA is violated in these circumstances because the statute prohibits discrimination based on the disability of an individual with whom an employee has a relationship or association, such as the employee's child. For more information, *see* EEOC's *Questions and Answers About the Association Provision of the ADA, available at* http://www.eeoc.gov/facts/association_ada.html (last visited May 5, 2014).

[83] 42 U.S.C. § 2000e-2(e).

[84] *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls*, 499 U.S. 187, 204 (1991).

[85] *Id.* at 201.

[86] *Johnson Controls*, 499 U.S. at 206-07 and 208-211 (no BFOQ based on risk to employee or fetus, nor on fear of tort liability); 29 C.F.R. § 1604.2(a) (1972) (no BFOQ based on stereotypes or customer preference). One court found that non-pregnancy was a BFOQ for unmarried employees at an organization whose mission included pregnancy prevention. *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987). However, the dissent to the order denying rehearing en banc argued that the court should have conducted "a more searching examination of the facts and circumstances . . . ." 840 F.2d at 584-86.

[87] *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987).

show that the policy is job related for the position in question and consistent with business necessity.[88] Proving disparate impact ordinarily requires a statistical showing that a specific employment practice has a discriminatory effect on workers in the protected group. However, statistical evidence might not be required if it could be shown that all or substantially all pregnant women would be negatively affected by the challenged policy.[89]

The employer can prove business necessity by showing that the requirement is "necessary to safe and efficient job performance."[90] If the employer makes this showing, a violation still can be found if there is a less discriminatory alternative that meets the business need and the employer refuses to adopt it.[91] The disparate impact provisions of Title VII have been used by pregnant plaintiffs to challenge, for example, weight lifting requirements,[92] light duty limitations,[93] and restrictive leave policies.[94]

EXAMPLE 8
Weight Lifting Requirement

Carol applied for a warehouse job. At the interview, the hiring official told her the job requirements and asked if she would be able to meet them. One of the requirements was the ability to lift up to 50 pounds. Carol said that she could not meet the lifting requirement because she was pregnant but otherwise would be able to meet the job requirements. She was not hired. The employer asserts that it did not select Carol because she could not meet the lifting requirement and produces evidence that it treats all applicants the same with regard to this hiring criterion. If the evidence shows that the lifting requirement disproportionately excludes pregnant applicants, the employer would

[88] 42 U.S.C. § 2000e-2(k). *See also* 42 U.S.C. § 2000e-2(a)(2); Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

[89] *Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 813 (5th Cir. 1996) (finding that if all or substantially all pregnant women would be advised by their obstetrician not to lift 150 pounds, then they would certainly be disproportionately affected by this job requirement and statistical evidence would be unnecessary).

[90] *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). By requiring an employer to show that a policy that has a discriminatory effect is job related and consistent with business necessity, Title VII ensures that the policy does not operate as an "artificial, arbitrary, and unnecessary barrier[]" to the employment of pregnant workers. *See Griggs*, 401 U.S. at 431.

[91] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (k)(1)(C).

[92] *Garcia*, 97 F.3d at 813.

[93] *Spivey v. Beverly Enters*., 196 F.3d 1309, 1314 (11th Cir. 1999). For a discussion of light duty, see Section I C.1., *infra*.

[94] *Abraham v. Graphic Arts. Int'l. Union*, 660 F.2d 811, 819 (D.C. Cir. 1981). For a discussion of restrictive leave policies, see Section I C.2., *infra*.

have to prove that the requirement is job related for the position in question and consistent with business necessity.[95]

C. Equal Access to Benefits

An employer is required under Title VII to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other employees similar in their ability or inability to work, whether by providing modified tasks, alternative assignments, or fringe benefits such as disability leave and leave without pay.[96] In addition to leave, the term "fringe benefits" includes, for example, medical benefits and retirement benefits.

1. Light Duty

a. Disparate Treatment

i. Evidence of Pregnancy-Related Animus

If there is direct evidence that pregnancy-related animus motivated an employer's decision to deny a pregnant employee light duty, it is not necessary for the employee to show that another employee was treated more favorably than she was.

EXAMPLE 9
Evidence of Pregnancy-Related Animus Motivating Denial of Light Duty

An employee requests light duty because of her pregnancy. The employee's supervisor is aware that the employee is pregnant and knows that there are light duty positions available that the pregnant employee could perform. Nevertheless, the supervisor denies the request, telling the employee that having a pregnant worker in the workplace is just too much of a liability for the company. It is not necessary in this instance that the pregnant worker produce evidence of a non-pregnant worker similar in his or her ability or inability to work who was given a light duty position.

ii. Proof of Discrimination Through *McDonnell Douglas* Burden-Shifting Framework

[95] The facts in this example were adapted from the case of *Garcia v. Woman's Hospital of Texas*, 97 F.3d 810 (5th Cir. 1996).

[96] 42 U.S.C. § 2000e(k).

A plaintiff need not resort to the burden shifting analysis set out in *McDonnell Douglas Corp. v. Green*[97] in order to establish an intentional violation of the PDA where there is direct evidence that pregnancy-related animus motivated the denial of light duty. Absent such evidence, however, a plaintiff must produce evidence that a similarly situated worker was treated differently or more favorably than the pregnant worker to establish a prima facie case of discrimination.

According to the Supreme Court's decision in *Young v. United Parcel Serv., Inc.*,[98] a PDA plaintiff may make out a prima facie case of discrimination by showing "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[99] As the Court noted, "[t]he burden of making this showing is not 'onerous.'"[100] For purposes of the prima facie case, the plaintiff does not need to point to an employee that is "similar in all but the protected ways."[101] For example, the plaintiff could satisfy her prima facie burden by identifying an employee who was similar in his or her ability or inability to work due to an impairment (e.g., an employee with a lifting restriction) and who was provided an accommodation that the pregnant employee sought.

Once the employee has established a prima facie case, the employer must articulate a legitimate, non-discriminatory reason for treating the pregnant worker differently than a non-pregnant worker similar in his or her ability or inability to work. "That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates."[102]

Even if an employer can assert a legitimate non-discriminatory reason for the different treatment, the pregnant worker may still show that the reason is pretextual. *Young* explains that

> [t]he plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.[103]

An employer's policy of accommodating a large percentage of nonpregnant employees with limitations while denying accommodations to a large percentage of pregnant employees

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[97] 411 U.S. 792, 802 (1973); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-256 (1981); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 504-510 (1983); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 (2003).

[98] --- U.S. ---, 135 S.Ct. 1338 (2015).

[99] *Id.* at 1354.

[100] *Id*. (citing *Texas Dep't of Community Affairs v. Burdine*, 430 U.S. 248, 253 (1981)).

[101] *Id*. (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

[102] *Id.*

[103] *Id.* at 1354.

may result in a significant burden on pregnant employees.[104] For example, in *Young* the Court noted that a policy of accommodating most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations would present a genuine issue of material fact.[105]

b. Disparate Impact

A policy of restricting light duty assignments may also have a disparate impact on pregnant workers.[106] If impact is established, the employer must prove that its policy was job related and consistent with business necessity.[107]

EXAMPLE 10
Light Duty Policy – Disparate Impact

Leslie, who works as a police officer, requested light duty when she was six months pregnant and was advised by her physician not to push or lift over 20 pounds. The request was not granted because the police department had a policy limiting light duty to employees injured on the job. Therefore, Leslie was required to use her accumulated leave for the period during which she could not perform her normal patrol duties. In her subsequent lawsuit, Leslie proved that since substantially all employees denied light duty were pregnant women, the police department's light duty policy had an adverse impact on pregnant officers. The police department claimed that state law required it to pay officers injured

[104] *See id.* at 1354-55.

