



**Accommodations for Pregnant and Nursing
Students and Employees in Higher Education
JUNE 15, 2023**



Presenter Information



Kylie E. Stryffeler

Attorney

Kstryffeler@brickergraydon.com

Bricker Graydon LLP



Erin Butcher

Attorney

ebutcher@brickergraydon.com

Bricker Graydon LLP



Disclaimer #1



We can't help it – we're lawyers

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use the chat function to ask general questions and hypotheticals.
- We have a variety of stakeholders here, so please keep that in mind.

Disclaimer #2



We can't help it – we're lawyers

- We are discussing federal law today. Please check state law (and local ordinances) to determine whether additional restrictions may apply.
- Title IX is a major part of our discussion. We recognize that there are new regulations that have been proposed. Today, we are discussing only current regulations and guidance. For more information on proposed regulations, check out our recorded webinars at <https://www.bricker.com/titleix>.

Today's Roadmap



Focusing on *Current* impacts to Higher Education

- Legal Landscape generally
 - Title IX
 - Various employment laws
 - Illinois Human Rights Act
- Quick Review of Recent OCR Resolution Agreements





Legal Landscape

- *Not quite as well-groomed as the topiary of justice.*

Title IX (1 of 2)



- 20 U.S.C. §1681 *et seq.*
 - “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Title IX (2 of 2)



- 34 C.F.R § 106.21(c)
 - Marital or Parental Status - Admissions
- **34 C.F.R § 106.40**
 - Marital or Parental Status - Students
- **34 C.F.R § 106.57**
 - Marital or Parental Status – Employees
- Non-Regulatory Guidance
 - *Supporting the Academic Success of Pregnant and Parenting Students (July 1991, reprinted June 2013)*
 - *Discrimination Based on Pregnancy and Related Conditions (October 2022)*

Other Relevant Laws



- Disability discrimination laws
 - Section 504 of the Rehabilitation Act
 - Americans with Disabilities Act
- Employee Protections
 - Pregnancy Discrimination Act
 - Family Medical Leave Act
 - Fair Labor Standards Act
 - **NEW:** Pregnant Workers Fairness Act & Providing Urgent Maternal Protections (“PUMP”) for Nursing Mothers ACT
- Illinois Human Rights Act

General Principles



- Non-Discrimination
 - Are you requiring someone to do something different because they are pregnant or because they are a parent?
 - If you had a non-pregnant person or non-parent ask for the same accommodation or leave in any other circumstance, would you grant it to them?
- Remember: Parents and pregnant people generally maintain autonomy to choose how to navigate their education/employment.
 - Informed consent is key.



REGULATIONS

Title IX

- *Current regulations and guidance*

Marital or Parental Status



- ***34 C.F.R § 106.40 (a)***: A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status **which treats students differently on the basis of sex.**
- Rivertown School of Beauty Resolution Letter, September 2013
 - Facts: Beauty School had a policy that required, among other things, students to withdraw upon the seventh month of pregnancy.
 - Result: School was found in violation of Title IX.

Non-Discrimination



- 34 C.F.R § 106.40(b)(1)
- A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

Health Certifications



- 34 C.F.R § 106.40(b)(2)
- A recipient **may require** such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation **so long as** such a certification **is required of all students for other physical or emotional conditions** requiring the attention of a physician.
- Rivertown School of Beauty Resolution Letter, September 2013
 - Required health certifications for absences and return from giving birth

Separate Programs



- 34 C.F.R § 106.40(b)(3)
- A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely **voluntary** on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the **separate portion is comparable to that offered to non-pregnant students.**

Temporary Disabilities (Title IX)



- 34 C.F.R § 106.40(b)(4)
- A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

Temporary Disabilities (ADA/504)



- These laws protect individuals with a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.
- According to the EEOC, “a minor, nonchronic condition of short duration, such as a sprain, infection, or broken limb, generally would not be covered.”
- Where do pregnancy-related conditions fit, if they resolve after having the baby?

