THE LAW OF ACCOMMODATION:
The Expansion of Disability and Religious Accommodation in the Workplace

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I. INTRODUCTION

The Equal Employment Opportunity Commission ("EEOC") is focused on workplace discrimination based on religion and pregnancy. This focus is evidenced by the fact that the EEOC’s current Strategic Enforcement Plan identifies accommodation of pregnancy-related limitations under Title VII of the Civil Rights Act of 1964 (as amended) ("Title VII"), Americans with Disabilities Act ("ADA"), and the Pregnancy Discrimination Act ("PDA") and religion-related limitations under Title VII as top priorities for fiscal years 2013 to 2016. See Strategic Enforcement Plan FY 2013-2016, attached as PDF titled "Strategic Plan." As a result of the EEOC’s enforcement efforts, employers should be mindful of their expanding accommodation obligations.

The following sets forth the existing legal framework for evaluating requests for accommodation, examines recent case law, and provides best practices to minimize risk of a claim for failure to accommodate.

II. STANDARDS

A. Legal Framework under the Americans with Disabilities Act ("ADA")

The ADA is a federal civil rights law that was enacted in 1992 to protect people with disabilities from discrimination in employment, in the programs and activities offered by state and local governments, and in accessing goods and services. Title I of the ADA prohibits discrimination in employment and requires employers to provide reasonable accommodations for employees with disabilities. See 42 U.S.C. § 12111. In 2008, the ADA Amendments Act (ADAAA) was enacted to, among other things, expand the definition of disability to cover more individuals with less severe impairments. See § 12101 et seq.

1. What Constitutes a Disability?

The ADA defines disability to mean: (1) a person who has a physical or mental impairment that substantially limits one or more major life activities; (2) a person with a record of a physical or mental impairment that substantially limits one or more major life activities; and (3) a person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. § 12102(1).

2. What Constitutes a “Reasonable” Accommodation?

An accommodation is reasonable if it is a modification or adjustment to a job, the work environment, or the way things usually are done that enables a qualified individual with a disability to enjoy an equal employment opportunity. See § 12111(9). The term “equal
employment opportunity” means an opportunity to attain the same level of performance or to enjoy equal benefits and privileges of employment that are available to an average, similarly-situated employee who is not disabled. See generally id.

The ADA requires reasonable accommodation to: 1) ensure equal opportunity in the application process, 2) enable a qualified individual with a disability to perform the essential functions of a job, and 3) enable an employee with a disability to enjoy equal benefits and privileges of employment. 29 C.F.R. § 1630.2(o). The term “essential job functions” means the fundamental job duties of the employment position that the individual with a disability holds or desires, but does not include marginal job functions. 29 C.F.R. § 1630.2(m). However, an employer is not prohibited by the ADA from making such accommodations if it so chooses.

ADA analysis is individualized so that each situation must be evaluated on its own facts. As a result, there are few bright lines to indicate what accommodations are “reasonable.” Accommodations that courts have found to be reasonable include job restructuring, part-time or modified work schedules, making existing facilities accessible, acquiring or modifying equipment, providing qualified readers or interpreters, changing training materials or policies, and reassignment to an available position. See, e.g., Jelsma v. City of Sioux Falls, 744 F.Supp.2d 997, 1009 (D.S.D. 2010) (finding both job restructuring and reassignment to a different job are considered reasonable accommodations); Dey v. Milwaukee Forge, 957 F.Supp. 1043, 1050 (E.D. Wis. 1996) (finding accommodation to be reasonable when employer makes changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work); Valentine v. American Home Shield Corp., 939 F.Supp. 1376, 139 (N.D. Iowa 1996) (changing employee's schedule to be a possible reasonable accommodation).

Accommodations that have not been found to be reasonable include removing essential job functions, creating new jobs, indefinite leave from work, and providing personal need items such as eye glasses and mobility aids. See Kallail v. Alliant Energy Corporate Services, Inc., 691 F.3d 925 (8th Cir. 2012) (employer not required to eliminate or change essential job function to provide accommodation); Gratzl v. Office of Chief Judges of 12th, 18th, 19th, & 22nd Judicial Circuits, 601 F.3d 674, 680 (7th Cir. 2010) (“An employer need not create a new job or strip a current job of its principal duties to accommodate a disabled employee”); 29 C.F.R. § 1630.9 (personal items may be required as reasonable accommodation only when they are specifically designed or required to meet job-related rather than personal needs).

An employer must provide reasonable accommodation unless doing so causes undue hardship for the employer. The “undue hardship” and “reasonable accommodation” analyses are intertwined.

3. An Employer's Obligation to Provide Reasonable Accommodations
   a. Recognizing Accommodation Requests

The EEOC Guidance provides that an employee does not need to mention the ADA or use the phrase “reasonable accommodation” or any special language when requesting an accommodation. See, e.g., Hardenburg v. Dunham's Athleisure Corp., 963 F.Supp.2d 693, 705 (E.D. Mich. 2013) (finding employer's knowledge of employee's impairment sufficient to
warrant a "reasonable accommodation"). The employer should therefore consider whether an employee is making a request for accommodation under the ADA whenever an employee indicates that he/she has a problem at work relating to the employee’s medical condition.

b. Addressing Accommodation Requests

Once the employer recognizes on its own or learns from the employee that an accommodation maybe necessary, the employer should engage the employee in an interactive dialogue to clarify the employee’s needs in an effort to identify the appropriate reasonable accommodation. The employer may ask the employee relevant questions about the need for accommodation and may request medical support that will enable it to make an informed decision about the request, including what alternative(s) to the requested accommodation might exist.

The exact nature of the dialogue will vary depending on the facts. An employer may not need to engage in any discussion if the disability and need for accommodation is obvious. If it is not obvious to the employer, then an employer may need to ask questions concerning the nature of the disability and the employee's functional limitations to identify an effective accommodation. The employee must describe the problems posed by the workplace barrier, but the employee does not need to identify a specific accommodation.

c. Requesting Medical Information Related to an Employee’s Request for Accommodation

As indicated above, an employer may seek medical information in response to an accommodation request under the ADA. When the disability or need for accommodation is not obvious, an employer may require that the employee provide medical documentation to establish that the employee has an ADA disability, to show that the employee needs the requested accommodation, and to help determine other effective accommodation options. See Conroy v. New York State Dept. of Correctional Serv's, 333 F.3d 88, 97 (2nd Cir. 2003) (finding ADA exception to prohibiting employers from inquiring into disabilities if an employer can demonstrate that a medical examination or inquiry is necessary to determine: (1) whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties, or (2) whether an employee's absence or request for an absence is due to legitimate medical reasons, when the employer has reason to suspect abuse). In this way, the scope of such medical inquiry must be limited.

4. What Constitutes Failure to Accommodate a Disability?

To prevail on a claim based on failure to accommodate under the ADA, an employee must show:

(1) the employee had a "disability" within the meaning of the ADA;

(2) the employee suffered an adverse employment action;
(3) the employee was able to perform the essential functions of his/her job, with or without reasonable accommodation; and,

(4) the employer was aware that a reasonable accommodation was necessary and possible.


B. **Legal Framework under Title VII**

Title VII is the federal law that prohibits most workplace harassment and discrimination, covers all private employers, state and local governments, and educational institutions with 15 or more employees. Title VII prohibits discrimination against workers because of race, color, national origin, religion, and sex.

Title VII’s gender-based protections have been expanded to include prohibition against discrimination on the basis of pregnancy and protection of sexual harassment. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (establishing that "quid pro quo" sexual harassment and "hostile work environment" sexual harassment are actionable as sex discrimination under Title VII of the Civil Rights Act); *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 678 (1983) (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).

Title VII also requires employers to reasonably accommodate an employee's religious practices and observances, unless an employer can demonstrate that such an accommodation would constitute an undue hardship. *See 42 U.S.C. § 2000(e)(j); Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74-75 (1977).

1. **What Constitutes a Religion?**

Title VII defines “religion” to include all aspects of religious observance, practice, and belief. Unconventional religious beliefs of individuals as well as traditional beliefs held by religious groups are protected if they are sincerely held. The Supreme Court has further defined “religious belief” to mean "a sincere and meaningful belief which occupies in the life of its possessor a place" that is parallel to God in traditional religions. *United States v. Seeger*, 380 U.S. 163, 176 (1965). The fact that no particular religious group espouses an individual's beliefs or the fact that the religious group to which the individual professes to belong does not accept such belief does not determine whether the belief qualifies as “religious.” *See Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005) (finding beliefs to represent religion regardless of the existence of a religious group "when a person sincerely holds beliefs dealing with issues of ultimate concern that for her occupy a place parallel to that filled by God in traditionally religious persons").
2. What Constitutes a Failure to Accommodate Religious Beliefs?

Similar to failure to accommodate claims under the ADA, an employee can bring a claim of religious discrimination for failure to accommodate religious beliefs. To establish such a claim, such employee must show:

(1) the employee has a bona fide religious belief that conflicts with an employment requirement;

(2) the employee informed the employer of this belief;

(3) the employee experienced adverse action for failing to comply with the conflicting employment requirement.


Under Title VII, before any accommodation obligation arises, an employee must first notify the employer of his/her need for a religious accommodation. Redmond v. GAF Corp., 574 F.2d 897, 902 (7th Cir.1978) ("The employee has the duty to inform his employer of his religious needs so that the employer has notice of the conflict"). An employee must provide sufficient information about his religious needs to make his employers aware of the existence of conflicts between the employees' religious practices and the employers' job requirements. Id. Doing so allows employers to arrange schedule changes and substitutions, if necessary. An employee’s failure to provide sufficient notice and information on the religious conflict, may enable the employer to demonstrate that making accommodation constitutes an undue hardship.

Once the employer is cognizant of the conflict between the individual’s religious beliefs and the job requirements, the employer must engage with the individual in an interactive process similar to the process used under the ADA. See Thomas v. National Assn. of Letter Carriers, 225 F.3d 1149 (10th Cir. 2000) (finding the interactive process encourages employers to make an attempt to resolve conflicts without litigation); Heller v. EBB Auto Co., 8 F.3d 1433, 1438 (9th Cir. 1993) (determining that the employer must establish that “it initiated good faith efforts to accommodate employee's religious practices.”).

After an employer provides a reasonable accommodation to the employee's religious needs, the employer is not required to demonstrate that other alternative accommodations would result in undue hardship. See Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986) (finding employer was not required to accept the employee's alternative proposals once employee rejected the reasonable accommodation offered by the employer). Thus, as under the ADA, the accommodation selected by the employer does not have to be the employee's preferred accommodation. See Wilson v. U.S. West Communications, Inc., 58 F.3d 1337, 1339 (8th Cir. 1995) (upholding employer's right to terminate employee who vowed to wear a graphic picture of a fetus on a button indefinitely, except when she slept or bathed, after employee refused to accept the employer's options to reasonably accommodate the employee, which were to "(1) wear the button in her cubicle, but remove it when she leaves the cubicle; (2) cover the button in some manner; or (3) wear a different anti-abortion button with the same message, but without the graphic photograph").
III. EEOC GUIDANCE

A. Pregnancy-Related Accommodations

For the first time in over 30 years, the EEOC revamped its Enforcement Guidance on Pregnancy Discrimination (“2014 Pregnancy Guidance”) to expand its anti-discrimination focus and counsel employers on their obligation to offer reasonable accommodations to employees with pregnancy-related conditions. See EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues No. 915.003, attached hereto as PDF titled "2014 Pregnancy Guidance.” Through this 2014 Pregnancy Guidance, the EEOC instructs employers that they now have broad obligations under federal law to provide accommodation for pregnant and formerly pregnant employees. The 2014 Pregnancy Guidance is fairly aggressive and conflicts with prior federal case law. Such conflict likely led to the Supreme Court's decision to accept for review the case of Young v. United Parcel Service, Inc., 134 S. Ct. 2898 (2014), which involves a claim against an employer for denial of a pregnant employee’s a request for "light duty" even though the employer provides such “light duty” accommodation to similarly situated employees for non-pregnancy related temporary reasons.

Specifically, the 2014 Pregnancy Guidance provides that the PDA requires employees affected by pregnancy, childbirth, or related medical conditions should be treated the same for all employment-related purposes as other persons not so affected, but similar in their ability or inability to work. An employer is thus obligated to treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs. Such accommodation might include providing modified tasks, alternative assignments, leave, or other fringe benefits.

The following summarizes pertinent provisions of the 2014 Pregnancy Guidance:

- **Light Duty:** Under Title VII, the PDA, and the ADA, individuals who are temporarily unable to perform the functions of their job due to pregnancy-related conditions must be treated the same as other, non-pregnant employees with similar abilities or inabilities to work, including with regard to providing accommodations. For example, if an employer provides light duty assignments to non-pregnant employees injured on the job, then comparable light duty assignments must also be offered to pregnant employees with similar limitations on their ability to perform work.

- **ADA Accommodations:** Under the ADA, pregnancy or childbirth-related conditions may qualify for accommodation, so long as such accommodation is reasonable and does not impose undue hardship on the employer. For example, morning sickness, lactation, and gestational diabetes are conditions that have qualified for reasonable accommodations. Although pregnancy is not a disability under the ADA by itself, pregnancy-related impairments that substantially limit a major life activity temporarily or permanently may qualify as disabilities under the ADA. Employers must also accommodate impairments of the reproductive
system that lead to physical restrictions to enable a full-term pregnancy, such as conditions that require bed rest during pregnancy.

- **Equal Benefits:** The 2014 Pregnancy Guidance provides for equal benefits for employees including health insurance, leave of absence, and seniority. For instance, employers who provide health insurance benefit plans must apply the same terms and conditions for pregnancy-related costs as for medical costs unrelated to pregnancy. Similarly, any parental leave provided by employers (as distinguished from medical leave associated with childbirth) must be provided on the same terms to similarly situated men and women. Finally, employers must allow women on pregnancy-related medical leave to accrue seniority in the same way as those who are on leave for reasons unrelated to pregnancy.

### B. Religious Accommodations

Similar to the EEOC's recent expansion of obligations related to pregnancy accommodation, the EEOC has expanded an employer's obligation to accommodate an employee's religious beliefs and practices ("Religious Accommodation Guidance"). See Religious Garb and Grooming in the Workplace: Rights and Responsibilities, attached hereto as PDF titled "2014 Religious Accommodation Guidance." Increasingly, employers have faced religious discrimination complaints, often in the context of an employee's availability for work or compliance with the company's dress code.

The Religious Accommodation Guidance focuses on religious garb and grooming practices and the steps employers should take to meet their legal obligations. As indicated above, Title VII requires employers to make an exception to workplace dress and grooming requirements as soon as the employer is on notice that a religious accommodation is needed for sincerely held religious beliefs or practices – unless doing so poses an undue hardship. See, e.g., *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 WL 2090677 (W.D. Wash. Aug. 29, 2005) (denying employer's motion for summary judgment where employer refused to accommodate employee whose religious beliefs precluded him from covering his Kemetic religious tattoos to comply with employer's dress code), *EEOC v. Brink's Inc.*, No. C04–1291JLR, 1:02-CV-0111 (C.D. Ill.) (consent decree entered Dec. 2002) (settlement of case alleging messenger employee was denied reasonable accommodation when she sought to wear culottes made out of uniform material, rather than the required pants, because her Pentecostal Christian beliefs precluded her from wearing pants); *EEOC v. Scottish Food Systems, Inc. and Laurinburg KFC Take Home*, 1:13-CV00796 (M.D.N.C. consent decree entered Dec. 2013) (settlement of case alleging denial of accommodation to Pentecostal Christian employee in food service position who adhered to a scriptural interpretation that women should wear only skirts or dresses, and therefore needed an exception to restaurant's requirement of uniform pants).