[105] *Id.* at 1354.

[106] Courts have disagreed as to how disparate impact is established in the context of light duty policies. *Compare Germain*, 2009 WL 1514513, at *4 (to establish a prima facie case of disparate impact, pregnant women must be compared to all others similar in their ability or inability to work, without regard to the cause of the inability to work), *with Woodard v. Rest Haven Christian Servs.*, 2009 WL 703270, at *7 (N.D. Ill. Mar. 16, 2009) (unpublished) (because pregnancy discrimination is sex discrimination, proper comparison would appear to be between the percentage of females who have been disparately affected and the percentage of males, though even if the comparison is between pregnant women and males, plaintiff failed to establish evidence of disparate impact). The EEOC agrees with *Germain's* holding that the appropriate comparison is between pregnant women and all others similar in their ability or inability to work, and disagrees with *Woodard's* holding that all women or all pregnant women should be compared to all men. As the *Germain* court recognized (*Germain*, 2009 WL 1514513, at *4), the Supreme Court has held that, "[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated *with respect to their ability to work*." *Int'l Union v. Johnson Controls*, 499 U.S. 187, 204-05 (1991) (emphasis added). That statutory language applies to disparate impact as well as to disparate treatment claims.

[107] 42 U.S.C. § 2000e-2(k)(1)(A)(i). *See, e.g., Germain*, 2009 WL 1514513, at *4 (denying summary judgment based on genuine issue of material fact as to business necessity).

on the job regardless of whether they worked and that the light duty policy enabled taxpayers to receive some benefit from the salaries paid to those officers. However, there was evidence that an officer not injured on the job was assigned to light duty. This evidence contradicted the police department's claim that it truly had a business necessity for its policy.[108]

This policy may also be challenged on the ground that it impermissibly distinguishes between pregnant and non-pregnant workers who are similar in their ability or inability to work based on the cause of their limitations.

[108] These facts were adapted from the case of *Lehmuller v. Incorporated Village of Sag Harbor*, 944 F. Supp. 1087 (E.D.N.Y. 1996). The court in that case found material issues of fact precluding summary judgment. These facts could also be analyzed as disparate treatment discrimination.

2. Leave

a. Disparate Treatment[109]

An employer may not compel an employee to take leave because she is pregnant, as long as she is able to perform her job. Such an action violates Title VII even if the employer believes it is acting in the employee's best interest.[110]

EXAMPLE 11
Forced Leave

Lena worked for a janitorial service that provided after hours cleaning in office spaces. When she advised the site foreman that she was pregnant, the foreman told her that she would no longer be able to work since she could harm herself with the bending and pushing required in the daily tasks. She explained that she felt fine and that her doctor had not mentioned that she should change any of her current activities, including work, and did not indicate any particular concern that she would have to stop working. The foreman placed Lena immediately on unpaid leave for the duration of her pregnancy. Lena's leave was exhausted before she gave birth and she was ultimately discharged from her job. Lena's discharge was due to stereotypes about pregnancy.[111]

A policy requiring workers to take leave during pregnancy or excluding all pregnant or fertile women from a job is illegal except in the unlikely event that an employer can prove that

[109] This subsection addresses leave issues that arise under the PDA. For a discussion of the interplay between leave requirements under the PDA and the Family and Medical Leave Act, see Section III A., *infra*.

[110] *See Johnson Controls*, 499 U.S. at 200 ("The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination under § 703(a) ….").

[111] *See* Sharon Terman, *Written Testimony of Sharon Terman*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 9 (citing Stephanie Bornstein, *Poor, Pregnant and Fired: Caregiver Discrimination Against Low-Wage Workers* (UC Hastings Center for WorkLife Law 2011)).

non-pregnancy or non-fertility is a bona fide occupational qualification (BFOQ).[112] To establish a BFOQ, the employer must prove that the challenged qualification is "reasonably necessary to the normal operation of [the] particular business or enterprise."[113]

While employers may not force pregnant workers to take leave, they must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work.[114] Thus, an employer could not fire a pregnant employee for being absent if her absence fell within the provisions of the employer's sick leave policy.[115] An employer may not require employees disabled by pregnancy or related medical conditions to exhaust their sick leave before using other types of accrued leave if it does not impose the same requirement on employees who seek leave for other medical conditions. Similarly, an employer may not impose a shorter maximum period for pregnancy-related leave than for other types of medical or short-term disability leave. Title VII does not, however, require an employer to grant pregnancy-related medical leave or parental

[112] In the past, airlines justified mandatory maternity leave for flight attendants or mandatory transfer of them to ground positions at a certain stage of pregnancy based on evidence that side effects of pregnancy can impair a flight attendant's ability to perform emergency functions. *See, e.g., Levin v. Delta Air Lines, Inc*., 730 F.2d 994 (5th Cir. 1984) (mandatory leave was justified by business necessity as the policy was neither unrelated to airline safety concerns, nor a manifestly unreasonable response to these concerns); *Harriss v. Pan American World Airways, Inc*., 649 F.2d 670 (9th Cir. 1980) (mandatory leave was justified as a bona fide occupational qualification based on the safety risks posed by pregnancy). These decisions predated, and are inconsistent with, the Supreme Court's decision in *Johnson Controls*, 499 U.S. at 198-205. Moreover, the Commission agrees with the position taken by the Federal Aviation Administration (FAA) that, as long as a flight attendant can perform her duties, no particular stage of pregnancy renders her unfit. *See* Department of Transportation Federal Aviation Administration Memo (5/5/1980) and confirming e-mail (3/5/2010) (on file with EEOC, Office of Legal Counsel).

[113] 42 U.S.C. § 2000e-2(e)(1). For further discussion of the BFOQ defense, see Section I B.1.c., *supra*.

[114] *See, e.g., Orr v. City of Albuquerque*, 531 F.3d 1210, 1216 (10th Cir. 2008) (reversing summary judgment for defendants where plaintiffs presented evidence that they were required to use sick leave for their maternity leave while others seeking non-pregnancy FMLA leave were routinely allowed to use vacation or compensatory time); *Maddox v. Grandview Care Ctr., Inc*., 780 F.2d 987, 991 (11th Cir. 1986) (affirming finding in favor of plaintiff where employer's policy limited maternity leave to three months while leave of absence for "illness" could be granted for indefinite duration).