Leaves of Absence



- 34 C.F.R § 106.40(b)(5)
- In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, **a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.**

Non-Discrimination on the Basis of Sex in Admissions (1 of 2)



- 34 C.F.R § 106.21(c): Recipients
 1. Shall not *apply any rule* concerning the **actual or potential parental, family, or marital status of a student or applicant** which treats persons differently on the basis of sex. . .
 2. Shall not discriminate against or exclude any person on the **basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom. . .**

Non-Discrimination on the Basis of Sex in Admissions (2 of 2)



- 34 C.F.R § 106.21(c): Recipients
3. Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition
 4. Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss or “Mrs.”

Title IX/Employees (1 of 2)

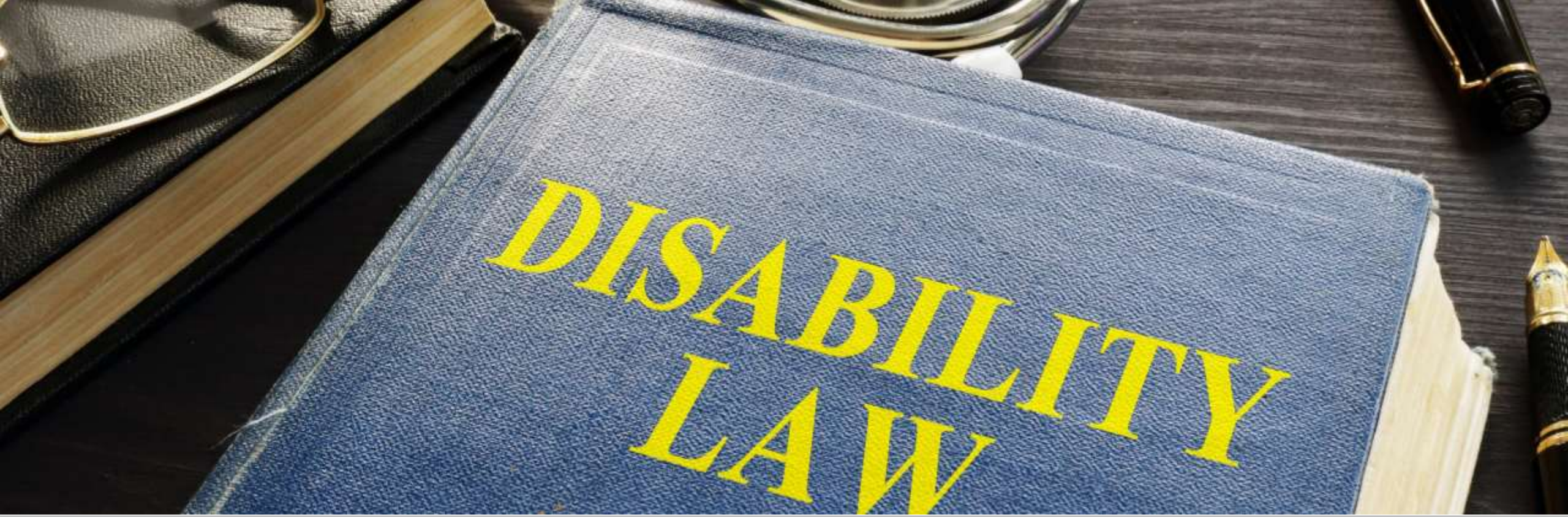


- 34 C.F.R § 106.57:
- Don't use potential marital, parental, or family status of an employee or applicant as a reason for employment decisions
- Don't use whether an employee is the breadwinner as a reason for employment decisions
- Can't discriminate or exclude from employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom

Title IX/Employees (2 of 2)



- 34 C.F.R § 106.57:
- Temporary disabilities from pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom should be treated the same as the employer treats any other temporary disability
- If no leave with pay is available, these are reasons for leave without pay. The employee must be reinstated to a “comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.”



What else applies? Lots more!

- *Current regulations and guidance*

Title VII – Married Women



- “[A]n employer’s rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by [T]itle VII...” 29 C.F.R. § 1604.4(a).

Title VII – Pre-employment



- Employers may request an applicant’s sex and/or whether they are “Mr. Mrs. Miss” on their application if “the inquiry is made in good faith for a nondiscriminatory purpose.” 29 C.F.R. § 1604.7.
 - What is your nondiscriminatory purpose?