The Religious Accommodation Guidance further specifies: (1) an undue hardship does not include customer preference, (2) job segregation is not a religious accommodation, and (3) the employer's personal knowledge of an employee's religion has no bearing on whether the employee's beliefs are sincerely held. See 2014 Religious Accommodation Guidance.
C. **Similarities and Differences among the Religious and Pregnancy-Related Accommodations**

An employer's accommodation obligations for disability and religion are similar in that employers are required to provide a reasonable accommodation to an employee once it is on notice that an accommodation is needed. Additionally, obligations under Title VII and the ADA require employers to engage in the interactive process with the employee to determine effective accommodations necessary.

However, there are differences as to the type of information an employer may seek through the interactive process depending on the type of accommodation needed. Regarding religious accommodations, the employer is entitled to make a limited inquiry of the employee into the facts and circumstances of the employee's claim that the belief or practice at issue is religious, sincerely held, and creates the need for the accommodation only if the accommodation request itself does not provide sufficient information to the allow the employer to decide and the employer has a "bona fide" doubt about the basis for the accommodation request. See *Bushouse v. Local Union 2209, United Auto., Aerospace & Agric. Implement Workers of Am.*, 164 F. Supp. 2d 1066, 1076, 1078, n.15 & 18 (N.D. Ind. 2001) (finding union did not violate Title VII's religious accommodation provision by refusing to provide accommodation unless employee produced independent corroboration that his accommodation request was motivated by a sincerely held religious belief, but cautioned that the holding was limited to “the facts and circumstances of the present case” and that “the inquiry [into sincerity] and scope of that inquiry will necessarily vary based upon the individual requesting corroboration and the facts and circumstances of the request”). Regarding disability accommodation, the employer may seek input from a third party in the form of medical certification verifying the employee's need for accommodation.

Another difference is the legal standard for showing an “undue hardship” under Title VII and the ADA. Undue hardship under Title VII is defined as “more than de minimis” cost or burden, which is a lower standard for employers to satisfy than the “undue hardship” required under the ADA. See *Trans World Airlines, Inc.*, at 74 (An employer may assert undue hardship under Title VII if the employer can demonstrate that the accommodation would require “more than a de minimis cost”). The ADA defines “undue hardship” as “significant difficulty or expense.” 28 C.F.R. § 36.104.

IV. **RECENT, ILLUSTRATIVE CASES**

Earlier this year, the U.S. Supreme Court granted a petition for certiorari in two employment discrimination cases: (1) *Young v. United Parcel Service, Inc.*, 134 S. Ct. 2898 (2014), to address whether, and in what circumstances, the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (“PDA”), requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are “similar in their ability or inability to work” and in (2) *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, No. 13A1139, 2014 WL 3702553 (U.S. Oct. 2, 2014), to address what is legally sufficient to put an employer on notice that a religious practice may conflict with a job requirement and, therefore, trigger the employer's duty to engage in an interactive process to explore accommodations. The Supreme Court is scheduled to rule on both
matters within the year. Until then, it is prudent for employers to act in accordance with established caselaw precedent and the EEOC’s recent guidance.

A. **Disability Accommodation**

*EEOC v. PJ Utah LLC, PJ Cheese, Inc., PJ United, Inc., Case No. 2:14-cv-00695-BCW, pending before the District Court for the District of Utah*

The EEOC claims Papa John’s Pizza violated the ADA by failing to provide reasonable accommodations, which includes the assistance of a job coach if necessary, to an employee with the intellectual disability of Down Syndrome. According to the lawsuit, the employee successfully performed his duties with the assistance of an independently employed and insured job coach. The EEOC alleges that the employee was fired after Papa John’s operating partner visited the store and fired the employee after seeing him working with the assistance of a job coach.

*Hill v. Walker, 737 F.3d 1209 (8th Cir. 2013)*

The court found the employer was not liable for failure to accommodate when the employee refused all of the options to accommodate her depression and anxiety provided to her by her employer. Plaintiff suffered from anxiety and depression and asked to be removed from a particularly stressful case. The employer responded by providing her with several options to accommodate her disability, but the court determined that the employer was not required to allow the employee to avoid stressful cases altogether because dealing with such cases was an “essential function” of the job.

*Lenzen v. Workers Compensation Reinsurance Assoc, 705 F.3d 816 (8th Cir. 2013)*

The court found the employer was not required to provide additional accommodations when the employee accepted the accommodation provided by the employer and the employee did not inform the employer of any further issues. The court determined that plaintiff’s failure to accommodate claim failed because she never requested or otherwise adequately informed her employer of the need for additional accommodations. The employer accommodated plaintiff by granting maternity leave, reducing the job requirements, and allowing her to take naps when necessary. Plaintiff unsuccessfully contended that her employer should have paid her during the approved nap breaks and provided her with a separate office for her naps.


The court ruled that an employer can terminate an employee without violating the ADA if the employee's disability prevents him from fulfilling a job obligation identified in his job description, even if he rarely performed those job duties. Schwan's Home Service, Inc. employed plaintiff as a depot Manager. Plaintiff’s job description required him to meet Federal Department of Transportation ("DOT") requirements as a condition of his employment. Due to an eye injury, plaintiff was unable to obtain his DOT license. Accordingly, Schwan's terminated his employment. Despite the fact that plaintiff had driven a truck less than 50 times during his two years as manager, the court determined that an employee's "essential job function" is not based on how many times he is required to perform those job duties, but rather what is listed in
his written job description. Accordingly, because eliminating an essential job function was not reasonable, the court upheld plaintiff’s termination.

B. **Pregnancy-Related Accommodations**

*Albin v. LVMH Moet Louis Vuitton, Inc., et al., No. 13-cv-4356 (S.D.N.Y. July 8, 2014)*

The court denied employer’s motion to dismiss Plaintiff’s failure-to-promote claim based on pregnancy where plaintiff had delivered her child less than four months prior to the challenged promotion decision. Focusing on the short period of time between the pregnancy and the promotion decision, the court stated that women who are four months or less removed from giving birth are generally protected by Title VII's anti-discrimination provisions. Courts determine the length of time that a new mother is protected under the law on a case-by-case basis by first identifying when the adverse employment action occurred. The court's ruling is consistent with the 2014 Pregnancy Guidance that states a “lengthy time difference between a claimant's pregnancy and the challenged action will not necessarily foreclose a finding of pregnancy discrimination.”


The court denied summary judgment in a case in which a pregnant nursing home employee was terminated after informing her employer that she would be subject to a lifting restriction beginning at the 20th week of her pregnancy. Although the employee was in her 15th week of pregnancy, she was terminated on the same day that she told her employer of the anticipated restriction. Despite finding that the employer was entitled to fire the employee as of the 20th week of her pregnancy when, it was undisputed, she would no longer be able to do her job, the court found the employer could not terminate the employee “simply because it believes pregnancy might prevent the employee from doing her job” in the future.

*EEOC v. The Lash Group, No. 8:14-cv-03091-PJM, pending before the Southern Division of the District Court of Maryland*

The EEOC alleges that the health care consulting company fired a woman experiencing post-partum depression in violation of the ADA. The employer placed the employee on short-term disability during her maternity leave. When her short-term disability benefits expired, the employee notified the company that she would need additional, unpaid leave due to her depression. The company extended her short-term disability leave, but allegedly refused to allow her to return to her previous position when she was cleared to return to work because it had already filled her position. Further, the company allegedly refused to transfer her to a vacant position for which she was qualified as a reasonable accommodation and, instead, required her to compete with new applicants for the vacancy. The EEOC provided that the company had an affirmative obligation to provide a reasonable accommodation by transferring her to a vacant position.
C. **Religious Accommodation**

Recent lawsuits filed by the EEOC based on religious accommodation, primarily fall into two categories: dress/grooming policies and scheduling.

1. **Scheduling Accommodations**

*EEOC v. Food Lion, LLC, No. 14-cv-00708 (M.D.N.C. August 20, 2014)*

The employee, a Jehovah’s Witness minister and elder who is required to attend church services and church-related meetings on Sunday and Thursday evenings, was hired by Food Lion as a meat cutter. Upon his employment, the employee requested not to be scheduled on Sunday or Thursday evenings. Although the store manager initially agreed to accommodate the employee's requests, Food Lion later transferred the employee to a store in another city. The employee's store manager at the new Food Lion location fired the employee because he allegedly did not believe the employee could remain employed at Food Lion, if he did not work on Sundays.

*EEOC v. JBS USA, LLC, No. 8:10-cv-0318 (D. Neb. Oct. 11, 2013)*

The EEOC claims the employer failed to accommodate requests from approximately 90 Muslim employees for scheduling adjustment throughout Ramadan. At the start of Ramadan, a group of Muslim employees approached management seeking a religious accommodation: 1) that JBS permit them to take unscheduled breaks to pray; and/or 2) that JBS move the meal break to a time that coincided with the employees’ sunset prayer time. JBS attempted to find reasonable accommodations that would work for it and the employees, but the parties ultimately could not agree on an accommodation. The district court found that the EEOC had met its prima facie case of failure to accommodate, but granted summary judgment in favor of the employer, holding that JBS established its affirmative defense of undue hardship because JBS was able to show that both options created more than a *de minimis* cost to the employer.

2. **Dress or Grooming Accommodations**


In its suit, the EEOC alleged Mims Distributing Company, Inc. violated federal law by failing to accommodate an applicant's religious beliefs because Mims allegedly rejected the applicant, who is a Rastafarian, because he wore his hair in dreadlocks. As a Rastafarian, the applicant sincerely believed that he should not have cut his hair in honor of Jah, the name given to the higher power in that faith. In its suit, the EEOC alleges Mims told the applicant that he couldn't have the job unless he cut his hair. The EEOC argues that the applicant should not be forced to choose either his religion or his job without the employer attempting to provide a reasonable accommodation.

*EEOC v. 704 HTL Operating, LLC and Investment Corporation of America, No. 11-cv-00845 (D.N.M. consent decree entered Nov. 2013)*
The employer hotel agreed to settle a religious accommodation lawsuit for $100,000 and other relief. The EEOC alleged that the hotel violated Title VII of the Civil Rights Act by failing to accommodate an employee's request to work wearing a hijab, which is a head scarf worn by Muslim women for religious purposes. The lawsuit specifically alleged that the hotel would not allow the employee to work unless she removed her head covering and fired her when she refused to remove it.

_EEOC v. United Galaxy Inc., d/b/a Tri-County Lexus, No. 2:10-CV-04987 (D.N.J. consent decree entered Nov. 2013)_

The employer car dealership agreed to settle a religious accommodation lawsuit for $50,000 and other relief. The EEOC alleged the dealership refused to hire an applicant of the Sikh faith because the dealership adhered to a strict dress code policy and the applicant's beliefs required him to maintain a beard, maintain uncut hair, and wear a turban. The dealership said it would only hire the applicant if he shaved his beard in order to comply with the dealership's dress code policy.

_EEOC v. LAZ Parking, LLC, Case No. 1:10-CV-1384 (N.D. Ga. consent decree entered Nov. 2010)_

The employer, a national parking company, agreed to settle a religious discrimination case for $46,000 and other relief including equal employment opportunity training. In its lawsuit, the EEOC alleged that the parking company unlawfully subjected a Muslim woman to religious discrimination by terminating the woman's employment based on her religious beliefs because she refused to work without her hijab.

V. RECOMMENDATION FOR MINIMIZING RISK

A. Recommendations for Employers

In light of the EEOC's recent enforcement actions, employers should take affirmative steps to prevent discrimination in the workplace based on religious and pregnancy accommodation. The following are recommended best practices:

1. REVIEW AND REVISE POLICIES AND PRACTICES

   - Implement a written reasonable accommodation policy that provides for reasonable accommodation based on disability and religion.
   - Have a process in place for expeditiously considering reasonable accommodation requests made by applicants and employees based on disability and religion, and for providing accommodation where appropriate.
   - The reasonable accommodation policy should be stated on employment applications.
• Make any written reasonable accommodation procedures available to all employees, and periodically remind employees of available procedures for requesting reasonable accommodation through regular training.

• Include a statement against retaliation in the reasonable accommodation policy and provide a process for reporting incidents of discrimination/retaliation.

• Review Job Descriptions to ensure they accurately reflect job functions.

• Review other policies regarding anti-discrimination, light duty, and leave of absence to include references to the reasonable accommodation policy and procedure for requesting accommodation.

• Ensure that employees with temporary conditions such as pregnancy, are treated similarly with regard to leaves of absence and other accommodations.

• Engage in interactive dialogue to explore requested accommodation(s) as well as alternatives.

• Ensure that any medical inquiry is appropriately limited in scope and related to the job.

2. PROVIDE MANDATORY TRAINING TO EMPLOYEES, PARTICULARLY MANAGEMENT-LEVEL EMPLOYEES

• Workplace training should include all forms of harassment/discrimination, including based on religion and pregnancy.

• Document every employee’s participation in the training.

• Train managers to recognize requests for reasonable accommodation, to respond promptly to such requests, and to avoid assuming that pregnancy-related impairments are not disabilities.

• Ensure that anyone designated to handle requests for reasonable accommodations is knowledgeable about accommodation requirements and the scope of permitted follow-up inquiry.

3. INTERACT WITH AND EVALUATE EMPLOYEES PROPERLY

• Base evaluations on objective job–related criteria.

• Do not make judgments or assessments based on appearance or anticipated future restrictions.
• If a particular accommodation requested by an employee cannot be provided, explain why, and consider/discuss alternative accommodation(s).

VI. CONCLUSION

Due to the increasing number of employment discrimination claims based on religion and pregnancy, an employer should take steps to limit and/or avoid liability. When the possibility of a need for accommodation arises, based on an individual’s specific request or based on the employer’s observation, the employer should inquire of the need and engage the individual in a dialogue to identify the best solution. An employer should provide reasonable accommodation, unless accommodation would result in an undue hardship.
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

STRATEGIC ENFORCEMENT PLAN

FY 2013 - 2016
EXECUTIVE SUMMARY

The U.S. Equal Employment Opportunity Commission’s (EEOC or Commission) Strategic Plan for Fiscal Years 2012 – 2016 directed the Commission to develop a Strategic Enforcement Plan (SEP) that (1) establishes priorities and (2) integrates all components of EEOC’s private, public, and federal sector enforcement. The purpose of the SEP is to focus and coordinate the EEOC’s programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace. The Commission approved the Strategic Enforcement Plan for Fiscal Years 2013 – 2016 on December 17, 2012.

SEP Priorities

Integrated enforcement uses a range of strategies from among the EEOC’s tools, including investigations, litigation, federal sector oversight and adjudication, policy development, research, and outreach and education. Based on intensive efforts by a staff work group and Commissioners, and extensive public input, the Commission adopts the following national priorities:

1. **Eliminating Barriers in Recruitment and Hiring.** The EEOC will target class-based recruitment and hiring practices that discriminate against racial, ethnic and religious groups, older workers, women, and people with disabilities.

2. **Protecting Immigrant, Migrant and Other Vulnerable Workers.** The EEOC will target disparate pay, job segregation, harassment, trafficking and discriminatory policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

3. **Addressing Emerging and Developing Issues.** The EEOC will target emerging issues in equal employment law, including issues associated with significant events, demographic changes, developing theories, new legislation, judicial decisions and administrative interpretations.

4. **Enforcing Equal Pay Laws.** The EEOC will target compensation systems and practices that discriminate based on gender.

5. **Preserving Access to the Legal System.** The EEOC will target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC’s investigative or enforcement efforts.

6. **Preventing Harassment Through Systemic Enforcement and Targeted Outreach.** The EEOC will pursue systemic investigations and litigation and conduct a targeted outreach campaign to deter harassment in the workplace.
The national priorities of the SEP will be complemented by district and federal sector priorities, recognizing that particular issues most salient to these communities also demand focused attention.

**Integrating the EEOC’s Work**

Through the SEP, the Commission adopts strategies to coordinate and maximize the use of communications, outreach, education, training, research, and technology as enforcement tools. These strategies should also ensure consistent and integrated enforcement throughout all three sectors – private, public, and federal.