[115] *See Byrd v. Lakeshore Hosp*., 30 F.3d 1380, 1383 (11th Cir. 1994) (rejecting employer's argument that plaintiff, who was discharged partly due to her use of accumulated sick leave for pregnancy-related reasons, additionally was required to show that non-pregnant employees with similar records of medical absences were treated more favorably; the court noted that an employer is presumed to customarily follow its own sick leave policy and, if the employer commonly violates the policy, it would have the burden of proving the unusual scenario).

leave or to treat pregnancy-related absences more favorably than absences for other medical conditions.[116]

EXAMPLE 12
Pregnancy-Related Medical Leave – Disparate Treatment

Jill submitted a request for two months of leave due to pregnancy-related medical complications. The employer denied her request, although its sick leave policy permitted such leave to be granted. Jill's supervisor had recommended that the company deny the request, arguing that her absence would present staffing problems and noting that this request could turn into additional leave requests if her medical condition did not improve. Jill was unable to report to work due to her medical condition, and was discharged. The evidence shows that the alleged staffing problems were not significant and that the employer had approved requests by non-pregnant employees for extended sick leave under similar circumstances. Moreover, the employer's concern that Jill would likely request additional leave was based on a stereotypical assumption about pregnant workers.[117] This evidence is sufficient to establish that the employer's explanation for its difference in treatment of Jill and her non-pregnant co-workers is a pretext for pregnancy discrimination.[118]

EXAMPLE 13
Medical Leave Policy -- No Disparate Treatment

Michelle requests two months of leave due to pregnancy-related medical complications. Her employer denies the request because its policy providing paid medical leave requires employees to be employed at least 90 days to be eligible for such leave. Michelle had only been employed for 65 days at the time of her request. There was no evidence that non-pregnant employees with less than 90 days of service were provided

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[116] *See Stout v. Baxter Healthcare*, 282 F.3d 856, 859-60 (5th Cir. 2002) (discharge of plaintiff due to pregnancy-related absence did not violate PDA where there was no evidence she would have been treated differently if her absence was unrelated to pregnancy); *Armindo v. Padlocker*, 209 F.3d 1319, 1321 (11th Cir. 2000) (PDA does not require employer to treat pregnant employee who misses work more favorably than non-pregnant employee who misses work due to a different medical condition); *Marshall v. Am. Hosp. Ass'n*, 157 F.3d 520 (7th Cir. 1998) (upholding summary judgment for employer due to lack of evidence it fired her because of her pregnancy rather than her announced intention to take eight weeks of leave during busiest time of her first year on the job).

Note that although Title VII does not require pregnancy-related leave, the Family and Medical Leave Act does require covered employers to provide such leave under specified circumstances. *See* Section III A., *infra*.

[117] For further information about stereotypes and assumptions regarding pregnancy, *see* Section I A.1.b., *supra*.

[118] These facts were drawn from *EEOC v. Lutheran Family Services in the Carolinas*, 884 F. Supp. 1022 (E.D.N.C. 1994). The court in that case denied the defendant's motion for summary judgment.

medical leave. Because the leave decision was made in accordance with the eligibility rules, and not because of Michelle's pregnancy, there is no evidence of pregnancy discrimination under a disparate treatment analysis.[119] For the same reason, if the employer had granted leave under the Family and Medical Leave Act to another employee with a serious health condition, it would not be required to provide a pregnant worker with the same leave if she had not attained eligibility by working with the employer for the requisite number of hours during the preceding 12 months.[120]

b. Disparate Impact

A policy that restricts leave might disproportionately impact pregnant women. For example, a 10-day ceiling on sick leave and a policy denying sick leave during the first year of employment have been found to disparately impact pregnant women.[121]

If a claimant establishes that such a policy has a disparate impact, an employer must prove that the policy is job related and consistent with business necessity. An employer must

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[119] If Michelle's pregnancy-related complications are disabilities within the meaning of the ADA, the employer will have to consider whether granting the leave, in spite of its policy, or some other reasonable accommodation is possible without undue hardship. *See* Section II B., *infra*.

[120] See Section III A, *supra* for additional information on the Family and Medical Leave Act.

[121] *See Abraham v. Graphic Arts. Int'l. Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (10-day absolute ceiling on sick leave drastically affected female employees of childbearing age, an impact males would not encounter); *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 655 (N.D. Ill. 1991) (requiring employees to work for a full year before being eligible for sick leave had a disparate impact on pregnant workers and was not justified by business necessity); 29 C.F.R. § 1604.10(c) ("Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."); *cf. Maganuco v. Leyden Cmty. High Sch. Dist. 212*, 939 F.2d 440, 444 (7th Cir. 1991) (court noted that PDA claimant challenging leave policy on basis of disparate impact might have been able to establish that women disabled by pregnancy accumulated more sick days than men, or than women who have not experienced pregnancy-related disability, but plaintiff never offered such evidence).

The Commission disagrees with *Stout v. Baxter Healthcare*, 282 F.3d 856 (5th Cir. 2002), in which the court refused to find a prima facie case of disparate impact despite the plaintiff's showing that her employer's restrictive leave policy for probationary workers adversely affected all or substantially all pregnant women who gave birth during or near their probationary period, on the ground that "to [allow disparate impact challenges to leave policies] would be to transform the PDA into a guarantee of medical leave for pregnant employees." The Commission believes that the Fifth Circuit erroneously conflated the issue of whether the plaintiff has made out a prima facie case with the ultimate issue of whether the policy is unlawful. As noted, an employer is not required to eliminate or modify the policy if it is job related and consistent with business necessity and the plaintiff fails to present an equally effective less discriminatory alternative. *See Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 813 (5th Cir. 1996) ("[t]he PDA does not mandate preferential treatment for pregnant women"; the plaintiff loses if the employer can justify the policy).

have supporting evidence to justify its policy. Business necessity cannot be established by a mere articulation of reasons. Thus, one court refused to find business necessity where the employer argued that it provided no leave to employees who had worked less than one year because it had a high turnover rate and wanted to allow leave only to those who had demonstrated "staying power," but provided no supporting evidence.[122] The court also found that an alternative policy denying leave for a shorter time period might have served the same business goal, since the evidence showed that most of the first year turnover occurred during the first three months of employment.[123]

3. Parental Leave

For purposes of determining Title VII's requirements, employers should carefully distinguish between leave related to any physical limitations imposed by pregnancy or childbirth (described in this document as pregnancy-related medical leave) and leave for purposes of bonding with a child and/or providing care for a child (described in this document as parental leave).

Leave related to pregnancy, childbirth, or related medical conditions can be limited to women affected by those conditions.[124] However, parental leave must be provided to similarly situated men and women on the same terms.[125] If, for example, an employer extends leave to new mothers beyond the period of recuperation from childbirth (e.g. to provide the mothers time to bond with and/or care for the baby), it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose.

EXAMPLE 14
Pregnancy-Related Medical Leave and Parental Leave Policy - No Disparate Treatment

An employer offers pregnant employees up to 10 weeks of paid pregnancy-related medical leave for pregnancy and childbirth as part of its short-term disability insurance. The employer also offers new parents, whether male or female, six weeks of parental leave. A male employee

[122] *Warshawsky*, 768 F. Supp. at 655.

[123] *Id.*

[124] *See California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987) (The state could require employers to provide up to four months of medical leave to pregnant women where "[t]he statute is narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions."); *Johnson v. Univ. of Iowa*, 431 F.3d 325, 328 (8th Cir. 2005) ("If the leave given to biological mothers is granted due to the physical trauma they sustain giving birth, then it is conferred for a valid reason wholly separate from gender.").

[125] *See Johnson*, 431 F.3d at 328 (if leave given to mothers is designed to provide time to care for and bond with newborn, "then there is no legitimate reason for biological fathers to be denied the same benefit"); EEOC Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, *supra* note 25. Although Title VII does not require an employer to provide child care leave if it provides no leave for other family obligations, the Family and Medical Leave Act requires covered employers to provide such leave. *See* Section III A., *infra*.

alleges that this policy is discriminatory as it gives up to 16 weeks of leave to women and only six weeks of leave to men. The employer's policy does not violate Title VII. Women and men both receive six weeks of parental leave, and women who give birth receive up to an additional 10 weeks of leave for recovery from pregnancy and childbirth under the short-term disability plan.