Title VII – Pregnancy/Childbirth



- Employers cannot exclude applicants or employees because of pregnancy, childbirth, or related medical conditions
- “Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions”
 - Consider leave/reinstatement, accrual of seniority, payments under insurance/sick leave, etc.
- See 29 C.F. R. § 1604.10.

Pregnancy Discrimination Act



- Already folded into the Title VII regulations, above
- Remember:
 - Employers must permit a pregnant employee to do the job for as long as the employee is capable
 - If you are providing temporary assistance to non-pregnant employees, plan on doing the same for pregnant employees
 - If a pregnant employee goes on leave, they are entitled to the return and accrual rights of other employees that go on leave

Back to ADA/504



- Applies to employees, students, and visitors
- Qualified individuals with disabilities receive protection from discrimination
- Reasonable accommodations may be requested
 - Institution must engage in an interactive process to determine what accommodations are reasonable
 - Medical documentation to support accommodations may be requested
- Must be able to perform essential functions either with/without reasonable accommodations

Unreasonable accommodations?



- Employers do not have to provide reasonable accommodations that would cause an “undue hardship” to the employer
 - Requires an individualized assessment that the specific request would cause significant difficulty or expense
 - Consider the overall financial resources of the facility

NEW: Pregnant Workers Fairness Act



- H.R. 2617-1626, 117th Cong. § 103(1) (signed into law December 29, 2022)
- Applies to employers with 15 or more employees
- Requires employers to provide reasonable accommodations to employees and applicants for conditions related to pregnancy
- The accommodations process is designed to mirror that under the ADA, except that the accommodations are likely to be temporary.
- Contains a non-retaliation provision

Family Medical Leave Act



- This could be a whole hour webinar in itself
- To be eligible, employees must:
 - work for a covered employer,
 - have worked for the employer for at least 12 months and 1,250 in those 12 months, and
 - must work at a location where the employer has 50 employees within 75 miles
- See 29 U.S.C. § 825.100

FMLA Leave



- 12 workweeks in a 12-month period for
 - Birth/adoption
 - To care for a spouse, child, or parent with a serious health condition
 - For a serious health condition that makes the employee unable to perform the essential functions of his or her job
- (More leave is available in certain military-related situations not relevant to us today.)

Serious Health Conditions



- Illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.
- This includes “any period of incapacity due to pregnancy, or for prenatal care”
- Very specific regulations in this area. See 29 C.F.R. Part 825 *et seq.*

Fair Labor Standards Act



- Employers must provide reasonable breaks for employees to express breast milk for a nursing child for one year after the child's birth, each time the employer must express milk
- Employers must provide a private space other than a bathroom – shielded from view, and free from intrusions
- Breaks do not have to be paid (unless employees are provided paid breaks generally)
- Breaks must be provided “as frequently as needed” for the purpose

NEW: PUMP ACT



- An amendment to the FLSA.
- The PUMP Act requires employees provide reasonable breaks for an employee (exempt or non-exempt) to express milk.
- For one year after the birth of a child.
- In a location that is not a bathroom, shielded from view, free from intrusion.
- Breaks do not have to be paid (unless employees are provided paid breaks generally)
- Non-exempt employees will still be paid for a lactation break if they are using otherwise paid break time to do so, while exempt employees must generally be paid their same fixed salary regardless of whether they take a lactation break.

Illinois Human Rights Act

- Discrimination, Harassment, and Retaliation in Employment, and Public Accommodations
- 775 ILCS 5/1-101 *et seq.*



Illinois Human Rights Act – Overview, Discrimination and Harassment



- Covers pregnancy rights in employment and public accommodations (colleges and universities)
- Prohibits discrimination, harassment, and retaliation against persons related to their pregnancy status (potential or intended, current, or past)
- “Harassment” under the Act means:
 - unwelcome conduct
 - that is either severe or pervasive
 - enough that it alters the conditions of the victim’s employment, housing, or full and equal enjoyment of a public accommodation, and creates a hostile or abusive environment.
 - Either one extremely serious act of harassment, or a series of less severe acts, could be severe or pervasive enough to constitute actionable harassment.