In adopting this SEP, the EEOC takes an important step toward fulfilling its mission to “stop and remedy discriminatory practices in the workplace” so that the nation can finally realize the vision of “justice and equality in the workplace.”

**I. INTRODUCTION**

**Background**

The U.S. Equal Employment Opportunity Commission’s (EEOC or Commission) is a bipartisan body composed of five members who are appointed by the President and confirmed by the Senate. The President designates one member of the EEOC to serve as Chair. The Chair is responsible for the administrative operations of the EEOC and for the hiring of personnel.

The EEOC’s General Counsel, also appointed by the President and confirmed by the Senate, is responsible for the conduct of litigation pursuant to the agency’s statutory authority.

The EEOC is the nation’s lead governmental enforcer of employment anti-discrimination laws and chief promoter of equal employment opportunity. The Commission, through its staff, is responsible for enforcing Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act of 1967 (ADEA), the Equal Pay Act of 1963 (EPA), Section 501 of the Rehabilitation Act of 1973, Titles I and V of the Americans with Disabilities Act of 1990 (ADA), and Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). Together, these laws protect individuals from employment discrimination on the basis of race, color, religion, sex, national origin, age, disability, and genetic information (which includes family medical history). They also make it illegal to retaliate against a person for opposing employment discrimination, filing a charge of discrimination, or participating in an investigation or lawsuit regarding employment discrimination.

The EEOC has jurisdiction to enforce the nation’s anti-discrimination laws in three sectors – private, state and local government (“public sector”), and federal. Congress granted EEOC the power to “prevent any person from engaging in any unlawful employment practice.” The EEOC is charged with achieving this goal by investigating and conciliating charges of
discrimination brought by individuals or by Commissioners alleging unlawful discrimination by private employers, state and local government employers, employment agencies and labor organizations. The General Counsel and legal staff have authority to litigate cases against private employers to enforce all of the federal equal employment opportunity laws and against state and local government employers to enforce the ADEA and EPA. The Department of Justice has authority to bring litigation against state and local governments in Title VII, ADA, and GINA cases.

In the federal sector, the Commission has authority to hold hearings on complaints of discrimination by federal employees and applicants and to adjudicate appeals of decisions on such claims. The Commission also has oversight responsibility to review, approve, and evaluate federal agency compliance with federal equal employment opportunity laws.

The Commission is also charged with providing education and technical assistance on the federal employment anti-discrimination laws and with performing technical studies that will help effectuate the purposes of those laws. Finally, the Commission collects data on the private, public, and federal workforces.

Since the EEOC opened its doors in 1965, the nation has made great strides towards equal employment opportunity for all. Never before in our nation’s history has the American workplace been more inclusive than it is today. Greater racial and ethnic diversity can be found throughout the workforce. Workers who once would have been forced out of jobs due to mandatory retirement policies can choose to remain in the labor force. Women now comprise nearly half of the nation’s workforce. Technological advances have enhanced opportunities for persons with disabilities to participate fully in the workplace. Once-prevalent practices, such as sex-specific advertisements for job openings, have largely been abandoned.

Yet, despite this progress, challenges remain, and the EEOC’s work is unfinished. The nation still confronts discriminatory practices that limit employment opportunities based on race, national origin, sex, religion, age, and disability. Immigrant, migrant and other vulnerable workers are too often subjected to discriminatory treatment in the workplace. Many of today’s workers are still subjected to pernicious forms of discrimination, including harassment. Individuals who exercise their rights to challenge workplace discrimination or assist others in doing so face retaliation too frequently.

Over the last decade, the number of charges filed against private and public employers increased by more than 22 percent. In Fiscal Year (FY) 2012, the EEOC received 99,412 charges of discrimination (85 percent against private employers and 15 percent against state and local government employers). Another 43,467 charges were dual-filed with the EEOC in FY 2012, but investigated by state and local fair employment practices agencies (FEPAs).

While the number of complaints filed in the federal sector has decreased by 23 percent over the last decade, the number of allegations of discrimination is still far too high for the nation’s
largest employer. Federal employees and applicants filed 16,974 complaints of alleged unlawful employment discrimination in FY 2011 (the most recent year available), and in FY 2012, the EEOC received 7,728 requests for hearings on federal sector complaints and received 4,350 appeals of federal agency actions on complaints.

Even as the nation confronts a rise in claims of discrimination, the resources allocated to the EEOC and designated for the FEPAs have failed to keep pace. Between FY 2000 and 2008, EEOC staffing levels and funding dropped nearly 30 percent. An infusion of resources in 2009 allowed for some rebuilding of capacity, but that was quickly stalled when funding was reduced and hiring freezes were implemented in FY 2011 and FY 2012. The agency is faced with meeting all of its mission responsibilities at a time of unprecedented demand for its services, notwithstanding its limited resources.

II. DEVELOPING THE STRATEGIC ENFORCEMENT PLAN

A. The Strategic Plan

On February 22, 2012, the Commission approved a Strategic Plan for Fiscal Years 2012 – 2016 (“the Strategic Plan”). The plan establishes a framework for achieving the EEOC’s mission to “stop and remedy unlawful employment discrimination,” so that the nation might realize the Commission’s vision of “justice and equality in the workplace.” The plan has three objectives: 1) combat employment discrimination through strategic law enforcement; 2) prevent employment discrimination through education and outreach; and 3) deliver excellent and consistent service through a skilled and diverse workforce and effective systems.

Under its first objective, the Strategic Plan required the development of a Strategic Enforcement Plan (SEP) that 1) establishes the EEOC’s priorities and 2) integrates the agency’s investigation, conciliation and litigation responsibilities in the private and public sectors; adjudicatory and oversight responsibilities in the federal sector; and research, policy development, and education and outreach activities.

The Strategic Plan also provides for the development of a Quality Control Plan for private and public sector investigations and conciliations and a Quality Control Plan for federal sector hearings and appeals, both of which will address consistency and customer service issues more extensively.

B. Input into the Development of the SEP

The SEP is the product of an extensive effort by staff and Commissioners and broad public input. A Work Group consisting of a cross-section of field and headquarters staff, led by Chair Jacqueline Berrien, General Counsel David Lopez, and Memphis District Director Katharine Kores provided input to the Commission. See Appendix A for a list of all SEP Work Group members.
On June 5, 2012, the Commission solicited written input on the SEP’s development. In response, comments were received from more than 100 individuals, organizations, and coalitions internal and external to the agency and from across the nation. See Appendix B for June 5 release.

On July 18, 2012, the Commission held a public meeting to receive input from more than 30 stakeholders on the issues they believed should be addressed in the plan. See Appendix C for the press release.

On September 4, 2012, the Commission released a draft of the SEP for public comment and again received comments from more than 100 individuals and organizations. See Appendix D for the press release.

C. Guiding Principles

The Commission is guided by the belief that targeted enforcement efforts will have broad and significant impact to prevent and remedy discriminatory practices in the workplace. Targeted enforcement also supports effective management of the agency’s charge inventory, as a clearly defined set of priorities informs categorization of charges to promote timely resolution. Finally, the Commission recognizes that in order to make the best use of limited resources, the agency will have to undertake an integrated approach to its work --- one that mobilizes all segments of agency operations and emphasizes effectiveness, efficiency and consistency.

1. A Targeted Approach. A targeted approach means focused attention on an identified set of priorities.

Under this approach, priorities will receive a greater share of agency time and resources as the Commission carries out its statutory obligations. Federal agencies, as well as private entities, often direct resources toward specific practices to secure compliance and more effectively manage their limited resources. For agencies that receive complaints, targeted enforcement necessitates a paradigm shift to focus on specific priorities, recognizing that a focused effort should have a broad and lasting impact to more effectively advance the agency’s mission and the public interest.

2. An Integrated Approach. An integrated approach ensures the full use of communications, outreach, education, training, research, and technology as tools to advance the agency’s overall mission in concert with administrative enforcement (investigations, mediations, and conciliations) and legal enforcement (litigation, amicus curiae participation, and policy development in the private and state and local government sectors, and hearings and appeals in the federal sector). An integrated approach also recognizes that, where possible, enforcement in the private, public, and federal sectors should be coordinated and consistent. Commission
policies and positions that apply to private and public employers should be applied to the federal
government as an employer as well.

Moreover, an integrated approach envisions collaboration and coordination among staff, offices,
and program areas and promotes the sharing of information and strategies to implement a
national law enforcement model. An integrated approach also requires that all internal agency
plans, policies, and procedures increase efficiency and consistency and maximize customer
satisfaction to further the ultimate goals of the agency. In short, an integrated approach means
“one EEOC.”

An integrated approach also acknowledges that the EEOC is one part of a multi-pronged national
equal employment law enforcement effort. The Department of Justice, Department of Labor,
Fair Employment Practices Agencies (FEPAs), Tribal Employment Rights Organizations
(TEROs), and the private bar all play a vital role in enforcing laws prohibiting employment
discrimination. As a result, it is important that the EEOC collaborate with each effectively to
further its mission.

3. Accountability. The EEOC is a national organization comprised of a Commission,
General Counsel, headquarters office, and 53 district, field, area, and local offices across the
nation. Throughout the Commission’s history, the agency’s success has hinged on a careful
balancing of the need for national priorities, standards, and oversight with the need for local
awareness, responsiveness, and discretion. In this time of limited resources and rising demand,
striking that balance properly has never been more important. To this end, the SEP seeks to
establish clear expectations for those charged with implementing this plan and to provide for
regular and meaningful communication amongst the Commission, General Counsel, agency
leadership, and agency staff. In doing so, the Commission can ensure that the strategic,
integrated and consistent enforcement approach established by the SEP is implemented and the
expertise of the agency’s workforce informs and enhances that implementation throughout the
country.

D. Previous Plans and Continuing Commitments

The Commission’s previous efforts to establish priorities, integrate enforcement, and manage the
charge inventory consist of the National Enforcement Plan, Priority Charge Handling

Priority Charge Handling Procedures. In 1995, the Commission adopted a Priority Charge
Handling Procedures (PCHP) system to categorize and expedite the handling of its charge
inventory to focus the agency’s resources on strategic enforcement. PCHP revoked the full
investigation protocol of the 1980s. The PCHP system was based on the development of
National and Local Enforcement Plans (NEP, LEPs) that prioritized issues for Commission
action.\textsuperscript{11} PCHP identified enforcement plan issues as the first and highest priority for charge
categorization.\textsuperscript{12}
With the adoption of the SEP and the Strategic Plan, PCHP must be examined and updated to ensure that meritorious priority matters receive greater resources and attention, as the NEP priorities received in the early years of PCHP implementation. Agency experience demonstrates that PCHP is most effective as a charge management system when priorities are clearly defined and consistently used in the categorization of charges.

PCHP initially resulted in a significant reduction in the EEOC’s pending inventory of charges. However, the charge inventory increased significantly between 2002 and 2008. During this period, the NEP and LEPs were used inconsistently to prioritize charges and the number of investigative staff decreased. While the number of incoming charges also decreased from 2003 through 2006, charge receipts rose in 2007. The charge inventory more than doubled between 2005 and 2008.

Budget increases between 2008 and 2010 allowed the agency to fill many vacant positions, update technology, and expand staff training opportunities. In FY 2010, Chair Jacqueline Berrien initiated a multi-year approach of sustained management attention to reverse the growth of the charge inventory. As a result, the number of unresolved charges was reduced by approximately 9 percent by the end of FY 2011 --- the first reduction in nearly a decade.

This progress will be enhanced by ensuring that PCHP is thoroughly examined and updated to fully implement the SEP and Strategic Plan. The Strategic Plan continues this course by directing staff to “[r]igorously and consistently implement charge and case management systems to focus resources and enforcement on the EEOC’s priorities.”

**National Enforcement Plan of 1996.** Approved by the Commission in 1996, the National Enforcement Plan (NEP) articulated the general principles governing the Commission's enforcement efforts, established national enforcement priorities, set parameters for Local Enforcement Plans (LEPs), and delegated significant litigation authority to the General Counsel. The SEP replaces the NEP.

**Comprehensive Enforcement Program of 2000.** In 2000, Chair Ida Castro initiated a Comprehensive Enforcement Program (CEP) to recommend best practices for administrative and legal enforcement coordination in the development of cases. In 2011, Chair Jacqueline Berrien, General Counsel David Lopez, and Director of the Office of Field Programs Nicholas Inzeo reaffirmed the importance of these principles in directives to the field.

**Systemic Task Force Recommendations of 2006.** The recommendations of the Systemic Task Force, unanimously adopted by the Commission in 2006, established a nationwide systemic program as a top priority of the Commission. In adopting the Systemic Task Force Report, the Commission sought to change how EEOC operated by requiring plans and procedures for early identification of systemic cases, by deploying the resources needed for successful systemic enforcement, and by implementing a national law firm model. Through the SEP, the Commission
III. NATIONAL PRIORITIES FOR INTEGRATED ENFORCEMENT

The Commission’s goal in identifying these priorities is to ensure that agency resources are targeted to prevent and remedy discriminatory practices where government enforcement is most likely to achieve broad and lasting impact. The Commission anticipates that each of these priorities will require the development of a multi-pronged response to include enforcement, education and outreach, research, and policy development. The Commission believes that a comprehensive and coordinated focus on the following priorities will significantly advance its mission.

The Commission does not expect that every EEOC office will approach every SEP priority identically or with the same level of intensity. Charge trends and demographic differences may demand a more localized approach in addressing different priorities, which will be set forth in the District Complement Plans (DCP) (Infra at IV.C).

A. Criteria for Determining Priorities

The Commission has identified priorities for national enforcement in the private, public, and federal sectors based on the following criteria:

1. Issues that will have broad impact because of the number of individuals, employers or employment practices affected;

2. Issues involving developing areas of the law, where the expertise of the Commission is particularly salient;

3. Issues affecting workers who may lack an awareness of their legal protections, or who may be reluctant or unable to exercise their rights;

4. Issues involving discriminatory practices that impede or impair full enforcement of employment anti-discrimination laws; and

5. Issues that may be best addressed by government enforcement, based on the Commission’s access to information, data, and research.

B. National Priorities

The Commission identifies the following issue priorities, with the goal and expectation that a concentrated and coordinated approach will result in reduced discrimination in these areas. Some of the priority categories, such as hiring discrimination, raise challenging and complicated issues...
affecting all of the protected classes, which the EEOC is better situated than the private bar to address given its investigatory authority and access to data. Other priorities, such as emerging issues, are more discrete, but a concerted effort by the agency may result in early resolution of an unsettled area that promotes increased and lasting compliance with equal employment laws.

The strategies for effectively addressing the priorities will vary as well. For some, a multi-pronged, coordinated enforcement, outreach, research and policy effort may be appropriate. For others such as harassment and retaliation, the Commission may intensify and target its education and outreach strategies.

1. Eliminating Barriers in Recruitment and Hiring. The EEOC will target class-based intentional recruitment and hiring discrimination and facially neutral recruitment and hiring practices that adversely impact particular groups. Racial, ethnic, and religious groups, older workers, women, and people with disabilities continue to confront discriminatory policies and practices at the recruitment and hiring stages. These include exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, restrictive application processes, and the use of screening tools (e.g., pre-employment tests, background checks, date-of-birth inquiries). Because of the EEOC’s access to data, documents and potential evidence of discrimination in recruitment and hiring, the EEOC is better situated to address these issues than individuals or private attorneys, who have difficulties obtaining such information.

2. Protecting Immigrant, Migrant and Other Vulnerable Workers. The EEOC will target disparate pay, job segregation, harassment, trafficking and other discriminatory practices and policies affecting immigrant, migrant and other vulnerable workers, who are often unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

3. Addressing Emerging and Developing Issues. As a government agency, the EEOC is responsible for monitoring trends and developments in the law, workplace practices, and labor force demographics. Under this SEP, the EEOC will continue to prioritize issues that may be emerging or developing. Given the EEOC’s research, data collection, and receipt of charges in the private and public sectors, and adjudication of complaints and oversight in the federal sector, the agency is well-situated to address these issues.