EXAMPLE 15
Discriminatory Parental Leave Policy

In addition to providing medical leave for women with pregnancy-related conditions and for new mothers to recover from childbirth, an employer provides six additional months of paid leave for new mothers to bond with and care for their new baby. The employer does not provide any paid parental leave for fathers. The employer's policy violates Title VII because it does not provide paid parental leave on equal terms to women and men.

4. Health Insurance

a. Generally

As with other fringe benefits, employers who offer employees health insurance must include coverage of pregnancy, childbirth, and related medical conditions. [126]

Employers who have health insurance benefit plans must apply the same terms and conditions for pregnancy-related costs as for medical costs unrelated to pregnancy.[127] For example:

- If the plan covers pre-existing conditions, then it must cover the costs of an insured employee's pre-existing pregnancy.[128]

[126] The legislative history of the PDA makes clear that the statute "in no way requires the institution of any new programs where none currently exist." H.R.Rep. No. 95-948, p. 4 (1978), Leg. Hist. 150, U.S. Code Cong. & Admin. News 1978, pp. 4749, 4752. The application of the non-discrimination principle to infertility and contraception is discussed at Section I A.3.c. and I A.3.d., *supra*.

[127] 29 C.F.R. § 1604.10(b) ("Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment.").

[128] The Patient Protection and Affordable Care Act (also known as Health Care Reform), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code) contains provisions regarding insurance coverage of pre-existing conditions. Effective January 1, 2014, insurers can no longer exclude coverage for treatments based on such conditions.

- If the plan covers a particular percentage of the medical costs incurred for non-pregnancy-related conditions, it must cover the same percentage of recoverable costs for pregnancy-related conditions.

- If the medical benefits are subject to a deductible, pregnancy-related medical costs may not be subject to a higher deductible.

- The plan may not impose limitations applicable only to pregnancy-related medical expenses for any services, such as doctor's office visits, laboratory tests, x-rays, ambulance service, or recovery room use.

- The plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy.[129]

The following principles apply to pregnancy-related medical coverage of employees and their dependents:

- Employers must provide the same level of medical coverage to female employees and their dependents as they provide to male employees and their dependents.

- Employers need not provide the same level of medical coverage to their employees' wives as they provide to their female employees.

b. Insurance Coverage of Abortion

The PDA makes clear that if an employer provides health insurance benefits, it is not required to pay for health insurance coverage of abortion except where the life of the mother would be endangered if the fetus were carried to term. If complications arise during the course of an abortion, the health insurance plan is required to pay the costs attributable to those complications.[130]

The statute also makes clear that an employer is not precluded from providing abortion benefits directly or through a collective bargaining agreement. If an employer decides to cover the costs of abortion, it must do so in the same manner and to the same degree as it covers other medical conditions.[131]

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[129] For further discussion of discrimination based on use of contraceptives, *see* Section I A.3.d., *supra*; *see also supra* note 39.

[130] *See Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 36 (1979).

[131] 42 U.S.C. § 2000e(k); *see also Questions and Answers on the Pregnancy Discrimination Act*, 29 C.F.R. pt. 1604 app., Question 37 (1979).

5. Retirement Benefits and Seniority

Employers must allow women who are on pregnancy-related medical leave to accrue seniority in the same way as those who are on leave for reasons unrelated to pregnancy. Therefore, if an employer allows employees who take medical leave to retain their accumulated seniority and to accrue additional service credit during their leaves, the employer must treat women on pregnancy-related medical leave the same way. Similarly, employers must treat pregnancy-related medical leave the same as other medical leave in calculating the years of service that will be credited in evaluating an employee's eligibility for a pension or for early retirement.[132]

II. AMERICANS WITH DISABILITIES ACT[133]

Title I of the ADA protects individuals from employment discrimination on the basis of disability. Disability discrimination occurs when a covered employer or other entity treats an applicant or employee less favorably because she has a disability or a history of a disability, or because she is believed to have a physical or mental impairment.[134] Discrimination under the ADA also includes the application of qualification standards, tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class or individuals with disabilities, unless the standard, test, or other selection criterion is shown to be job related for the position in question and consistent with business necessity.[135] The ADA forbids discrimination in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, and any other term or condition of employment. Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is limited.[136] The law also requires that an employer provide reasonable accommodation to an employee or job applicant with a disability unless doing so would cause undue hardship, meaning significant difficulty or expense for the employer.[137]

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[132] However, prior to the passage of the PDA, it did not violate Title VII for an employer's seniority system to allow women on pregnancy-related medical leave to earn less seniority credit than workers on other forms of short-term medical leave. Because the PDA is not retroactive, an employer is not required to adjust seniority credits for pregnancy-related medical leave that was taken prior to the effective date of the PDA (April 29, 1979), even if pregnancy-related medical leave was treated less favorably than other forms of short-term medical leave. *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009).

[133] The principles set forth in this section also apply to claims arising under Section 501 of the Rehabilitation Act. 29 U.S.C. § 791.

[134] Under the ADA, an "employer" includes a private sector employer, and a state or local government employer, with 15 or more employees. 42 U.S.C. § 12111(5)(A). The term "employer" in this document refers to any entity covered by the ADA including labor organizations and employment agencies.

[135] *See* 42 U.S.C. §§ 12112(b)(6), 12113(a); 29 C.F.R. § 1630.10.

[136] 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.13.

[137] 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9.

A. Disability Status

The ADA defines the term "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having a disability.[138] Congress made clear in the ADA Amendments Act of 2008 (ADAAA) that the question of whether an individual's impairment is a covered disability should not demand extensive analysis and that the definition of disability should be construed in favor of broad coverage. The determination of whether an individual has a disability must be made without regard to the ameliorative effects of mitigating measures, such as medication or treatment that lessens or eliminates the effects of an impairment.[139] Under the ADAAA, there is no requirement that an impairment last a particular length of time to be considered substantially limiting.[140] In addition to major life activities that may be affected by impairments related to pregnancy, such as walking, standing, and lifting, the ADAAA includes the operation of major bodily functions as major life activities. Major bodily functions include the operation of the neurological, musculoskeletal, endocrine, and reproductive systems, and the operation of an individual organ within a body system.

Prior to the enactment of the ADAAA, some courts held that medical conditions related to pregnancy generally were not impairments within the meaning of the ADA, and so could not be disabilities.[141] Although pregnancy itself is not an impairment within the meaning of the ADA,[142] and thus is never on its own a disability, [143] some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended.

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[138] 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2(g).

[139] Pub. L. No. 110-325, §§ 2(b)(5), 4(a), 122 Stat. 3553 (2008); 29 C.F.R. §§ 1630.1(c)(4), 1630.2(j)(1)(vi). Plaintiffs seeking to show that their pregnancy-related impairments are covered disabilities should provide specific evidence of symptoms and impairments and the manner in which they are substantially limiting.

[140] 29 C.F.R. § 1630.2(j)(1)(ix).

[141] *See, e.g., Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002), *aff'd*, 340 F.3d 543 (8th Cir. 2003) (periodic nausea, vomiting, dizziness, severe headaches, and fatigue were not disabilities within the meaning of the ADA because they are "part and parcel of a normal pregnancy"); *Gudenkauf v. Stauffer Commc'ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996) (morning sickness, stress, nausea, back pain, swelling, and headaches or physiological changes related to a pregnancy are not impairments unless they exceed normal ranges or are attributable to a disorder); *Tsetseranos v. Tech Prototype, Inc.*, 893 F. Supp. 109, 119 (D.N.H. 1995) ("pregnancy and related medical conditions do not, without unusual circumstances, constitute a 'physical or mental impairment' under the ADA").