Illinois Human Rights Act – Reasonable Accommodations



- Act requires employers to make reasonable accommodations for an employee's pregnancy, childbirth, and related medical or common conditions.
- Act provides that a failure to accommodate on the basis of pregnancy is prohibited.
- Regarding public accommodations (colleges and universities), the Act provides that refusal to accommodate may constitute unlawful discrimination under the Act.

Illinois Human Rights Act – Reasonable Accommodations for Employers

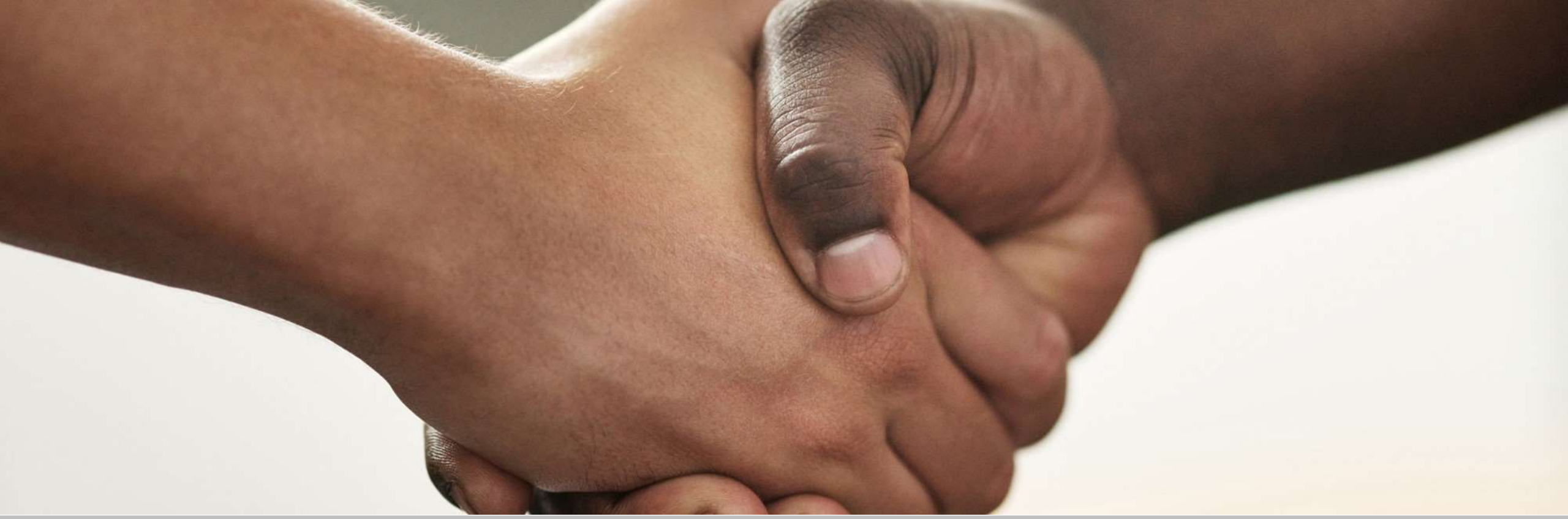


- Failing to provide a lactating employee a place, other than a restroom, to express milk.
- Refusing to let a pregnant employee with gestational diabetes eat snacks while working.
- Denying a pregnant employee's request to use time off for abortion care.
- Immediately discharging a pregnant employee who requests a reasonable accommodation without discussing potential options for the accommodation.

Illinois Human Rights Act – Reasonable Accommodations for Colleges and Universities (Non-Religious)



- Refusing to enroll a pregnant student.
- Failure to respond when a teacher or student engages in severe or pervasive harassment of another student for being pregnant or having an abortion.
- Denying a lactating student access to a place, other than a restroom, to express breastmilk.