Swift and responsive attention to demographic changes (e.g. the aging of the workforce), recently enacted legislation, developing judicial and administrative interpretations and theories, and significant events (e.g. the attacks of 9/11) that may impact employment practices can prevent the spread of emerging discriminatory practices by promoting greater awareness and facilitating early, voluntary compliance with the law.

For example, the Commission recognizes that elements of the following issues are emerging or developing: 1) certain ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat, as refined by the Strategic Enforcement Teams
(Infra at IV.B); 2) accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA); and 3) coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, as they may apply.

These issues are illustrative and not exhaustive. Additional emerging or developing issues may be identified and recommended by the Strategic Enforcement Team for Emerging or Developing Issues (Infra at IV.B). The team will also make recommendations as to when an issue should no longer be considered a priority under the emerging or developing category.

4. **Enforcing Equal Pay Laws.** The EEOC will target compensation systems and practices that discriminate based on gender. Among the many strategies to address these issues, the Commission particularly encourages the use of directed investigations and Commissioner Charges to facilitate enforcement.

5. **Preserving Access to the Legal System.** The EEOC will also target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC’s investigative or enforcement efforts. These policies or practices include retaliatory actions, overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination, and failure to retain records required by EEOC regulations.

6. **Preventing Harassment Through Systemic Enforcement and Targeted Outreach.** Harassment is one of the most frequent complaints raised in the workplace. Harassment claims based on race, ethnicity, religion, age and disability combined significantly outnumber even sexual harassment claims in the private and public sectors. The same is true in the federal sector. While investigation and litigation of harassment claims has been successful, the Commission believes a more targeted approach that focuses on systemic enforcement and an outreach campaign aimed at educating employers and employees will greatly deter future violations.

IV. **Implementation of SEP National Priorities**

For the SEP to succeed, resources must align with the priorities established herein. As part of the Strategic Plan for Fiscal Years 2012 – 2016, the Commission established Performance Measure 14, which requires the EEOC’s budgetary resources for FY 2014 – 2017 to align with the plan. The following guidelines are intended to ensure that SEP priorities receive the necessary attention and resources to advance the agency’s mission of ending and remedying unlawful discrimination in the workplace and to achieve the goals of a targeted and integrated national law enforcement approach.
A. Implementation of Priorities in Administrative Enforcement and Legal Enforcement (Private and Public Sectors)

Identifying priorities for enforcement is a critical tool for strategically managing investigations and for guiding case selection. The SEP and District Complement Plans (Infra at IV.C) set forth those priorities for the EEOC.

Office Directors and Regional Attorneys are entrusted to exercise leadership and prosecutorial discretion in determining whether government enforcement of select charges and cases furthers the effective implementation of the Strategic Plan, the SEP, and District Complement Plans. The pursuit of any investigation or case must be premised on the strength of the evidence and its potential as a strong vehicle for meaningful law enforcement. Charges or cases should not be pursued, even if they fall within a priority category, unless a rigorous assessment of the merits determines significant law enforcement potential. While resources will focus on priorities, meritorious charges and cases in non-priority areas may be pursued where resources permit and based on the sound discretion of the District Director and Regional Attorney.

The Office of Field Programs and Office of the General Counsel should strengthen capacity in priority areas through expanded training on investigating and litigating priority issues and should facilitate greater collaboration in the investigation, development, and resolution of priority charges.

Implementing SEP priorities through administrative and legal enforcement will require increased coordination within and between offices, particularly for systemic cases, to facilitate strategic decisions about which types of charges and cases within the SEP priorities should be pursued and where and when they should be pursued. Implementation of SEP priorities can also be facilitated by collaboration with other law enforcement partners (such as the Department of Justice on state and local government sector charges and the private bar), and through interaction with employers to promote voluntary compliance.

1. Priority Charge Handling Procedures (PCHP) Implementation

The Commission recognizes that PCHP must be updated and adapted to successfully implement the SEP. The Commission expects staff to fully comply with PCHP as described below and in forthcoming implementation guidance. Rigorous implementation of PCHP remains the key tool for reducing our pending inventory of charges, effectively managing new charges, and ensuring that enforcement priorities receive appropriate attention.

Under PCHP, “enforcement plan cases are the highest priority.” Thus, charges raising priorities identified in either the SEP or in the District Complement Plans (Infra at IV.C) should be afforded the highest priority.
Charges shall be screened promptly to determine if an SEP or district priority issue is raised. Where a preliminary assessment indicates that a priority issue in a charge is likely to have merit, the charge shall be initially designated as the highest category in PCHP. Given the complexity of some of the SEP issues, this initial designation permits a deeper and more expeditious examination to determine whether the charge is sufficiently meritorious to pursue. Charges raising SEP or district priorities that are deemed meritorious shall receive greater investigatory attention and resources to ensure timely and quality enforcement action.

Throughout the investigation of any charge, including charges raising SEP or district priorities, offices are expected to re-evaluate the charge’s category designation on an ongoing basis and should promptly re-categorize a charge, as appropriate. Charges raising priority issues, as with all charges, should be dismissed as soon as the office has sufficient information to conclude that further investigation is not likely to result in a cause finding.

Under PCHP, enforcement plan charges (SEP or DCP) are the highest priority. In addition, PCHP also includes two other types of charges among the top category: where further investigation likely would result in a cause finding or where irreparable harm will result unless processing is expedited. These designations will continue until PCHP is updated (Supra at II.D). Non-priority issue charges may be pursued if resources permit. Where they are of equal merit and strength to an SEP or DCP charge, the priority charge should take precedence.

2. Litigation Program

Meritorious cases raising SEP or district priority issues should be given precedence in case selection. Where appropriate, SEP priorities should also be considered in selecting cases for amicus curiae participation.

Where resources permit, meritorious cases in non-priority areas may also be filed where government enforcement is needed and is likely to have impact. Neither the Commission nor the General Counsel will establish rigid goals as to the number of cases, priority or otherwise, that should be filed.

The Commission recognizes that it will not be able to litigate every meritorious case that fails conciliation, including cases that fall within the SEP or under District Complement Plans. Thus, the Commission encourages the General Counsel, District Directors, and Regional Attorneys to continue to collaborate with the private bar, non-profit organizations, the Department of Justice, the Office of Federal Contract Compliance Programs (OFCCP), and the EEOC’s state and local partners to support their critical role in civil rights enforcement.

3. Systemic Program

Eradicating systemic discrimination has long been one of the EEOC’s top priorities, as underscored in the Strategic Task Force Recommendations of 2006 and reaffirmed in the Strategic Plan. The SEP and District Complement Plans (Infra at IV.C) will focus the types of
systemic investigations and cases to be pursued by the Commission on enforcement priorities at the national and local levels. Meritorious systemic charges and cases that raise SEP or district priority issues should be given precedence over individual priority matters and over all non-priority matters, whether individual or systemic. Where resources permit, meritorious systemic charges and cases in non-priority areas may be pursued based on the sound discretion of the District Director and Regional Attorney.

4. Alternative Dispute Resolution Programs

The Commission recognizes that mediation and other forms of alternative dispute resolution (ADR) are integral components of an effective enforcement program. Resolution of charges through mediation comprised 91 percent of all administrative settlements by the agency in FY 2012. The EEOC’s mediation program resolved 76 percent of the 11,380 charges that individuals and employers agreed to mediate in FY 2012. Most parties who participate in EEOC’s mediation program view mediation very favorably, with 98 percent reporting confidence in the program.

Mediation and other forms of ADR also play a critical role in resolving many federal sector and internal agency EEO complaints. ADR has thus contributed significantly to the successful resolution of private and public sector charges and federal sector complaints filed with the EEOC. The Commission encourages the continued use of ADR to resolve individual discrimination charges and complaints.

As the Strategic Plan and Strategic Enforcement Plan shift investigative and litigation resources to address SEP and district priorities, ADR will become even more important as a tool to improve customer service and promote timely resolution of discrimination charges filed with the agency. Offices should explore opportunities to expand the use of ADR by referring meritorious non-priority charges to mediation; through the use of pro bono mediators; partnering with local law school clinics; and encouraging participation in ADR in technical assistance programs and other agency public education events. Increased support for staff and contract mediators should be considered as resources permit.

B. Strategic Enforcement Teams

To ensure the development of integrated and comprehensive strategies for addressing the SEP priorities, the Chair will appoint Strategic Enforcement Teams, as appropriate. Each team will identify specific strategies among the wide range of enforcement tools at the EEOC’s disposal, including investigations, mediation, conciliation, litigation, directed investigations, commissioners charges, amicus curiae participation, federal sector oversight, federal sector hearings and appeals, policy development, research, staff training, communications, outreach and education, and state, local, and federal agency collaboration. Teams should also recommend methods of evaluating the effectiveness of the proposed strategies.
Strategies developed by the teams are to be considered recommendations to the Chair, Commission, General Counsel, Program Directors, Office Directors and Regional Attorneys. Nothing in this Section is meant to alter existing lines of authority.

C. District Complements to the SEP

The priorities above lay out a vision for the EEOC operating as a whole -- as a national law enforcement agency. The EEOC’s 15 district offices and 38 field, area, and local offices are integral components to the effective implementation of the SEP at the local level. The SEP contemplates that implementation strategies, types of cases investigated, and cases filed raising SEP priority issues may vary from office to office.

Even as EEOC offices focus on national priorities, the Commission recognizes that local challenges demand attention as well and specifically provides for local priorities as an important component of the District Complement Plans. District offices are best situated to address and respond flexibly to significant issues and systemic practices in their communities. In determining the district priorities to complement the SEP, District Directors and Regional Attorneys are expected to consider demographic data, charge data, trends, and input from stakeholders.

Under the leadership of the General Counsel and the Director of the Office of Field Programs, each District Office Director and Regional Attorney, in consultation with Field, Local, and Area Office Directors in their district, shall develop a District Complement Plan to the SEP by March 29, 2013. At a minimum, these plans should: 1) identify how the office will implement the SEP priorities; 2) identify local enforcement priorities, including areas for systemic investigation and litigation and strategies for addressing them; and (3) identify strategies for collaborative legal/enforcement efforts (Infra at V.A.1).

In consultation with members of the Commission, the Chair will review District Complement Plans to ensure that, taken together, they effectively complement national SEP priorities. Plans submitted by March 29, 2013 shall take effect on June 1, 2013, unless expressly disapproved by the Chair.

District Complement Plans shall be evaluated and revised as the SEP is evaluated and revised, or as necessary to remain current and relevant.

D. Federal Sector Complement to the SEP

The Strategic Plan also requires that the SEP address the need for a federal sector enforcement plan. After careful consideration, the Commission has determined a federal sector plan is needed.

The Office of Federal Operations and Office of Field Programs shall develop a Federal Sector Complement Plan (FCP) to the SEP by March 29, 2013. At a minimum, this plan should: 1)
identify how the federal sector will implement the SEP priorities; 2) identify specific enforcement priorities for the federal sector and strategies for addressing them; and 3) recommend strategies to improve communication, oversight, and consistency across the federal sector.

This plan should determine how enforcement priorities for the federal sector will be reflected in the federal sector case management system, required by Performance Measure 3 of the Strategic Plan. In addition, the plan should address how enforcement priorities will be incorporated into the forthcoming integrated data system required by Performance Measure 5 of the Strategic Plan, which will be used to identify and address potentially discriminatory policies or practices in federal agencies.

The Commission shall vote on the plan by May 31, 2013.

The FCP shall be evaluated and revised as the SEP is evaluated and revised, as the Strategic Plan performance measures that relate to the federal sector are implemented, or as necessary to remain current and relevant.

E. Other Priorities

The SEP replaces all existing enforcement priorities and initiatives. Like District Complement Plans, Chair initiatives should complement, rather than replace national SEP priorities.

V. INTEGRATION

The EEOC has been afforded many internal tools and authorities – administrative enforcement (including investigations, mediation, and conciliation), litigation, amicus curiae participation, policy development, federal sector oversight and adjudication, education, outreach, and research – through which it pursues its mission to stop and remedy unlawful employment discrimination. The Commission also partners with agencies at the federal, state, and local levels to enforce workplace anti-discrimination laws. Ensuring that each of these components works together efficiently and effectively is both a challenge and an opportunity for the EEOC. As noted in the guiding principles above, the Commission is committed to an integrated approach at the agency that promotes broad sharing and consideration of ideas, strategies, and best practices and furthers collaboration and coordination throughout the agency, beginning with the following requirements.

A. Integrating Administrative Enforcement and Legal Enforcement in the Private and Public Sectors

The Commission has a statutory responsibility to investigate charges. If the Commission determines there is reasonable cause to believe discrimination has occurred, it
attempts to end the alleged unlawful practice through conciliation. If conciliation fails, the Commission has the authority to bring a civil action.

Congress placed those responsibilities upon the Commission as an integrated whole -- not on discrete units within the Commission. As the Supreme Court recognized in a case brought shortly after the Commission was granted litigation authority, Congress created an "integrated, multi-step enforcement procedure" for the agency.\(^{30}\) Having a seamless, integrated effort between the staff who investigate and conciliate charges and staff who litigate cases on behalf of the Commission is paramount. The importance of such integrated, sequential work has been emphasized by the Commission\(^{31}\) and by the courts.\(^ {32}\)

Many EEOC offices already ensure that legal staff are appropriately consulted during administrative enforcement. To establish a baseline of consistency across all offices so that the “integrated, multistep enforcement procedure” that the Supreme Court referenced becomes an enduring reality, the SEP requires:

1. **Consultation between Investigative and Legal Enforcement Staff.** The Commission reaffirms the importance of regular and meaningful consultation and collaboration between investigative and legal staff throughout investigations and conciliations. To ensure this occurs, Legal/Enforcement Interaction procedures for such collaboration and coordination will be part of the District Complement Plans. The Commission also expects that the Quality Control Plan, required by Performance Measure 2 of the Strategic Plan for all investigations and conciliations, will further support measures to improve coordination between investigative and legal enforcement functions. The Commission believes that an integrated approach will increase quality and timeliness in the investigation of priority issues as investigative and legal staff work collaboratively on such charges.

2. **Coordination of Systemic Enforcement.** The Commission reaffirms that systemic enforcement must be coordinated and adequately resourced, in addition to focusing on SEP and district priorities. Pursuit of systemic matters should utilize integrated strategies, including research, outreach, and communications to have the broadest impact.

Systemic enforcement should be coordinated across EEOC districts. Offices are expected to avoid duplication of effort and promote efficiency through collaboration, consultation and strategic partnerships.

To improve coordination, the Committee of Advisors on Systemic Enforcement (CASE) shall review the agency’s systemic efforts in light of the SEP and the DCPs and shall provide recommendations for improvements to the program to the Chair, Commissioners, General Counsel and Director of the Office of Field Programs.
B.  Integrating Federal Sector Activities

While the statutory obligations of the Commission in the federal sector differ from the Commission’s enforcement responsibilities in the private and public sectors, the same goals for equal opportunity apply for employees, applicants, and employers in all sectors. Moreover, the same principles of targeted, integrated and consistent enforcement apply.

To promote increased coordination in the federal sector, the SEP applies to the federal sector, and requires the development of an FCP (Supra at IV.D).

The Commission also believes that it is important to fully evaluate the current structure of the federal sector hearings program, specifically with respect to the placement and status of Administrative Judges in the EEOC’s organization, and related issues impacting the effectiveness of the program. The Commission shall vote on these recommendations (Federal Sector Organization Plan) September 30, 2013. At a minimum, those responsible for developing the recommendation to the Commission shall consult with members of the Commission, the Administrative Judges Association, EEOC Council of Locals 216, the Directors of the Office of Federal Operations and the Office of Field Programs, the Senior Executive Service Advisory Counsel and agency leadership.