[142] 29 C.F.R. pt. 1630 app. § 1630.2(h).

[143] *See, e.g., Walker v. Fred Nesbit Distrib. Co.*, 331 F. Supp. 2d 780, 790 (S.D. Iowa 2004) (routine pregnancy is not a disability under ADA); *Gover v. Speedway Super America, LLC*, 254 F. Supp. 2d 695, 705 (S.D. Ohio 2002) (same).

An impairment's cause is not relevant in determining whether the impairment is a disability.[144] Moreover, under the amended ADA, it is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary.[145]

Some impairments of the reproductive system may make a pregnancy more difficult and thus necessitate certain physical restrictions to enable a full term pregnancy, or may result in limitations following childbirth. Disorders of the uterus and cervix may be causes of these complications.[146] For instance, someone with a diagnosis of cervical insufficiency may require bed rest during pregnancy. One court has concluded that multiple physiological impairments of the reproductive system requiring an employee to give birth by cesarean section may be disabilities for which an employee was entitled to a reasonable accommodation.[147]

Impairments involving other major bodily functions can also result in pregnancy-related limitations. Some examples include pregnancy-related anemia (affecting normal cell growth); pregnancy-related sciatica (affecting musculoskeletal function); pregnancy-related carpal tunnel syndrome (affecting neurological function); gestational diabetes (affecting endocrine function); nausea that can cause severe dehydration (affecting digestive or genitourinary function); abnormal heart rhythms that may require treatment (affecting cardiovascular function); swelling, especially in the legs, due to limited circulation (affecting circulatory function); and depression (affecting brain function). [148]

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[144] The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. 29 C.F.R. pt. 1630 app. §1630.2(j). The ADA includes a functional rather than a medical definition of disability. 136 CONG. REC. H1920 H1921 (daily ed. May 1, 1990) (Statement of Rep. Bartlett).

[145] *See* 29 C.F.R. § 1630.2(j)(ix) (impairments lasting fewer than six months can be disabilities).

[146] *See Insufficient Cervix*, U.S. NAT'L LIBRARY OF MED., http://www.nlm.nih.gov/medlineplus/ency/patientinstructions/000595.htm (last visited April 30, 2014) (general information about insufficient cervix). Uterine fibroids (non-cancerous tumors that grow in and around the wall of the uterus) may cause severe localized abdominal pain, carry an increased of risk of miscarriage, or cause preterm or breech birth and may necessitate a cesarean delivery. *See* Hee Joong Lee, MD et al., *Contemporary Management of Fibroids in Pregnancy*, REVIEWS IN OBSTETRICS & GYNECOLOGY (2010), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2876319/ (last visited Apr. 30, 2014).

[147] *Price v. UTi, U.S., Inc*., 2013 WL 798014, at *2 (E.D. Mo. Mar. 5, 2013), *reconsideration denied in Price v. UTi, U.S., Inc*., 2013 WL 1411547 (E.D. Mo. Apr. 08, 2013) (denying summary judgment to employer who terminated employee three weeks after she gave birth by cesarean section).

[148] Nausea causing severe vomiting resulting in dehydration may be a condition known as hyperemesis gravidarum. Excessive swelling due to fluid retention, edema, may require rest and elevation of legs. Abnormal heart rhythms may require further monitoring. *See Pregnancy*, U.S. DEP'T OF HEALTH & HUMAN SERVS., http://womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.html (last visited Apr. 30, 2014).

In applying the ADA as amended, a number of courts have concluded that pregnancy-related impairments may be disabilities within the meaning of the ADA, including: pelvic inflammation causing severe pain and difficulty walking and resulting in a doctor's recommendation that an employee have certain work restrictions and take early pregnancy-related medical leave;[149] symphysis pubis dysfunction causing post-partum complications and requiring physical therapy;[150] and complications related to a pregnancy in a breech presentation that required visits to the emergency room and bed rest.[151] In another case, the court concluded that there was a triable issue on the question of whether the plaintiff had a disability within the meaning of the amended ADA, where her doctor characterized the pregnancy as "high risk" and recommended that the plaintiff limit her work hours and not lift heavy objects, even though the doctor did not identify a specific impairment.[152]

EXAMPLE 16
Pregnancy-Related Impairment Constitutes ADA Disability Because It Substantially Limits a Major Life Activity

In Amy's fifth month of pregnancy, she developed high blood pressure, severe headaches, abdominal pain, nausea, and dizziness. Her doctor diagnosed her as having preeclampsia and ordered her to remain on bed rest through the remainder of her pregnancy. This evidence indicates that Amy had a disability within the meaning of the ADA, since she had

[149] *McKellips v. Franciscan Health Sys.*, 2013 WL 1991103, at *4 (W.D. Wash. May 13, 2013) (plaintiff's allegations that she suffered severe pelvic inflammation and immobilizing pain that necessitated workplace adjustments to reduce walking and early pregnancy-related medical leave were sufficient to allow her to amend her complaint to include an ADA claim).

[150] *Nayak v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 2013 WL 121838, at *3 (S.D. Ind. Jan. 9, 2013) (denying defendant's motion to dismiss plaintiff's ADA claim).

[151] *Mayorga v. Alorica, Inc.*, 2012 WL 3043021, at *6 (S.D. Fla. July 25, 2012) (unpublished) (denying defendant's motion to dismiss where plaintiff claimed impairments related to her pregnancy included premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, and extreme headaches). Several recent district court decisions that have concluded that impairments related to pregnancy are not disabilities have been based either on a lack of any facts describing how the impairment limited major life activities, or on the incorrect application of the more stringent requirements for establishing that an impairment constitutes a disability that existed prior to the effective date of the ADA Amendments Act (ADAAA). *See Wanamaker v. Westport Board of Education*, 899 F. Supp. 2d 193 (D. Conn. 2012) (plaintiff did not allege facts that would demonstrate that the spinal injury, transverse myelitis, she suffered in childbirth substantially limited a major life activity); *Selkow v. 7-Eleven, Inc.*, 2012 WL 2054872 (M.D. Fla. June 7, 2012) (without acknowledging the ADAAA, which applied at the time of plaintiff's termination, the court held that plaintiff presented no evidence to withstand summary judgment on whether her weakened back constituted the type of "severe complication" related to pregnancy required to establish a disability); *Sam-Sekur v. Whitmore Group, LTD*, 2012 WL 2244325 (E.D.N.Y. June 15, 2012) (relying on case law pre-dating the ADAAA, the court held that "temporary impairments, pregnancies, and conditions arising from pregnancy are not typically disabilities," but allowed the *pro se* plaintiff to amend her complaint to allege facts concerning the duration of her chronic cholecystitis, which required removal of her gall bladder, and how the condition was linked to pregnancy).

[152] *Heatherly v. Portillo's Hot Dogs, Inc.*, 2013 WL 3790909, at *6 (N.D. Ill. July 19, 2013).

a physiological disorder that substantially limited her ability to perform major life activities such as standing, sitting, and walking, as well as major bodily functions such as functions of the cardiovascular and circulatory systems. The effects that bed rest may have had on alleviating the symptoms of Amy's preeclampsia may not be considered, since the ADA Amendments Act requires that the determination of whether someone has a disability be made without regard to mitigating measures.