OCR Findings and Resolution Agreements

- *Learn from Colleagues*

Troy University – January 2023 (1 of 2)



- Complainant contacted the institution and was connected to the Title IX Coordinator
- Complainant experienced complications with her pregnancy and at one point was hospitalized
- Complainant thereafter made various requests for accommodation:
 - Larger desk
 - Excused absences
 - Ability to attend class via Teams
 - Ability to make up missed assignments/exams
- At times, the Title IX Coordinator said they would follow up, but did not. Title IX Coordinator also followed up with the student a month after she contacted them

Troy University – January 2023 (2 of 2)



- OCR expressed concern that:
 - Troy did not make “reasonable and responsive” adjustments in response to Complainant’s requests
 - The school did not provide any information to the students in its Student Handbook/website about seeking adjustments related to pregnancy
 - One instructor interviewed said they had not been trained regarding Title IX’s application to pregnancy
 - The Title IX Coordinator did not “promptly” or “consistently intervene” when Complainant contacted them.
 - The institution did not engage in an “interactive process” with the Complainant
 - Although, OCR noted she did receive some adjustments, they were “ad hoc” and “uncoordinated”

Salt Lake Community College

June 2022 (1 of 4)



- Complainant learned she was pregnant and informed her professor that she had missed or had been tardy to class as a result of morning sickness.
- Professor had an attendance policy → three late arrivals was one absence, a student that misses 20% of the class is not eligible to pass the class.
- Student requested the ability to turn in assignments late and to excuse her absences.
- Professor agreed to allow Student to miss some (but not all) of the classes, and would apply a penalty to late assignments.

Salt Lake Community College

June 2022 (2 of 4)



- Student continued to struggle with morning sickness, and the Professor then advised the student to drop the class because her “health is more important than a class” and she “needed to take some responsibility for the things that were going on.”
- The Title IX Coordinator was contacted and then denied the student’s requests for academic adjustments because they would constitute “fundamental alterations” to the course. Title IX Coordinator said they corresponded with the instructor and dean but did not document those discussions.

Salt Lake Community College

June 2022 (3 of 4)



- Result:
 - OCR found that the College failed to respond promptly and equitably to the Complainant's complaint of pregnancy discrimination, in violation of Title IX.
 - OCR found that the College failed to engage in an interactive process with the Complainant to determine the appropriate special services and/or academic adjustments to provide in light of her pregnancy, in violation of Title IX.

Salt Lake Community College

June 2022 (4 of 4)



- Result:
 - OCR found that the College failed to engage in an interactive process with the Complainant and failed to consider whether the Complainant's pregnancy caused a temporary disability requiring academic adjustments, in violation of Section 504.
 - Finally, OCR found that the College failed to excuse the Complainant's absences related to pregnancy, provide her the opportunity to make up work missed due to absences related to pregnancy, or provide alternatives to making up missed work at a later date, in violation of Title IX.

Final Thoughts



- The law sets the floor, not the ceiling.
- How you treat your students and employees figures not just into legal compliance, but also:
 - Retention
 - Recruiting
 - Public Relations
 - Donations
- What is both compliant and consistent with your institution's ethic of care?

Title IX Trainings



- *Higher Education CLE Webinar Series Presented by Bricker Graydon and Southern Illinois University School of Law*
 - **Athletics Compliance Update**
Thursday, June 22, 2023, 1:00-2:00 PM ET
- *The Athletic Director's Toolkit Series: Balancing Compliance and Competitive Success in an Era of Change*
 - **Session 1: Title IX and Athletics | What Every Athletic Administrator Needs to Know**
Tuesday, July 11, 2023, 12:00-1:30 PM ET
 - **Session 2: Student-Athlete Conduct and Health, Safety, and Well-being**
Tuesday, July 13, 2023, 12:00-1:30 PM ET
 - **Session 3: Athletic Operations and Revenue Generation in an Ever-Changing Climate**
Tuesday, July 18, 2023, 12:00-1:30 PM ET
 - **Session 4: The Future of College Athletics | Practical Tips and Takeaways in Anticipating the "New Normal"**
Thursday, July 20, 2023, 12:00-1:30 PM ET

Higher Ed Title IX Level 1 & 2s – Will be announced soon for Fall 2023!

[Bricker.com/events](https://bricker.com/events)

Keep in Touch!



- Find us on LinkedIn:
 - Erin Butcher
 - Kylie Stryffeler
- Subscribe to our newsletter on our homepage by clicking “subscribe” in the upper right corner