C.  Integrating Education and Outreach Activities

Congress specifically recognized the importance of education and outreach as a part of EEOC’s powers when it created the Commission in 1964 and in subsequent statutory amendments. The Commission has reaffirmed the importance of education and outreach in the Strategic Plan for 2012-2016. The EEOC conducts hundreds of fee-based and free technical training and assistance programs each year for employers, employees, advocates, agency stakeholders, and other interested members of the public. The agency also informs the public about its activities and the requirements of laws enforced by the EEOC through its website (www.eeoc.gov) and various publications. Additionally, the Commission issues regulations and other materials to assist employers and employees in understanding their rights and responsibilities under the federal anti-discrimination laws.

Clear and accessible information and legal guidance are crucial aspects of preventing discrimination and furthering enforcement. To ensure the public has easy access to information and technical assistance from the EEOC and that the EEOC is presenting a coordinated and consistent national message, the Commission adopts the following strategies:

1. The Office of Legal Counsel, in consultation with the Office of General Counsel, Office of Field Programs, and Office of Federal Operations, shall develop a multi-year plan for reviewing and updating subregulatory guidance to support and further the implementation of the SEP priorities, consistent with Performance Measure 11 in the Strategic Plan. In consultation
with members of the Commission and agency leadership, the Chair shall review and approve the plan.

2. The Office of Communications and Legislative Affairs, Office of Field Programs, Office of Federal Operations, Office of the General Counsel, Office of Legal Counsel, and the Strategic Enforcement Teams shall collaborate to develop a multi-year nationwide communications and outreach plan to ensure consistency and coordination in message content and management of the agency’s communications, program outreach, technical assistance, and legislative outreach. The plan may have both national and local components and should address the private, public, and federal sectors. In consultation with members of the Commission and agency leadership, the Chair will review and approve the plan.

3. The Office of Communications and Legislative Affairs shall assume responsibility for the management of the EEOC’s public website.

D. Integrating Research, Data and Enforcement

Among the powers granted to the Commission is the power to “make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public.” Today, collecting and analyzing data is central to the EEOC’s enforcement and educational efforts.

The Commission must be able to conduct relevant research on a timely basis for cases in litigation, and have the ability to research broad issues of employment discrimination that are not connected to pending cases. Moreover, the Commission must have the appropriate technological capacity to collect data in a useful form.

In order to enhance the integration of its research efforts, the Commission adopts the following strategy:

The Office of Research and Information Planning, the Office of Field Programs, the Office of Federal Operations, the Office of the General Counsel, the Office of Legal Counsel, the Office of Communications and Legislative Affairs, the Office of Information Technology, and the Strategic Enforcement Teams shall collaborate to develop a multi-year research plan that identifies research needs for the SEP priority areas and includes an integrated approach for working with all offices within the Commission.

The Commission shall vote on the plan by July 31, 2013.

E. Collaboration with State and Local Fair Employment Practice Agencies

State and local Fair Employment Practices Agencies (FEPAs) are critical partners in the EEOC’s enforcement of equal employment laws. As noted above, FEPAs currently investigate
approximately 45,000 charges a year that are dual filed with the EEOC. Consistent with Performance Measure 7 of the 2012-2016 Strategic Plan, and to engage the state and local FEPAs in strategic enforcement plan implementation, the Commission adopts the following strategy:

The Office of Field Programs shall consult with the leadership of state and local FEPAs, members of the Commission, and agency leadership to develop recommendations concerning ways to engage FEPAs more fully in the pursuit of SEP and DCP priorities.

**F. Supporting Private Enforcement of the Federal Anti-Discrimination Laws**

The Commission has an obligation to ensure meaningful legal protections for individuals while also effectively using its resources to have the greatest impact. Given its limited resources, the EEOC litigates only a fraction of the charges it receives annually. In FY 2011, the Commission filed 261 lawsuits on the merits. Workers and their advocates filed 16,879 federal lawsuits under the federal civil rights statutes in calendar year 2011. Suits by individuals are critical to the enforcement of federal anti-discrimination laws. With regard to all charges, the EEOC’s staff may share, to the extent permitted under the law, information to facilitate swift enforcement and early resolution of charges.

To better assist individuals whose charges are not pursued by the EEOC, district offices may provide referrals to local and state bar associations.

**G. Revising National Standard Operating Procedures, Practices, and Processes**

As a law enforcement agency, the EEOC’s leadership and staff interact each day with thousands of individuals -- employers, lawyers, advocates, members of the general public -- throughout the Commission’s headquarters and 53 field offices. That each of our customers receives the same high quality of service and professionalism in all of our offices is of vital importance to achieving our mission and promoting good government.

In keeping with Strategic Objective I of the Strategic Plan on strategic law enforcement and Strategic Objective III on quality customer service, the Director of the Office of Field Programs and General Counsel shall submit recommendations for standard operating procedures at each stage of interaction with EEOC’s customers, including during private and public sector enforcement and federal sector adjudicatory proceedings.

With respect to federal sector matters, the Director of the Office of Federal Operations (OFO) and the Director of the Office of Field Programs (OFP) and their designees shall develop recommendations to improve communication, oversight, and consistency across the federal sector, including consistency (a) between OFO staff, Administrative Judges, and other staff of the hearings program, and (b) across OFO appeals units, and (c) across all offices.
VI. CONTINUED DELEGATION OF AUTHORITY

With the goal of increasing the efficiency and effectiveness of the agency’s enforcement programs, the Commission has delegated substantial authority to its District Directors, to its General Counsel (and through the General Counsel, to its Regional Attorneys), and to its Office of Federal Operations. Their assessment of how the delegated authority has been exercised and whether the Commission's stated goals have been better achieved as a result of such delegation shall be included in the reports from the Directors of the Office of Field Programs and the Office of Federal Operations, and the General Counsel, described in Part VII below.

In its 2012-2016 Strategic Plan, the Commission committed to improving the timeliness and quality of its enforcement activities in all sectors. Consistent with this goal, staff who investigate, litigate and adjudicate claims have an obligation to act expeditiously in all enforcement matters. The Commission has a similar obligation to expeditiously resolve the matters within its decision-making authority as well.

A. Investigations and Conciliations

The delegation of authority from the Commission to its District Directors is codified in regulations at 29 C.F.R. § 1601. Under these regulations, the Commission delegates authority to its District Directors to negotiate settlements and conciliation agreements, issue no cause findings, and make reasonable cause determinations in most cases that come before the Commission. The Commission reaffirms this delegation of authority.

B. Legal Enforcement

1. The delegation of litigation authority to the General Counsel was established in the 1996 National Enforcement Plan. The Commission delegates to the General Counsel the decision to commence or intervene in litigation in all cases except the following:

   a. Cases involving a major expenditure of resources, e.g., cases involving extensive discovery or numerous expert witnesses and many systemic, pattern-or-practice or Commissioner's charge cases;

   b. Cases that present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision, or compliance manuals;

   c. Cases that the General Counsel reasonably believes to be appropriate for submission for Commission consideration because of their likelihood for public controversy or otherwise (e.g., recently modified or adopted Commission policy);
d. All recommendations in favor of Commission participation as *amicus curiae*, which shall continue to be submitted to the Commission for review and approval.

A minimum of one litigation recommendation from each District Office shall be presented for Commission consideration each fiscal year, including litigation recommendations based on the above criteria.

2. The Commission ratifies its decision to give the General Counsel the authority to redelegate to regional attorneys the authority to commence litigation. The Commission encourages such redelegation of litigation authority as appropriate.

3. The Commission restates and ratifies its April 19, 1995 delegation to the General Counsel of the authority to refer public sector Title VII and ADA cases which fail conciliation to the Department of Justice, as well as the authority to redelegate this authority to Regional Attorneys. The Commission further authorizes delegation of authority to the General Counsel to refer public sector GINA cases which fail conciliation to the Department of Justice, as well as the authority to redelegate this authority to Regional Attorneys.

C. **Federal Sector**

The Commission regulations at 29 C.F.R. § 1614 grant certain authority in the federal sector to the EEOC’s staff. These regulations authorize Administrative Judges to hold hearings on federal sector complaints and authorize the Office of Federal Operations to issue decisions on appeals "on behalf of the Commission." The Commission reaffirms this authority.

**VII. EVALUATION**

The Commission believes this is an opportune moment for transformative change. But such change will require rigorous and consistent implementation of the strategic enforcement and integration recommendations of the SEP.

**A. Commission Oversight on Implementation of SEP**

The Commission has the responsibility to carry out its statutory mandate in a manner that provides consistent and quality service and that maximizes the use of agency resources to stop and remedy unlawful employment discrimination. The SEP puts into place systems for regular communication with the Chair and members of the Commission to fulfill their oversight responsibilities.
1. **Quarterly Commission Meetings on SEP Enforcement**

Beginning in the second quarter of FY 2013, the Chair will convene quarterly meetings on implementation of the SEP. As noted in Part VI above, all office directors must include an assessment of the delegated authority in their quarterly report.

The Director of the Office of Field Programs shall report on significant decisions by administrative judges in the federal sector and the Director of the Office of Federal Operations shall report on appellate decisions by OFO attorneys on priority areas under the SEP and Federal Sector Complement Plan, and on other significant issues. A written report by each Director to the Commission shall summarize significant decisions by each priority area.

The Director of the Office of Field Programs shall report on investigations, conciliations, and pre-determination settlements on SEP and district priority areas and other significant matters, such as the effectiveness of legal/enforcement interaction strategies. A written report to the Commission shall summarize these investigations, conciliations and settlements by each priority area.

The General Counsel will report to the Commission on cases and settlements within SEP and district priority areas, other significant litigation, and other significant matters, such as the effectiveness of legal/enforcement interaction strategies. A written report to the Commission shall summarize these cases and settlements by each priority area and include non-priority litigation. The report shall also include a discussion of significant Supreme Court decisions that may affect the work of the Commission.

2. **Annual Reporting on SEP Implementation**

As a federal agency, the Commission is required to issue a Performance and Accountability Report (PAR) after the end of each fiscal year. The report presents the agency’s most significant achievements in enforcement, communications, outreach, research, policy and technology efforts and highlights progress made toward achieving the Performance Measures of the Strategic Plan. In keeping with the principle of accountability, the Commission shall hold a public meeting within 45 days of the release of the PAR on implementation of the Strategic Plan, which will include a discussion of the Strategic Enforcement Plan, to evaluate progress and consider recommendations for improvement.

### B. **Timeline and Reporting Requirements**

<table>
<thead>
<tr>
<th>Required by SEP</th>
<th>Key Deadlines</th>
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<tbody>
<tr>
<td>Quality Control Plan*</td>
<td>Submitted to the Commission by March 29, 2013.</td>
</tr>
<tr>
<td></td>
<td>Voted on by the Commission by April 30, 2013.</td>
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<tr>
<td>Plan</td>
<td>Status</td>
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<td>If not disapproved by this date, a plan becomes effective.</td>
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*The Quality Control Plan is a requirement of the Strategic Plan.

**EFFECTIVE DATE**

The SEP is effective the day following approval by the Commission and will remain in effect until superseded, modified or withdrawn by vote of a majority of members of the Commission.39

The Commission approved the SEP on December 17, 2012 by a vote of 3-1.

**ACKNOWLEDGEMENTS**

The Commission would like to thank all those who participated in the development of the SEP, beginning with the leaders and members of the SEP Work Group and all those who submitted public comments.
APPENDIX A

EEOC STRATEGIC ENFORCEMENT PLAN WORK GROUP

**Leadership**
Chair Jacqueline A. Berrien  
General Counsel David Lopez  
Memphis District Director Katharine Kores

**Members**

Lynette Barnes  
*Regional Attorney, Charlotte District Office*

Dexter Brooks  
*Director of Federal Sector Programs, Office of Federal Operations*

Robbie Dix  
*Director, Review Division, Office of Federal Operations*

Martin Ebel  
*Deputy Director, Houston District Office*

Greg Gochanour  
*Supervisory Trial Attorney, Chicago District Office*

Keith Hill  
*Director, New Orleans Field Office*

Dana Hutter  
*National Systemic Program Manager, Office of Field Programs*

Spencer Lewis  
*District Director, Philadelphia District Office*

Carol Miaskoff  
*Acting Associate Legal Counsel, Office of Legal Counsel*

Christine Nazer  
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Jerome Scanlan  
*Assistant General Counsel, Office of General Counsel*

Tonyaa Shiver  
*Investigator, EEOC Dallas District Office; National Council of EEOC Locals No. 216*

Cathy Ventrell-Monsees  
*Senior Attorney Advisor, Office of the Chair*

**Ex-Officio Members**

Claudia Withers  
*Chief Operating Officer and Performance Improvement Officer*

Deidre Flippen  
*Director, Office of Research, Information and Planning and Deputy, Performance Improvement Officer*

**Key Staff Support**

Leslie Annexstein, *Senior Attorney Advisor, Office of General Counsel*  
Joi Chaney, *Special Assistant, Office of the Chair*  
Patrick Patterson, *Senior Counsel, Office of the Chair*
APPENDIX B

Press Release 6-5-12

EEOC Seeks Public Input in Developing Strategic Enforcement Plan

In February 2012, the U.S. Equal Employment Opportunity Commission (EEOC) approved a Strategic Plan for Fiscal Years 2012 – 2016. The Strategic Plan establishes a framework for achieving the EEOC’s mission to stop and remedy unlawful employment discrimination by focusing on strategic law enforcement, education and outreach, and efficiently serving the public. The first performance measure of the plan requires the Commission to approve a Strategic Enforcement Plan (SEP). The Commission is now developing the SEP and would like input from the public. We encourage participation from individuals, employers, advocacy groups, agency stakeholders and other interested parties.

While no specific format is required, we are most interested in what the EEOC’s national priorities should be for the next three years to have the greatest impact in combating discrimination in the workplace; and recommendations for improving enforcement, outreach and prevention, and customer service. Please also include a contact email and/or mailing address.

Suggestions must be submitted by 5:00 pm EDT on June 19, 2012 to strategic.plan@eeoc.gov or received by mail at Executive Officer, Office of the Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, DC 20507.

All submissions will be reviewed for possible inclusion in a future Commission meeting in Washington, D.C. on the development of the SEP. If selected, the author or a representative would be invited to testify before the Commission in person, via phone, or via live video.

For general inquiries about the 2012 Strategic Plan or the development of the SEP, please email strategic.plan@eeoc.gov or call (202) 663-4070/(TTY: 202-663-4494). For press inquiries, please contact the Office of Communications and Legislative Affairs at (202) 663-4191 or newsroom@eeoc.gov. If you are a private citizen seeking EEOC information, please see the "Contact Us" page of our website at www.eeoc.gov/contact or call 1-800-669-4000.

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at www.eeoc.gov.
APPENDIX C

Press Release 7-18-12

EEOC Holds Unprecedented Public Meeting to Hear Views on Strategic Enforcement Plan

Five Roundtable Discussions With 32 People From Many Different Viewpoints Presented

WASHINGTON—The U.S. Equal Employment Opportunity Commission today held an unprecedented public meeting at which academics, representatives of the civil rights, business and federal sector communities, as well as former EEOC leaders and current employees presented their views about the agency’s proposed Strategic Enforcement Plan (SEP).

“We welcome the views of interested members of the public as we consider how to better leverage the EEOC’s resources to improve enforcement, outreach and customer service,” said EEOC Chair Jacqueline Berrien. “An open strategic planning process ensures that the Commission is prepared for 21st century challenges and also honors the spirit of open government.”

The Strategic Enforcement Plan grew out of the agency’s Strategic Plan (Plan) adopted at a Commission meeting on February 22, 2012, governing fiscal years 2012-2016. That Plan set forth three underlying values that will guide the work of the EEOC: commitment to justice, accountability, and integrity; and three strategic objectives: strategic law enforcement, education and outreach, and efficiently serving the public. One requirement of the Strategic Plan was to develop the SEP and have it in place by the start of fiscal year 2013 — October 1, 2012.