An employer discriminates against a pregnant worker on the basis of her record of a disability when it takes an adverse action against her because of a past substantially limiting impairment.

EXAMPLE 17
Discrimination Against a Job Applicant Because of Her Record of a Disability

A county police department offers an applicant a job as a police officer. It then asks her to complete a post-offer medical questionnaire and take a medical examination.[153] On the questionnaire, the applicant indicates that she had gestational diabetes during her pregnancy three years ago, but the condition resolved itself following the birth of her child. The police department will violate the ADA if it withdraws the job offer based on this past history of gestational diabetes when the applicant has no current impairment that would affect her ability to perform the job safely.

Finally, an employer regards a pregnant employee as having a disability if it takes a prohibited action against her (e.g., termination or reassignment to a less desirable position) based on an actual or perceived impairment that is not transitory (lasting or expected to last for six months or less) and minor.[154]

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[153] Prior to an offer of employment, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job. After an applicant is given a conditional offer, but before she starts work, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. After employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job related and consistent with business necessity. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. 42 U.S.C. § 12112(d)(4); 29 C.F.R. §§ 1630.13, 1630.14; EEOC Enforcement Guidance: *Preemployment Disability-Related Questions and Medical Examinations* (Oct. 10, 1995), *available at* http://www.eeoc.gov/policy/docs/preemp.html (last visited May 5, 2014); *see also EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, at question 1, (July 27, 2000), *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html (last visited May 5, 2014).

[154] 29 C.F.R. § 1630.2(l)(1).

EXAMPLE 18
Pregnant Employee Regarded as Having a Disability

An employer reassigns a welder who is pregnant to a job in its factory's tool room, a job that requires her to keep track of tools that are checked out for use and returned at the end of the day, and to complete paperwork for any equipment or tools that need to be repaired. The job pays considerably less than the welding job and is considered by most employees to be "make work." The manager who made the reassignment did so because he believed the employee was experiencing pregnancy-related "complications" that "could very possibly result in a miscarriage" if the employee was allowed to continue working in her job as a welder. The employee was not experiencing pregnancy-related complications, and her doctor said she could have continued to work as a welder. The employer has regarded the employee as having a disability, because it took a prohibited action (reassigning her to a less desirable job at less pay) based on its belief that she had an impairment that was not both transitory and minor. The employer also is liable for discrimination because there is no evidence that the employee was unable to do the essential functions of her welder position or that she would have posed a direct threat to her own or others' safety in that job. Since the evidence indicated that the employee was able to perform her job, the employer is also liable under the PDA.[155]

B. Reasonable Accommodation

A pregnant employee may be entitled to reasonable accommodation under the ADA for limitations resulting from pregnancy-related conditions that constitute a disability or for limitations resulting from the interaction of the pregnancy with an underlying impairment.[156] A reasonable accommodation is a change in the workplace or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job's essential functions, or enjoy equal benefits and privileges of employment.[157] An employer may only deny a reasonable accommodation to an employee with a disability if it would result in an undue

[155] These facts were drawn from the case of *Spees v. James Marine, Inc.*, 617 F.3d 380, 398 (6th Cir. 2010). The court's decision that the employer regarded the pregnant employee as having a disability because she had complications with previous pregnancies was made under the more stringent "regarded as" standard in place prior to the ADAAA.

[156] *See* Job Accommodation Network, "Accommodation Ideas for Pregnancy," *available at* https://askjan.org/soar/other/preg.html (last visited May 5, 2014).

[157] 29 C.F.R. § 1630.2(o); s*ee* EEOC Revised Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (Oct. 17, 2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html (last visited May 5, 2014).

hardship.[158] An undue hardship is defined as an action requiring significant difficulty or expense.[159]

EXAMPLE 19
Conditions Resulting from Interaction of Pregnancy and an Underlying Disability

Jennifer had been successfully managing a neurological disability with medication for several years. Without the medication, Jennifer experienced severe fatigue and had difficulty completing a full work day. However, the combination of medications she had been prescribed allowed her to work with rest during the breaks scheduled for all employees. When she became pregnant, her physician took her off some of these drugs due to risks they posed during pregnancy. Adequate substitutes were not available. She began to experience increased fatigue and found that rest during short breaks in the day and lunch time was insufficient. Jennifer requested that she be allowed more frequent breaks during the day to alleviate her fatigue. Absent undue hardship, the employer would have to grant such an accommodation.

Examples of reasonable accommodations that may be necessary for a disability caused by pregnancy-related impairments include, but are not limited to, the following:[160]

- Redistributing marginal functions that the employee is unable to perform due to the disability. Marginal functions are the non-fundamental (or non-essential) job duties.

  Example: The manager of an organic market is given a 20-pound lifting restriction for the latter half of her pregnancy due to pregnancy-related sciatica. Usually when a delivery truck arrives with the daily shipment, one of the stockers unloads and takes the produce into the store. The manager may need to unload the produce from the truck if the stocker arrives late or is absent, which may occur two to three times a month. Since one of the cashiers is available to unload merchandise during the period of the manager's lifting restrictions, the employer is able to remove the marginal function of unloading merchandise from the manager's job duties.

- Altering how an essential or marginal job function is performed (e.g., modifying standing, climbing, lifting, or bending requirements).

  Example: A warehouse manager who developed pregnancy-related carpal tunnel syndrome was advised by her physician that she should avoid working at a computer key

[158] 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9.

[159] *See* 29 C.F.R. § 1630.2(p). Factors that may be considered in determining whether an accommodation would impose an undue hardship include the nature and cost of the accommodation, the overall financial resources of the facility or entity, and the type of operation of the entity.

[160] *See supra* note 157.

board. She is responsible for maintaining the inventory records at the site and completing a weekly summary report. The regional manager approved a plan whereby at the end of the week, the employee's assistants input the data required for the summary report into the computer based on the employee's dictated notes, with the employee ensuring that the entries are accurate.

- Modification of workplace policies.

  Example: A clerk responsible for receiving and filing construction plans for development proposals was diagnosed with a pregnancy-related kidney condition that required that she maintain a regular intake of water throughout the work day. She was prohibited from having any liquids at her work station due to the risk of spillage and damage to the documents. Her manager arranged for her to have a table placed just outside the file room where she could easily access water.

- Purchasing or modifying equipment and devices.

  Example: A postal clerk was required to stand at a counter to serve customers for most of her eight-hour shift. During her pregnancy she developed severe pelvic pain caused by relaxed joints that required her to be seated most of the time due to instability. Her manager provided her with a stool that allowed her to work comfortably at the height of the counter.

- Modified work schedules.

  Example: An employee with depression found that her condition worsened during her pregnancy because she was taken off her regular medication. Her physician provided documentation indicating that her symptoms could be alleviated by a counseling session each week. Since appointments for the counseling sessions were available only during the day, the employee requested that she be able to work an hour later in the afternoon to cover the time. The manager concluded that, because the schedule change would not adversely affect the employee's ability to meet with customers and clients and that some of the employee's duties, such as sending out shipments and preparing reports, could be done later in the day, the accommodation would not be an undue hardship.

- Granting leave (which may be unpaid leave if the employee does not have accrued paid leave) in addition to what an employer would normally provide under a sick leave policy for reasons related to the disability.