While all cabinet level departments and agencies are required to develop Strategic Plans with enforcement components, it is highly unusual that plans are developed with so much input from the public. The EEOC sought views about what its national priorities should be for the next three years to have the greatest impact in combating discrimination in the workplace; and also recommendations for improving enforcement, outreach, and customer service. Over 80 organizations and individuals responded to the request for input, with their responses totaling more than 450 pages.

At the meeting, participants noted the importance of the EEOC continuing to use systemic investigations and litigation to target specific issues and practices where government enforcement will have the greatest impact. Several advocacy groups urged the Commission to focus its enforcement efforts on hiring discrimination and retaliation which affect so many workers, as well as focusing on pay, pregnancy, and caregiver discrimination, and developing issues under the Americans with Disabilities Act Amendments Act. Both employee and employer representatives highlighted the need for consistent practices and procedures across...
field offices. Participants from many different backgrounds requested the Commission devote more resources to enhance efficient charge processing, and urged new outreach and education initiatives, including greater use of social media.

Participants in the roundtable focusing on the EEOC’s federal sector program included representatives from other agencies, unions representing federal employees, and federal employee affinity groups. They noted, among other issues, the need to clarify the role of agency counsel in the investigative stage of proceedings, the need for increased oversight of federal agency enforcement, the need for training for managers on supervision as well as EEO, and for employees on navigating the complaints process.

The Commission will consider all of the input—both written and from the meeting—in crafting its SEP. That document will be posted on the Commission’s website when finalized. Additionally, the comments that were submitted will be available for onsite review in the EEOC’s library.

The EEOC will hold open the July 18, 2012, Commission meeting record for 15 days, and invites audience members, as well as other members of the public, to submit written comments on any issues or matters discussed at the meeting. Public comments may be mailed to Commission Meeting, EEOC Executive Officer, 131 M Street, N.W., Washington, D.C. 20507, or e-mailed to Commissionmeetingcomments@eeoc.gov.

The EEOC enforces federal laws prohibiting employment discrimination. Further information about the EEOC is available on its web site at www.eeoc.gov.
APPENDIX D

Press Release 9-4-12

EEOC Seeks Input on Strategic Enforcement Plan

The U.S. Equal Employment Opportunity Commission (EEOC) has released for public comment a draft of its Strategic Enforcement Plan (SEP). Comments must be submitted by 5:00 pm ET on September 18, 2012 at strategic.plan@eeoc.gov or received by mail at Executive Officer, Office of the Executive Secretariat, U.S. Equal Employment Opportunity Commission, 131 M Street, NE, Washington, D.C. 20507. The Commission plans to vote on the draft plan at the end of this fiscal year.

The first requirement of the EEOC's Strategic Plan for Fiscal Years 2012 - 2016 was to develop the SEP by the start of fiscal year 2013 -- October 1, 2012. The SEP will establish the Commission's priorities and integrate all components of EEOC's private, public and federal sector enforcement.

The process for developing the SEP has been highly inclusive and collaborative. The plan was developed by the Commission with input from a Work Group consisting of district and headquarters staff, led by Chair Jacqueline Berrien, General Counsel P. David Lopez, and Memphis District Director Katharine Kores. On June 5, the Commission solicited written input on the SEP's development. In response, comments were submitted by more than 100 individuals, organizations, and coalitions - internal and external to the agency - from across the nation. On July 18, the Commission held a public meeting to receive input from more than 30 stakeholders on the issues they believed should be addressed in the plan.

The Commission is continuing this inclusive effort by soliciting comments from the general public on a draft of the SEP. Your input is vital to their efforts to ensure accountability to our nation's workers, employers, and taxpayers in general. All comments will be reviewed and considered as the Commission continues to edit the plan.

The EEOC has served as the nation's lead enforcer of employment antidiscrimination laws and chief promoter of equal employment opportunity (EEO) since 1965. The agency is responsible for enforcing Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, the Equal Pay Act of 1963, Section 501 of the Rehabilitation Act of 1973, Titles I and V of the Americans with Disabilities Act of 1990, and Title II of the Genetic Nondiscrimination Act of 2008. Together, these laws protect private, public, and federal workers from employment discrimination on the basis of race, color, religion, sex, national origin, age, disability, or genetic information. They also make it illegal to retaliate against a person for filing a charge of, or participating in an investigation or lawsuit regarding, employment discrimination.
For general inquiries about the plan, please email strategic.plan@eeoc.gov or call (202) 663-4070/(TTY: 202-663-4494). For press inquiries, please contact the Office of Communications and Legislative Affairs at (202) 663-4191 or newsroom@eeoc.gov. If you are seeking EEOC information, please call (202) 663-4900 or e-mail info@eeoc.gov. Further information about the EEOC is available on its web site at www.eeoc.gov.
ENDNOTES


3 “Charges” are filed in private and public sector enforcement proceedings, see 42 U.S.C. § 2000e-5(b), while “complaints” are filed with federal agencies in federal sector enforcement proceedings. See 42 U.S.C. § 2000e-16(c).


6 This represents a decrease of 4.7 percent from 8,113 requests for hearings in FY 2011 and a decrease of 16 percent from 5,175 appeals in FY 2011.

7 Strategic Plan, supra note 1, at 11.

8 Id. at 16-18.

9 See David Weil, Improving Workplace Conditions Through Strategic Enforcement, A Report to the Wage and Hour Division of the Department of Labor (2010).

10 The Commission has a statutory obligation to accept charges, serve notice on the respondent, and to “make an investigation.” 42 U.S.C. § 2000e-5(b). The statute does not define the elements or scope of that investigation, nor condition an individual’s right to sue on the agency taking any action. Federal Express, Corp. v. Holowekchi, 552 U.S. 389 (2008). Determining the appropriate extent of an investigation of a particular charge lies within the discretion of the agency, guided by the purposes of the anti-discrimination statutes.


12 “Category A: Enforcement Plan/Potential Cause Charges.” The first category includes (1) charges that fall within the national or local enforcement plan and (2) other charges where further investigation will probably result in a cause finding. Cases should also be classified as
Category A if irreparable harm will result unless processing is expedited. Within resource constraints, enforcement plan cases are the highest priority.” Id. at 4.


14 Strategic Plan, supra note 1, at 11.


19 In the last four years, one third of the systemic discrimination suits filed by the agency challenged discriminatory harassment in the workplace.

20 Strategic Plan, supra note 1, at 12.

21 As required by the Strategic Plan, more detailed internal guidance will be developed and coordinated by the Chair to insure that the SEP is fully implemented.
The Commission defines systemic cases as pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area. While systemic cases typically involve a class of individuals, they may also originate from a single charging party alleging that a policy is discriminatory, for example. In the current Strategic Plan, the Commission established a performance measure requiring that systemic cases figure more prominently in the agency’s litigation docket by setting a target percentage rather than a fixed number of cases filed each year. See Strategic Plan, supra note 19.

An administrative settlement is a signed agreement to which the EEOC and the charging party or the respondent are parties, negotiated before a determination has been made on the merits of the case.


In the 1996 NEP, the Commission required a “coordinated enforcement strategy, which the Comprehensive Enforcement Program (CEP) of 2000 reaffirmed by “link[ing] and integrat[ing] every phase of the Commission’s work in the private sector program, from outreach to taking and developing charges of discrimination, investigation, and final resolution.”

See also Hickey-Mitchell Co., 507 F.2d 944, 948 (8th Cir. 1974) ("'The Commission’s "power of suit and administrative process [are not] unrelated activities, [but] sequential steps in a..."').
unified scheme for securing compliance with Title VII.'") (alterations in original), quoting EEOC v. E.I. DuPont de Nemours & Co., 373 F. Supp. 1321, 1333 (D. Del. 1974)).


34 See Strategic Plan, supra note 1, at 23-27.


36 The Commission anticipates that the Quality Control Plans for private sector investigations and for federal sector hearings and appeals as part of the implementation of the Strategic Plan will provide focused attention on consistency and quality issues.


38 29 C.F.R. § 1614.405 (2012).

39 See Strategic Plan, supra note 1 at 15.
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.


Originator: Office of Legal Counsel.

Jacqueline A. Berrien
Chair

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). 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." 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." The PDA requires that pregnant employees be treated the same as non-pregnant employees who are similar in their ability or inability to work.

**Fundamental PDA Requirements**

1) An employer may not discriminate against an employee 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. This suggests that pregnant workers continue to face inequality in the workplace. 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 releases, medical examinations that are not job related or consistent with business necessity, and forced leave.

**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. \(^\text{10}\) 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. \(^\text{11}\) 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.

**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," \(^\text{12}\) and gave women "the right . . . to be financially and legally protected before, during, and after [their] pregnancies." \(^\text{13}\) 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. \(^\text{14}\)

#### 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. \(^\text{15}\) 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," an issue may arise as to whether the employer knew of the pregnancy.

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.

Employment decisions based on such stereotypes or assumptions violate Title VII. 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." 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.

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."

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. 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.

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. 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.

3. Potential or Intended Pregnancy

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

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.” Accordingly, the policy could only be justified if the employer proved that female infertility was a bona fide occupational qualification (BFOQ). 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.”

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. 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.* 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.

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.

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. 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. Title VII may be implicated by exclusions of particular treatments that apply only to one gender.

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

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. Because prescription contraceptives are available only for women, a health insurance plan facially discriminates against women on the basis of gender if it excludes prescription contraception but otherwise provides comprehensive coverage. 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. 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.

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 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.

Title VII also requires that an employer provide the same benefits for pregnancy-related medical conditions as it provides for other medical conditions. 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. 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 "disability" within the meaning of the ADA. It also might violate Title II of the Genetic Information Nondiscrimination Act (GINA) and/or the Employee Retirement Income Security Act (ERISA).

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. Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination. For example, a manager's statement that an employee 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.

To continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk, 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. 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, 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 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.

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. For more information, see Section III C., infra.

c. Abortion

Title VII protects women from being fired for having an abortion or contemplating having an abortion. 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. The statute also makes clear that, although not required to do so, an employer is permitted to provide health insurance coverage for abortion. 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.

5. Persons Similar in Their Ability or Inability to Work

Title VII requires that individuals affected by pregnancy, childbirth, or related medical conditions be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work. Thus, an employer is obligated to treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave, or fringe benefits.

An employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job). However, an employer may treat a pregnant employee the same as other employees who are similar in their ability or inability to work with respect to other prerequisites for obtaining the benefit that do not relate to the cause of an employee's limitation. For example, a pregnant worker who needs changes in her duties or schedule would be responsible for conveying the request to her supervisor and for providing reasonable documentation of her limitations if this is what the employer requires of employees who seek workplace changes for reasons other than pregnancy. Similarly, if a pregnant worker requests a change that the employer is providing as a reasonable accommodation to a co-worker with a disability, the employer may evaluate the pregnant employee's request in light of whether the change would constitute an "undue hardship," since this would amount to treating the pregnant employee the same as an employee with a disability whose accommodation request would also be subject to the defense of undue hardship.

Pregnant employees seeking to establish that they have not been treated the same as other employees similar in their ability or inability to work can establish unequal treatment through various forms of evidence. For example, there might be evidence that reasonable accommodations (including exceptions to policies) are provided under the ADA to individuals with disabilities who are similar to a pregnant worker in terms of their ability or inability to work.

The ADAAA expanded the definition of disability to include employees with conditions requiring work-related restrictions similar to those needed by pregnant women. For example, someone who, because of a back impairment, has a 20-pound lifting restriction that lasts for several months would be an individual with a disability under the ADA entitled to reasonable accommodation, absent undue hardship. The same individual would be an appropriate comparator for PDA purposes to a woman who has a similar restriction due to pregnancy. Similarly, pregnant employees may require other kinds of workplace adjustments similar to accommodations provided to individuals with disabilities, such as permission to take more frequent breaks and to keep a water bottle at a workstation where an employer generally prohibits this practice (an accommodation that an employer might provide to someone who takes medication to combat the effects of dry mouth caused by certain psychiatric medications), or permission to use a stool to carry out job functions generally performed while
standing (an accommodation that might be provided to an employee with a back or leg impairment that limits
standing).\textsuperscript{69}

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

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." A violation under this provision will be established where all of the evidence,
viewed as a whole, establishes that an employer has treated a pregnant worker differently than a non-pregnant
worker similar in his/her ability or inability to work.

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\textsuperscript{70} 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 \textit{Deneen v. Northwest Airlines, Inc.},\textsuperscript{71} a manager stated the plaintiff would not be rehired "because of
    her pregnancy complication." This statement directly proved pregnancy discrimination.\textsuperscript{72}
- Close timing between the challenged action and the employer's knowledge of the employee's pregnancy,
  childbirth, or related medical condition.
  - In \textit{Asmo v. Keane, Inc.},\textsuperscript{73} 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.\textsuperscript{74}
- More favorable treatment of employees of either sex\textsuperscript{75} who are not affected by pregnancy, childbirth, or
  related medical conditions but are similar in their ability or inability to work.
  - In \textit{Wallace v. Methodist Hospital System},\textsuperscript{76} 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 evidence that this reason was pretextual by showing that the employer
    merely reprimanded a non-pregnant worker for nearly identical misconduct.\textsuperscript{77}
- Evidence casting doubt on the credibility of the employer's explanation for the challenged action.
  - In \textit{Nelson v. Wittern Group},\textsuperscript{78} 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.\textsuperscript{79}
- Evidence that the employer violated or misapplied its own policy in undertaking the challenged action.
  - In \textit{Cumpiano v. Banco Santander Puerto Rico},\textsuperscript{80} 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.\textsuperscript{81}

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.\textsuperscript{82}
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.83

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 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.84

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),85 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.86 An employer violates the ADA by treating a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily because the worker also cares for a child with a disability.87

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).88 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,89 and the defense must be based on objective, verifiable skills required by the job rather than vague, subjective standards.90

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.91
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.92

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 show that the policy is job related for the position in question and consistent with business necessity.93 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.94

The employer can prove business necessity by showing that the requirement is "necessary to safe and efficient job performance."95 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.96 The disparate impact provisions of Title VII have been used by pregnant plaintiffs to challenge, for example, weight lifting requirements,97 light duty limitations,98 and restrictive leave policies.99

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 have to prove that the requirement is job related for the position in question and consistent with business necessity.100

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.101 In addition to leave, the term "fringe benefits" includes, for example, medical benefits and retirement benefits.

1. Light Duty

a. Disparate Treatment: Pregnancy-Related Comments as Direct Evidence of Discrimination

If there is 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.

b. Disparate Treatment: Evidence of Other Workers Similar in Their Ability or Inability to Work Who Are Given Light Duty

In the absence of pregnancy-related statements evidencing animus, a pregnant worker may still establish a violation of the PDA by showing that she was denied light duty or other accommodations that were granted to other employees who are similar in their ability or inability to work. The PDA provides that "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."102 Accordingly, an employer's failure to treat pregnant employees the same as non-pregnant employees similar in their ability or inability to work is a violation of the PDA.
EXAMPLE 10
Employer Does Not Provide Equal Access to Light Duty

An employer has a policy or practice of providing light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20-pound lifting restriction related to her pregnancy. The employer denies the light duty request, claiming that pregnancy itself does not constitute an injury, illness, or disability, and that the employee has not provided any evidence that the restriction is the result of a pregnancy-related impairment that constitutes a disability under the ADA. The employer has violated the PDA because the employer's policy treats pregnant employees differently from other employees similar in their ability or inability to work.

An employer does not violate the PDA when it offers benefits to pregnant workers on the same terms that it offers benefits to other workers similar in their ability or inability to work. Therefore, if an employer's light duty policy places certain types of restrictions on the availability of light duty positions, such as limits on the number of light duty positions or the duration of light duty assignments, the employer may lawfully apply those restrictions to pregnant workers, as long as it also applies the same restrictions to other workers similar in their ability or inability to work.\(^\text{103}\)

EXAMPLE 11
Employer Provides Equal Access to Light Duty

Rachel worked as a nursing assistant at Sunrise Valley, a long-term care facility. After Rachel became pregnant, she applied for and was denied a light duty assignment. Sunrise Valley then discharged Rachel because she could not perform all of her job duties. Rachel filed a charge claiming that she was discriminated against on the basis of pregnancy by being denied light duty while light duty was provided to other workers with similar restrictions.

The EEOC investigation finds that Sunrise Valley has five administrative positions that it staffs with employees who are unable to perform one or more of their regular job functions and that Sunrise Valley has appropriately determined that this is the maximum number of light duty positions it can make available consistent with its staffing needs and the facility's obligation to ensure proper care and safety of its residents. The evidence also shows that in the past, pregnant workers have received light duty when positions were available and non-pregnant workers have been denied light duty when all positions were filled. At the time that Rachel made her request, all of the available light duty positions were filled. Because pregnant workers have equal access to light duty positions under the same terms as others similar in their ability or inability to work, Sunrise Valley's failure to provide light duty for Rachel when no light duty positions were available does not violate the PDA.\(^\text{104}\)

However, an employer cannot lawfully deny or restrict light duty based on the source of a pregnant employee's limitation. Thus, for example, an employer must provide light duty for pregnant workers on the same terms that light duty is offered to employees injured on the job who are similar to the pregnant worker in their ability or inability to work.

EXAMPLE 12
Employer Does Not Apply Restrictions Equally

An employer makes six light duty positions available to workers unable to perform one or more job duties due to an on the job injury, pregnancy, or an injury, illness, or condition that would constitute a disability under the ADA. A pregnant worker applies for a light duty assignment as a result of work restrictions imposed by her pregnancy. The employer denies the request, claiming that all six positions are currently filled. The employee produces evidence that, in the past, the employer has provided light duty assignments to workers injured on the job even when all six assignments were filled. The employee has provided evidence that the policy's restrictions were not applied equally to the pregnant worker's request for a light duty position.


A plaintiff need not resort to the burden shifting analysis set out in McDonnell Douglas Corp. v. Green\(^\text{105}\) in order to establish a violation of the PDA where there is direct evidence that pregnancy-related animus motivated the denial of light duty, or evidence that a pregnant employee was denied a light duty position provided to other employees who are similar to the pregnant employee in their ability or inability to work. If a plaintiff relies on this method of proof, however, she 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. The Commission's
position is that workers placed in light duty positions because they were injured on the job and/or because they meet the definition of "disability" under the ADA are appropriate comparators for purposes of this stage of the McDonnell Douglas analysis. Thus, consistent with the statutory language, a pregnant worker with a work restriction who challenges a denial of light duty should be able to establish a prima facie case of discrimination under McDonnell Douglas by identifying any other employee who is similar in his or her ability or inability to work and who was treated more favorably, including employees injured on the job and/or covered by the ADA.

The Commission rejects the position that the PDA does not require an employer to provide light duty for a pregnant worker if the employer has a policy or practice limiting light duty to workers injured on the job and/or to employees with disabilities under the ADA. Some courts have reached this conclusion based on the premise that employees covered by such policies are not proper comparators to the pregnant worker for the purposes of the McDonnell Douglas analysis. This analysis is flawed because it rejects the PDA's clear admonition that pregnant workers must be treated the same as non-pregnant workers similar in their ability or inability to work.

Under McDonnell Douglas, once the employee has established a prima facie case, the employer is required to 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. A policy that excludes pregnant workers from benefits offered to non-pregnant workers similar in their ability or inability to work based on the cause of their limitations, such as a policy that provides light duty only for individuals injured on the job, does not constitute such a legitimate, non-discriminatory reason. Even if an employer can assert a legitimate non-discriminatory reason for the different treatment, such as an evenly applied policy based on something other than the source of an employee's limitations (e.g., a policy limiting the number of available light duty positions), the pregnant worker is then able to present evidence showing that the articulated reason is merely a pretext for discrimination. For example, the pregnant worker might show that an employer that asserts it has a cap on the number of available light duty assignments has waived that cap for workers injured on the job but never for pregnant workers.

d. Disparate Impact

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

EXAMPLE 13

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 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.

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.

2. Leave

a. Disparate Treatment

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.

EXAMPLE 14

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.\footnote{113}

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 non-pregnancy or non-fertility is a bona fide occupational qualification (BFOQ).\footnote{114} 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."\footnote{115}

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.\footnote{116} 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.\footnote{117} 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 leave or to treat pregnancy-related absences more favorably than absences for other medical conditions.\footnote{118}

**EXAMPLE 15**

**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.\footnote{119} 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.\footnote{120}

**EXAMPLE 16**

**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 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.\footnote{121} 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.\footnote{122}

**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.\footnote{123}

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 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.\footnote{124} 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.\footnote{125}
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. However, parental leave must be provided to similarly situated men and women on the same terms. 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 17**

**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 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 18**

**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.

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. For example:

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

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.
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.  

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.

II. AMERICANS WITH DISABILITIES ACT

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. 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. 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. 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.

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. 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. Under the ADAAA, there is no requirement that an impairment last a particular length of time to be considered substantially limiting. 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. Although pregnancy itself is not an impairment within the meaning of the ADA and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended. An impairment's cause is not relevant in determining whether the impairment is a disability. 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.

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. 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.

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).
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;\(^\text{151}\) symphysis pubis dysfunction causing post-partum complications and requiring physical therapy;\(^\text{152}\) and complications related to a pregnancy in a breech presentation that required visits to the emergency room and bed rest.\(^\text{153}\) 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.\(^\text{154}\)

**EXAMPLE 19**

**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 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 20**

**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.\(^\text{155}\) 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.\(^\text{156}\)

**EXAMPLE 21**

**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.\(^\text{157}\)

**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. An 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. An employer may only deny a reasonable accommodation to an employee with a disability if it would result in an undue hardship. An undue hardship is defined as an action requiring significant difficulty or expense.

EXAMPLE 22
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:

- 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 keyboard. 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.163

  **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.164 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.165

Under the FMLA, an eligible employee166 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;
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.167

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 13152168 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;
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

Section 4207 of the Patient Protection and Affordable Care Act provides the following:

- 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.
- 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.

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. 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.

In California Fed. Sav. & Loan Ass'n v. Guerra, 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."

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." 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.

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.

**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.
• 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.

**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.
• 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.

**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, to respond promptly to all requests, and to avoid assuming that pregnancy-related impairments are not disabilities.
• 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.

Footnotes

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).


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.

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.


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.

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.
plaintiff’s supervisor had knowledge of pregnancy and had significant input into the termination decision). discharged plaintiff due to her pregnancy because the decision maker did not know of it, but evidence showed
904 F.2d 707, 1990 WL 82720, at *5 (6th Cir. 1990) (unpublished) (defendant claimed it could not have
be based on [a woman’s] being pregnant if [the employer] did not know she was”); Miller v. Am. Family Mut. Ins. Co.

“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. This issue is considered in Sections I A.S. and I C., infra.


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 date and not return until three months
after delivery denied due process).

15 See, e.g., Prebich-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);
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
plaintiffs supervisor had knowledge of pregnancy and had significant input into the termination decision).


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).

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 the
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 Dept 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).

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).

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)) ("The 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).

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").


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. Cnty. 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.").

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.

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.

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.


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).


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 ADA 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., --- S. Ct. ---, 62 U.S.L.W. 4636 (U.S. June 30, 2014) (Nos. 13-354 and 13-356), 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.

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).

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 & Assoc., 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.").

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. PacificCorp, 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).


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).

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.


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).

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).


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 an abortion violated PDA).

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).


64 See Section I C.1., infra.

65 See Section II B. infra, for further information about undue hardship under the ADA.

66 The ADA requires employers to provide reasonable accommodations, absent undue hardship, for the known physical or mental limitations of applicants or employees who are otherwise qualified for jobs they hold or seek. See 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9(a).

67 29 C.F.R. pt. 1630 app. §1630.2(j)(1)(viii) (someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting).


69 See Section I C.1., infra for further discussion on light duty policies.

70 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).

71 132 F.3d 431, 436 (8th Cir. 1998).

72 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 statement 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 not work any longer because she was pregnant raised material issue of fact as to whether discharge was due to pregnancy discrimination).

73 471 F.3d 588, 593-94 (6th Cir. 2006).

74 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).

75 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).
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. DOJl, 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).

Circumstantial evidence of pregnancy discrimination included employer's alleged failure to follow its disciplinary policy before demoting plaintiff). 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).

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, 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).

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

For further discussion of childcare leave issues, see Section I C.3., infra.

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).
90 Id. at 201.
91 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.
92 Cleveland Board of Educ. v. LaFleur, 414 U.S. 632 (1974); Carney v. Martin Luther Home, Inc., 824 F.2d 643 (8th Cir. 1987).
94 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).
95 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.
97 Garcia, 97 F.3d at 813.
98 Spivey v. Beverly Enters., 196 F.3d 1309, 1314 (11th Cir. 1999). For a discussion of light duty, see Section I C.1., infra.
100 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).
102 Id.
103 However, the PDA explicitly provides that the presence of a seniority system does not permit an employer to treat pregnant workers differently from workers similar in their ability or inability to work. See 42 U.S.C. § 2000e (k) ("and nothing in section 703(h) of this title shall be interpreted to permit otherwise"). An employer may not turn down a pregnant worker's request for light duty on the basis that such positions are awarded through seniority.
104 Of course, if Rachel's limitations resulted from a pregnancy-related impairment that constitutes a disability within the meaning of the ADA, Sunrise Valley would have an obligation under the ADA, absent undue hardship, to provide her with a reasonable accommodation that would enable her to perform her current job. See Section II B., infra.
106 See EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1192-95 (10th Cir. 2000) (a pregnant worker can be "qualified" for light duty work even if she did not sustain an occupational injury because requiring her to address the source of her impairment at the prima facie stage is equivalent to requiring her to dispel the employer's explanation for the adverse action); Latowski v. Northwoods Nursing Ctr., 2013 WL 6727331 (6th Cir. Dec. 23, 2013) (unpublished) (employees with work-related medical conditions receiving light duty were similarly situated to the pregnant worker in their ability to work because they also were under lifting restrictions of up to 50
pounds); Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) (for purposes of the prima facie case, pregnant worker need not be similarly situated in all respects; she need only be similar in the ability or inability to work); Germain v. County of Suffolk, 2009 WL 1514513, at *5 (E.D.N.Y. May 29, 2009) (unpublished) (“[w]hen an employee’s failure to meet objective, employer-imposed criteria is one of the legitimate, non-discriminatory reasons advanced by an employer to dispel the inference of discrimination raised by an employee at the prima facie stage, it cannot also be used to defeat the employee’s prima facie case,” citing EEOC v. Horizon). The Commission disagrees with Urbano v. Continental Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998), which held that a pregnant worker could not establish a prima facie case of pregnancy discrimination on the ground that she, like other workers who suffered off-duty injuries, was not qualified for transfer to a light duty position. By refusing to find a prima facie case of pregnancy discrimination, the court relieved the defendant of its burden to produce evidence of a legitimate, non-discriminatory reason for its action. See also Emily Martin, Written Testimony of Emily Martin, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://www.eeoc.gov/eeoc/meetings/2-15-12/martin.cfm (last visited April 30, 2014); Joan Williams, Written Testimony of Joan Williams, supra note 9 (evidence of stereotyping or departure from employer policies in treatment of pregnant women may be alternative methods for raising an inference of discrimination).

107 See, e.g., Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. 2013) (holding that a policy limiting light duty to employees injured on the job, employees who have disabilities within the meaning of the ADA, and employees who have lost their certification to drive commercial motor vehicles is a neutral “pregnancy blind” policy that neither constitutes direct evidence of pregnancy discrimination nor raises an inference of discrimination), cert. granted, 81 U.S.L.W. 3602 (U.S. July 1, 2014) (No. 12-1226); Reeves v. Swift Transp. Co., 446 F.3d 637, 643 (6th Cir. 2006) (refusal to give light duty to pregnant workers is not a pretext for pregnancy discrimination where employer provides light duty assignments only to workers injured on the job); Spivey v. Beverly Enters., 196 F.3d 1309, 1313 (11th Cir. 1999) (employer did not violate PDA by offering modified duty solely to employees injured on the job, although pregnant employees must be treated the same as every other employee with a non-occupational injury); Serednyj v. Beverly Healthcare, LLC, 2010 WL 1568606 (N.D. Ind. Apr. 16, 2010) (unpublished) (policy of allowing only employees injured on the job and those receiving reasonable accommodations for disabilities under the ADA to work with restrictions did not violate the PDA because it was pregnancy-blind), aff’d, 656 F.3d 540 (7th Cir. 2011).

108 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 disparateley 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.


110 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.

111 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.

112 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) ....”).

113 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)).

114 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
Counsel).

Aviation Administration Memo (5/5/1980) and confirming e-mail (3/5/2010) (on file with EEOC, Office of Legal Counsel); the Commission disagrees 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).


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).

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).

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.

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

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.

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.

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

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 which has a disparate impact upon the employment of women, who is not similarly situated to men, 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).

124 Warshawsky, 768 F. Supp. at 655.

125 Id.

126 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.").

127 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.


129 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.").


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


134 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).

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

136 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.

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

138 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.13.

139 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9.
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.

142 29 C.F.R. § 1630.2(j)(ix).

143 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").

144 29 C.F.R. pt. 1630 app. § 1630.2(h).


146 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).

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


150 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. DEPT OF HEALTH & HUMAN SERVS., http://womenshealth.gov/pregnancy/you-are-pregnant/pregnancy-complications.html (last visited Apr. 30, 2014).

151 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).


153 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).


155 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).

156 29 C.F.R. § 1630.2(l)(1).

157 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.


160 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9.

161 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.

162 See supra note 159.


164 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/fmlaad.html (last visited May 5, 2014).

165 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.

166 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)).
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.

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

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

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.

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).

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.

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

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.

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.


Id. at 280 (citation omitted).

Id. at 287.

Id. at 291.

See Section I A.3.a., supra.

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.

Id.
This publication by the U.S. Equal Employment Opportunity Commission (EEOC) answers questions about how federal employment discrimination law applies to religious dress and grooming practices, and what steps employers can take to meet their legal responsibilities in this area.

Examples of religious dress and grooming practices include wearing religious clothing or articles (e.g., a Muslim hijab (headscarf), a Sikh turban, or a Christian cross); observing a religious prohibition against wearing certain garments (e.g., a Muslim, Pentecostal Christian, or Orthodox Jewish woman's practice of not wearing pants or short skirts), or adhering to shaving or hair length observances (e.g., Sikh uncut hair and beard, Rastafarian dreadlocks, or Jewish peyes (sidelocks)).

In most instances, employers are required by federal law to make exceptions to their usual rules or preferences to permit applicants and employees to observe religious dress and grooming practices.

1. **What is the federal law relating to religious dress and grooming in the workplace?**

   Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended ("Title VII"), prohibits employers with at least 15 employees (including private sector, state, and local government employers), as well as employment agencies, unions, and federal government agencies, from discriminating in employment based on race, color, religion, sex, or national origin. It also prohibits retaliation against persons who complain of discrimination or participate in an EEO investigation. With respect to religion, Title VII prohibits among other things:

   - disparate treatment based on religion in recruitment, hiring, promotion, benefits, training, job duties, termination, or any other aspect of employment (except that "religious organizations" as defined under Title VII are permitted to prefer members of their own religion in deciding whom to employ);
   - denial of reasonable accommodation for sincerely held religious practices, unless the accommodation would cause an undue hardship for the employer;
   - workplace or job segregation based on religion;
   - workplace harassment based on religion;
   - retaliation for requesting an accommodation (whether or not granted), for filing a discrimination charge with the EEOC, for testifying, assisting, or participating in any manner in an EEOC investigation or EEO proceeding, or for opposing discrimination.