  Example: An account representative at a bank was diagnosed during her pregnancy with a cervical abnormality and was ordered by her physician to remain on bed rest until she delivered the baby. The employee has not worked at the bank long enough to qualify for leave under the Family and Medical Leave Act, and, although she has accrued some sick leave under the employer's policy, it is insufficient to cover the period of her recommended bed rest. The company determines that it would not be an undue hardship to grant her request for sick leave beyond the terms of its unpaid sick leave policy.

- Temporary assignment to a light duty position.[161]

  Example: An employee at a garden shop was assigned duties such as watering, pushing carts, and lifting small pots from carts to bins. Her physician placed her on lifting restrictions and provided her with documentation that she should not lift or push more than 20 pounds due to her pregnancy-related pelvic girdle pain, which is caused by hormonal changes to pelvic joints. The manager approved her for a light duty position at the cash register.

III. OTHER REQUIREMENTS AFFECTING PREGNANT WORKERS

A. Family and Medical Leave Act (FMLA)

Although Title VII does not require an employer to provide pregnancy-related or child care leave if it provides no leave for other temporary illness or family obligations, the FMLA does require covered employers to provide such leave.[162] The FMLA covers private employers with 50 or more employees in 20 or more workweeks during the current or preceding calendar year, as well as federal, state, and local governments.[163]

Under the FMLA, an eligible employee[164] may take up to 12 workweeks of leave during any 12-month period for one or more of the following reasons:

(1) the birth and care of the employee's newborn child;

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[161] *See EEOC Enforcement Guidance: Workers' Compensation and the ADA*, at Q&A 28, (Sept.10, 1996), available at http://www.eeoc.gov/policy/docs/workcomp.html (last visited May 5, 2014). For further discussion of light duty issues, see Section I C.1., *supra*.

[162] The Department of Labor (DOL) enforces the FMLA. Recently revised DOL regulations under the FMLA can be found at 29 C.F.R. Part 825. Additional information about the interaction between the FMLA and the laws enforced by the EEOC can be found in the EEOC's *Fact Sheet on the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964, available at* http://www.eeoc.gov/policy/docs/fmlaada.html (last visited May 5, 2014).

[163] In comparison, Title VII covers employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred. Title VII also covers governmental entities.

[164] Employees are "eligible" for FMLA leave if they: (1) have worked for a covered employer for at least 12 months; (2) had at least 1,250 hours of service during the 12 months immediately preceding the start of leave; and (3) work at a location where the employer employs 50 or more employees within 75 miles. 29 C.F.R. § 825.110. Special hours of service requirements apply to flight crew members. Airline Flight Crew Technical Corrections Act, Pub. L. No. 111-119, 123 Stat. 3476 (codified as amended at 29 U.S.C. § 2611(2)(D)).

(2) the placement of a child with the employee through adoption or foster care;

(3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; or

(4) to take medical leave when the employee is unable to work because of a serious health condition.[165]

The FMLA also specifies that:

- an employer must maintain the employee's existing level of coverage under a group health plan while the employee is on FMLA leave as if the employee had not taken leave;

- after FMLA leave, the employer must restore the employee to the employee's original job or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment;

- spouses employed by the same employer are not entitled to more than 12 weeks of family leave between them for the birth and care of a healthy newborn child, placement of a healthy child for adoption or foster care, or to care for a parent who has a serious health condition; and

- an employer may not interfere with, restrain, or deny the exercise of any right provided by FMLA; nor may it discriminate against any individual for opposing any practice prohibited by the FMLA, or being involved in any FMLA related proceeding.

B. Executive Order 13152 Prohibiting Discrimination Based on Status as Parent

Executive Order 13152[166] prohibits discrimination in federal employment based on an individual's status as a parent. "Status as a parent" refers to the status of an individual who, with respect to someone under age 18 or someone 18 or older who is incapable of self-care due to a physical or mental disability, is:

(1) a biological parent;

(2) an adoptive parent;

(3) a foster parent;

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[165] The FMLA also provides military family leave entitlements to employees with family members in the armed forces in circumstances not likely to be relevant to pregnancy-related leave, or leave to care for a newborn child, a newly adopted child, or a child newly placed in foster care.

[166] 65 Fed. Reg. 26115 (May 4, 2000). The Office of Personnel Management is charged with issuing guidance pursuant to this order.

(4) a stepparent;

(5) a custodian of a legal ward;

(6) in loco parentis over such an individual; or

(7) actively seeking legal custody or adoption of such an individual.

C. Reasonable Break Time for Nursing Mothers[167]

Section 4207 of the Patient Protection and Affordable Care Act[168] provides the following: [169]

- Employers must provide "reasonable break time" for breastfeeding employees to express breast milk until the child's first birthday.
- Employers must provide a private place, other than a bathroom, for this purpose.
- An employer need not pay an employee for any work time spent for this purpose. [170]
- Hourly employees who are not exempt from the overtime pay requirements of the Fair Labor Standards Act are entitled to breaks to express milk.
- Employers with fewer than 50 employees are not subject to these requirements if the requirements "would impose an undue hardship by causing significant difficulty or expense when considered in relation to the size, nature, or structure of the employer's business."
- Nothing in this law preempts a state law that provides greater protections to employees.[171]

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[167] For a discussion of discrimination based on lactation and breastfeeding, *see* Section I A.4.b., *supra*.

[168] Pub. L. No. 111-148, amending Section 7 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 207. Because the Affordable Care Act provides no specific effective date, the new break time law for nursing mothers was effective on the date of enactment – March 23, 2010.

[169] DOL has published a Fact Sheet providing general information on the break time requirement for nursing mothers. The Fact Sheet can be found at http://www.dol.gov/whd/regs/compliance/whdfs73.htm (last visited May 5, 2014).

[170] The DOL Fact Sheet explains that, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way other employees are compensated for break time.

[171] Currently, 24 states, Puerto Rico, and the District of Columbia have legislation setting workplace requirements related to breastfeeding.

D. State Laws

Title VII does not relieve employers of their obligations under state or local laws except where such laws require or permit an act that would violate Title VII.[172] Therefore, employers must comply with state or local provisions regarding pregnant workers unless those provisions require or permit discrimination based on pregnancy, childbirth, or related medical conditions.[173]

In *California Fed. Sav. & Loan Ass'n v. Guerra*,[174] the Supreme Court held that the PDA did not preempt a California law requiring employers in that state to provide up to four months of unpaid pregnancy disability leave. Cal Fed claimed the state law was inconsistent with Title VII because it required preferential treatment of female employees disabled by pregnancy, childbirth, or related medical conditions. The Court disagreed, concluding that Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise."[175]

The Court, in *Guerra*, stated that "[i]t is hardly conceivable that Congress would have extensively discussed only its intent not to require preferential treatment if in fact it had intended to prohibit such treatment."[176] The Court noted that the California statute did not compel employers to treat pregnant women better than employees with disabilities. Rather, the state law merely established benefits that employers were required, at a minimum, to provide pregnant workers. Employers were free, the Court stated, to give comparable benefits to other employees with disabilities, thereby treating women affected by pregnancy no better than others not so affected but similar in their ability or inability to work.[177]

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[172] Section 708 of Title VII provides: "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title." 42 U.S.C. § 2000e-7.

Section 1104 of Title XI, applicable to all titles of the Civil Rights Act, provides: "Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of the Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4.

[173] Some states, including Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, New Jersey, Texas, Minnesota, and West Virginia, have passed laws requiring that employers provide some reasonable accommodation for a pregnant worker. For instance, in the state of Maryland an employee with a disability contributed to or caused by pregnancy may request reasonable accommodation and the employer must explore "all possible means of providing the reasonable accommodation." The law lists various options to consider such as changing job duties, changing work hours, providing mechanical or electrical aids, transferring employees to less strenuous or less hazardous positions, and providing leave. Md. Code Ann., State Gov't Article, §20-609.

[174] 479 U.S. 272 (1987).

[175] *Id.* at 280 (citation omitted).

[176] *Id.* at 287.

[177] *Id.* at 291.

IV. BEST PRACTICES

Legal obligations pertaining to pregnancy discrimination and related issues are set forth above. Below are suggestions for best practices that employers may adopt to reduce the chance of pregnancy-related PDA and ADA violations and to remove barriers to equal employment opportunity.

Best practices are proactive measures that may go beyond federal non-discrimination requirements or that may make it more likely that such requirements will be met. These policies may decrease complaints of unlawful discrimination and enhance employee productivity. They also may aid recruitment and retention efforts.

General

- Develop, disseminate, and enforce a strong policy based on the requirements of the PDA and the ADA.
    - Make sure the policy addresses the types of conduct that could constitute unlawful discrimination based on pregnancy, childbirth, and related medical conditions.
    - Ensure that the policy provides multiple avenues of complaint.
- Train managers and employees regularly about their rights and responsibilities related to pregnancy, childbirth, and related medical conditions.
    - Review relevant federal, state, and local laws and regulations, including Title VII, as amended by the PDA, the ADA, as amended, the FMLA, as well as relevant employer policies.
- Conduct employee surveys and review employment policies and practices to identify and correct any policies or practices that may disadvantage women affected by pregnancy, childbirth, or related medical conditions or that may perpetuate the effects of historical discrimination in the organization.
- Respond to pregnancy discrimination complaints efficiently and effectively. Investigate complaints promptly and thoroughly. Take corrective action and implement corrective and preventive measures as necessary to resolve the situation and prevent problems from arising in the future.
- Protect applicants and employees from retaliation. Provide clear and credible assurances that if applicants or employees internally or externally report discrimination or provide information related to discrimination based on pregnancy, childbirth, or related medical conditions, the employer will protect them from retaliation. Ensure that these anti-retaliation measures are enforced.

Hiring, Promotion, and Other Employment Decisions

- Focus on the applicant's or employee's qualifications for the job in question. Do not ask questions about the applicant's or employee's pregnancy status, children, plans to start a family, or other related issues during interviews or performance reviews.

- Develop specific, job related qualification standards for each position that reflect the duties, functions, and competencies of the position and minimize the potential for gender stereotyping and for discrimination on the basis of pregnancy, childbirth, or related medical conditions. Make sure these standards are consistently applied when choosing among candidates.

- Ensure that job openings, acting positions, and promotions are communicated to all eligible employees.

- Make hiring, promotion, and other employment decisions without regard to stereotypes or assumptions about women affected by pregnancy, childbirth, or related medical conditions.

- When reviewing and comparing applicants' or employees' work histories for hiring or promotional purposes, focus on work experience and accomplishments and give the same weight to cumulative relevant experience that would be given to workers with uninterrupted service.

- Make sure employment decisions are well documented and, to the extent feasible, are explained to affected persons. Make sure managers maintain records for at least the statutorily required periods. *See* 29 C.F.R. § 1602.14.

- Disclose information about fetal hazards to applicants and employees and accommodate resulting requests for reassignment if feasible.[178]

Leave and Other Fringe Benefits

- Leave related to pregnancy, childbirth, or related conditions can be limited to women affected by those conditions. Parental leave must be provided to similarly situated men and women on the same terms.

- If there is a restrictive leave policy (such as restricted leave during a probationary period), evaluate whether it disproportionately impacts pregnant workers and, if so, whether it is necessary for business operations. Ensure that the policy notes that an employee may qualify for leave as a reasonable accommodation.

- Review workplace policies that limit employee flexibility, such as fixed hours of work and mandatory overtime, to ensure that they are necessary for business operations.

[178] *See* Section I A.3.a., *supra*.

- Consult with employees who plan to take pregnancy and/or parental leave in order to determine how their job responsibilities will be handled in their absence.

- Ensure that employees who are on leaves of absence due to pregnancy, childbirth, or related medical conditions have access to training, if desired, while out of the workplace.[179]

Terms and Conditions of Employment

- Monitor compensation practices and performance appraisal systems for patterns of potential discrimination based on pregnancy, childbirth, or related medical conditions. Ensure that compensation practices and performance appraisals are based on employees' actual job performance and not on stereotypes about these conditions.

- Review any light duty policies. Ensure light duty policies are structured so as to provide pregnant employees access to light duty equal to that provided to people with similar limitations on their ability to work.

- Temporarily reassign job duties that employees are unable to perform because of pregnancy or related medical conditions if feasible.

- Protect against unlawful harassment. Adopt and disseminate a strong anti-harassment policy that incorporates information about pregnancy-related harassment; periodically train employees and managers on the policy's contents and procedures; incorporate into the policy and training information about harassment of breastfeeding employees; vigorously enforce the anti-harassment policy.

- Develop the potential of employees, supervisors, and executives without regard to pregnancy, childbirth, or related medical conditions.

- Provide training to all workers, including those affected by pregnancy or related medical conditions, so all have the information necessary to perform their jobs well.[180]

- Ensure that employees are given equal opportunity to participate in complex or high-profile work assignments that will enhance their skills and experience and help them ascend to upper-level positions.

- Provide employees with equal access to workplace networks to facilitate the development of professional relationships and the exchange of ideas and information.

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[179] Employers should consider, however, how the pay provisions of the Fair Labor Standards Act could be implicated by an employee's involvement in training while on leave. Under U.S. Department of Labor regulations, certain training activities outside of working hours need not be treated as compensable time. *See* 29 C.F.R. §§ 785.11-785.32.

[180] *Id.*

Reasonable Accommodation

- Have a process in place for expeditiously considering reasonable accommodation requests made by employees with pregnancy-related disabilities, and for granting accommodations where appropriate.

- State explicitly in any written reasonable accommodation policy that reasonable accommodations may be available to individuals with temporary impairments, including impairments related to pregnancy.

- Make any written reasonable accommodation procedures an employer may have widely available to all employees, and periodically remind employees that the employer will provide reasonable accommodations to employees with disabilities who need them, absent undue hardship.

- Train managers to recognize requests for reasonable accommodation and to respond promptly to all requests. Given the breadth of coverage for pregnancy-related impairments under the ADA, as amended, managers should treat requests for accommodation from pregnant workers as requests for accommodation under the ADA unless it is clear that no impairment exists.

- Make sure that anyone designated to handle requests for reasonable accommodations knows that the definition of the term "disability" is broad and that employees requesting accommodations, including employees with pregnancy-related impairments, should not be required to submit more than reasonable documentation to establish that they have covered disabilities. Reasonable documentation means that the employer may require only the documentation needed to establish that a person has an ADA disability, and that the disability necessitates a reasonable accommodation. The focus of the process for determining an appropriate accommodation should be on an employee's work-related limitations and whether an accommodation could be provided, absent undue hardship, to assist the employee.

- If a particular accommodation requested by an employee cannot be provided, explain why, and offer to discuss the possibility of providing an alternative accommodation.