   There may be state or local laws in your jurisdiction that have protections that are parallel to or broader than those in Title VII.

2. **Does Title VII apply to all aspects of religious practice or belief?**

   Yes. Title VII protects all aspects of religious observance, practice, and belief, and defines religion very broadly to include not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, Buddhism, and Sikhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or may seem illogical or unreasonable to others.

   Religious practices may be based on theistic beliefs or non-theistic moral or ethical beliefs as to what is right or wrong that are sincerely held with the strength of traditional religious views. Religious observances or practices may include, for example, attending worship services, praying, wearing religious garb or symbols, displaying religious objects, adhering to certain dietary rules, proselytizing or other forms of religious expression, or refraining from certain activities. Moreover, an employee's belief or practice can be "religious" under Title VII even if it is not followed by others in the same religious sect, denomination, or congregation, or even if the employee is unaffiliated with a formal religious organization.[1]

   The law's protections also extend to those who are discriminated against or need accommodation because they profess no religious beliefs. For example, an employer that is not a religious organization (as legally defined
under Title VII) cannot make employees wear religious garb or articles (such as a cross) if they object on grounds of non-belief.

Because this definition is so broad, whether or not a practice or belief is religious typically is not disputed in Title VII religious discrimination cases.

3. Does the law apply to dress or grooming practices that are religious for an applicant or employee, even if other people engage in the same practice for non-religious reasons?

Yes. Title VII applies to any practice that is motivated by a religious belief, even if other people may engage in the same practice for secular reasons. However, if a dress or grooming practice is a personal preference, for example, where it is worn for fashion rather than for religious reasons, it does not come under Title VII's religion protections.

4. What if an employer questions whether the applicant's or employee's asserted religious practice is sincerely held?

Title VII's accommodation requirement only applies to religious beliefs that are "sincerely held." However, just because an individual's religious practices may deviate from commonly-followed tenets of the religion, the employer should not automatically assume that his or her religious observance is not sincere. Moreover, an individual's religious beliefs - or degree of adherence - may change over time, yet may nevertheless be sincerely held. Therefore, like the "religious" nature of a belief or practice, the "sincerity" of an employee's stated religious belief is usually not in dispute in religious discrimination cases. However, if an employer has a legitimate reason for questioning the sincerity or even the religious nature of a particular belief or practice for which accommodation has been requested, it may ask an applicant or employee for information reasonably needed to evaluate the request.

EXAMPLE 1
New Observance
Eli has been working at the Burger Hut for two years. While in the past he has always worn his hair short, he has recently let it grow longer. When his manager advises him that the company has a policy requiring male employees to wear their hair short, Eli explains that he is a newly practicing Nazirite and now adheres to religious beliefs that include not cutting his hair. Eli's observance can be sincerely held even though it is recently adopted.

EXAMPLE 2
Observance That Only Occurs at Certain Times or Irregularly
Afizah is a Muslim woman who has been employed as a bank teller at the ABC Savings & Loan for six months. The bank has a dress code prohibiting tellers from wearing any head coverings. Although Afizah has not previously worn a religious headscarf to work at the bank, her personal religious practice has been to do so during Ramadan, the month of fasting that falls during the ninth month of the Islamic calendar. The fact that Afizah adheres to the practice only at certain times of the year does not mean that her belief is insincere.

5. Can an employer exclude someone from a position because of discriminatory customer preference?

No. If an employer takes an action based on the discriminatory religious preferences of others, including customers, clients, or co-workers, the employer is unlawfully discriminating in employment based on religion. Customer preference is not a defense to a claim of discrimination.

EXAMPLE 3
Employment Decision Based on Customer Preference
Adarsh, who wears a turban as part of his Sikh religion, is hired to work at the counter in a coffee shop. A few weeks after Adarsh begins working, the manager notices that the work crew from the construction site near the shop no longer comes in for coffee in the mornings. When the manager makes inquiries, the crew complains that Adarsh, whom they mistakenly believe is Muslim, makes them uncomfortable in light of the anniversary of the September 11th attacks. The manager tells Adarsh that he will be terminated because the coffee shop is losing the construction crew's business. The manager has subjected Adarsh to unlawful religious discrimination by taking an adverse action based on customer preference not to have a cashier of Adarsh's perceived religion. Adarsh's termination based on customer preference would violate Title VII regardless of whether he was correctly or incorrectly perceived as Muslim, Sikh, or any other religion.
Employers may be able to prevent this type of religious discrimination from occurring by taking steps such as training managers to rely on specific experience, qualifications, and other objective, non-discriminatory factors when making employment decisions. Employers should also communicate clearly to managers that customer preference about religious beliefs and practices is not a lawful basis for employment decisions.

6. **May an employer automatically refuse to accommodate an applicant's or employee's religious garb or grooming practice if it would violate the employer's policy or preference regarding how employees should look?**

No. Title VII requires an employer, once it is aware that a religious accommodation is needed, to accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless doing so would pose an undue hardship. Therefore, when an employer's dress and grooming policy or preference conflicts with an employee's known religious beliefs or practices, the employer must make an exception to allow the religious practice unless that would be an undue hardship on the operation of the employer's business. Fact patterns illustrating whether or not an employer is aware of the need for accommodation appear below at examples 4-7.

For purposes of religious accommodation, undue hardship is defined by courts as a "more than de minimis" cost or burden on the operation of the employer's business. For example, if a religious accommodation would impose more than ordinary administrative costs, it would pose an undue hardship. This is a lower standard than the Americans with Disabilities Act (ADA) undue hardship defense to disability accommodation.

When an exception is made as a religious accommodation, the employer may nevertheless retain its usual dress and grooming expectations for other employees, even if they want an exception for secular reasons. Co-workers' disgruntlement or jealousy about the religious accommodation is not considered undue hardship, nor is customer preference.

**EXAMPLE 4**

**Exception to Uniform Policy as a Religious Accommodation**

Based on her religious beliefs, Ruth adheres to modest dress. She is hired as a front desk attendant at a sports club, where her duties consist of checking members' identification badges as they enter the facility. The club manager advises Ruth that the club has a dress code requiring all employees to wear white tennis shorts and a polo shirt with the facility logo. Ruth requests permission as a religious accommodation to wear a long white skirt with the required shirt, instead of wearing shorts. The club grants her request, because Ruth's sincerely held religious belief conflicts with the workplace dress code, and accommodating her would not pose an undue hardship. If other employees seek exceptions to the dress code for non-religious reasons such as personal preference, the employer is permitted to deny their requests, even though it granted Ruth a religious accommodation.

7. **How will an employer know when it must consider making an exception to its dress and grooming policies or preferences to accommodate the religious practices of an applicant or employee?**

Typically, the employer will advise the applicant or employee of its dress code or grooming policy, and subsequently the applicant or employee will indicate that an exception is needed for religious reasons. Applicants and employees will not know to ask for an accommodation until the employer makes them aware of a workplace requirement that conflicts with their religious practice. The applicant or employee need not use any "magic words" to make the request, such as "accommodation" or "Title VII." If the employer reasonably needs more information, however, the employer and the employee should discuss the request. In some instances, even absent a request, it will be obvious that the practice is religious and conflicts with a work policy, and therefore that accommodation is needed.

**EXAMPLE 5**

**Employer Knowledge Insufficient**

James's employer requires all of its employees to be clean-shaven. James is a newly hired employee, and was hired based on an online application and a telephone interview. When he arrives the first day with an unshorn beard, his supervisor informs him that he must comply with the "clean-shaven" policy or be terminated. James refuses to comply, but fails to inform his supervisor that he wears his beard for religious reasons. James should have explained to his supervisor that he wears the beard pursuant to a religious observance. The employer did not have to consider accommodation because it did not know that James wore his beard for religious reasons.

**EXAMPLE 6**

**Employer Knowledge Sufficient**
Same facts as above but, instead, when James's supervisor informs him that he must comply with the "clean-shaven" policy or be terminated, James explains that he wears the beard for religious reasons, as he is a Messianic Christian. This is sufficient to request accommodation. The employer is permitted to obtain the limited additional information needed to determine whether James's beard is worn due to a sincerely held religious practice and, if so, must accommodate by making an exception to its "clean-shaven" policy unless doing so would be an undue hardship. [6]

**EXAMPLE 7**
**Employer Believes Practice Is Religious and Conflicts with Work Policy**

Aatma, an applicant for a rental car sales position who is an observant Sikh, wears a chunni (religious headscarf) to her job interview. The interviewer does not advise her that there is a dress code prohibiting head coverings, and Aatma does not ask whether she would be permitted to wear the headscarf if she were hired. There is evidence that the manager believes that the headscarf is a religious garment, presumed it would be worn at work, and refused to hire her because the company requires sales agents to wear a uniform with no additions or exceptions. This refusal to hire violates Title VII, even though Aatma did not make a request for accommodation at the interview, because the employer believed her practice was religious and that she would need accommodation, and did not hire her for that reason. Moreover, if Aatma were hired but then instructed to remove the headscarf, she could at that time request religious accommodation.

**8. May an employer assign an employee to a non-customer contact position because of customer preference?**

No. Assigning applicants or employees to a non-customer contact position because of actual or feared customer preference violates Title VII's prohibition on limiting, segregating, or classifying employees based on religion. Even if the employer is following its uniformly applied employee policy or practice, it is not permitted to segregate an employee due to fear that customers will have a biased response to religious garb or grooming. The law requires the employer to make an exception to its policy or practice as a religious accommodation, because customer preference is not undue hardship.

**EXAMPLE 8**
**Assigning Employee to "Back Room" Because of Religious Garb**

Nasreen, a Muslim applicant for an airport ticket counter position, wears a headscarf, or hijab, pursuant to her religious beliefs. Although Nasreen is qualified, the manager fears that customers may think an airport employee who is identifiably Muslim is sympathetic to terrorist hijackers. The manager, therefore, offers her a position in the airline's call center where she will only interact with customers by phone. This is religious segregation and violates Title VII.[7]

As a best practice, managers and employees should be trained that the law may require making a religious exception to an employer's otherwise uniformly applied dress or grooming rules, practices, or preferences. They should also be trained not to engage in stereotyping about work qualifications or availability based on religious dress and grooming practices. Many EEOC settlements of religious accommodation cases provide for the employer to adopt formal religious accommodation procedures to guide management and employees in handling these requests, as well as annual training on this topic.

**9. May an employer accommodate an employee's religious dress or grooming practice by offering to have the employee cover the religious attire or item while at work?**

Yes, if the employee's religious beliefs permit covering the attire or item. However, requiring an employee's religious garb, marking, or article of faith to be covered is not a reasonable accommodation if that would violate the employee's religious beliefs.

**EXAMPLE 9**
**Covering Religious Symbol Contrary to Individual's Religious Beliefs**

Edward practices the Kemetic religion, an ancient Egyptian faith, and affiliates himself with a tribe numbering fewer than ten members. He states that he believes in various deities and follows the faith's concept of Ma'at, a guiding principle regarding truth and order that represents physical and moral balance in the universe. During a religious ceremony he received small tattoos encircling his wrist, written in the Coptic language, which express his servitude to Ra, the Egyptian god of the sun. When his employer asks him to cover the tattoos, he explains that it is a sin to cover them intentionally because doing so would signify a rejection of Ra. Therefore, covering the tattoos is not a reasonable accommodation, and the employer cannot require it absent undue hardship.[8]
10. May an employer deny accommodation of an employee's religious dress or grooming practice based on the "image" that it seeks to convey to its customers?

An employer's reliance on the broad rubric of "image" or marketing strategy to deny a requested religious accommodation may amount to relying on customer preference in violation of Title VII, or otherwise be insufficient to demonstrate that making an exception would cause an undue hardship on the operation of the business.

**EXAMPLE 10**

"Image"

Jon, a clerical worker who is an observant Jew, wears tzitzit (ritual knotted garment fringes at the four corners of his shirt) and a yarmulke (or skull cap) in conformance with his Jewish beliefs. XYZ Temps places Jon in a long-term assignment with one of its client companies. The client asks XYZ to notify Jon that he must remove his yarmulke and his tzitzit while working at the front desk, or assign another person to Jon's position. According to the client, Jon's religious attire presents the "wrong image" and also violates its dress code prohibiting any headgear and requiring "appropriate business attire." XYZ Temps may not comply with this client request without violating Title VII.

The client also would violate Title VII if it changed Jon's duties to keep him out of public view, or if it required him not to wear his yarmulke or his tzitzit when interacting with customers. Assigning Jon to a position out of public view is segregation in violation of Title VII. Moreover, because notions about customer preference (real or perceived) do not establish undue hardship, the client must make an exception to its dress code to let Jon wear his religious garb during front desk duty as a religious accommodation. XYZ should strongly advise its client that the EEO laws require allowing Jon to wear this religious garb at work and that, if the client does not withdraw its request, XYZ will place Jon in another assignment at the same rate of pay and decline to assign another worker to the client.[9]

**EXAMPLE 11**

"Image"

Tahera, an applicant for a retail sales position at a national clothing company that carries current fashions for teens, wears a headscarf in accordance with her Muslim religious beliefs. Based on its marketing strategy, the company requires sales personnel to wear only clothing sold in its stores, and no headgear, so that they will look like the clothing models in the company's sales catalogues. Although the company believes that Tajera wears a headscarf for religious reasons, the company does not hire her because it does not want to make an exception. While the company may maintain its dress and grooming rule for other sales personnel, it must make an exception for Tahera as a religious accommodation in the absence of employer evidence of undue hardship.[10]

In many jobs for which employers require employees to wear uniforms (e.g., certain food service jobs or service industry jobs), the employee's beliefs may permit accommodation by, for example, wearing the item in the company uniform color(s). Employers should ensure that front-line managers and supervisors understand that if an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative accommodations.

11. Do government agencies whose employees work with the public have to make exceptions to uniform policies or otherwise allow religious dress and grooming practices if doing so would not cause an undue hardship?

Yes. Government agency employers, like private employers, must generally allow exceptions to dress and grooming codes as a religious accommodation, although there may be limited situations in which the need for uniformity of appearance is so important that modifying the dress or grooming code would pose an undue hardship. Therefore, it is advisable in all instances for employers to make a case-by-case determination of any needed religious exceptions.

**EXAMPLE 12**

Public Employee

Elizabeth, a librarian at a public library, wears a cross as part of her Catholic religious beliefs. In addition, after church services she attends on Ash Wednesday each year, Elizabeth arrives at work with a black ash mark on her forehead in the shape of a cross, which she leaves on until it wears off. Her new supervisor directs her not to wear the cross in the future while on duty, and to wash off the ash mark before reporting to work. Because Elizabeth's duties require her to interact with the public as a government employee, the supervisor fears that her cross and ash mark
could be mistaken as government endorsement of religion in violation of the Establishment Clause of the First Amendment to the U.S. Constitution. He cites the need to avoid any appearance of religious favoritism by government employees interacting with the public, and emphasizes that librarians must be viewed as impartial with respect to any information requests from library patrons. However, because the librarian's cross and ash mark are clearly personal in this situation, they would not cause a perception of government endorsement of religion. Accordingly, accommodating Elizabeth's religious practice is not an undue hardship under Title VII.\[11\]

**EXAMPLE 13**
**Public Employee**

Gloria, a newly hired municipal bus driver, was terminated when she advised her supervisor during new-employee orientation that due to the tenets of her faith (Apostolic Pentecostal), she needs to wear a skirt rather than the pants required by the transit agency dress code. Absent evidence that the type of skirt Gloria must wear would pose an actual safety hazard, no undue hardship would have been posed by allowing this dress code exception, and Gloria's termination would violate Title VII.\[12\]

**12. May an employer bar an employee’s religious dress or grooming practice based on workplace safety, security, or health concerns?**

Yes, but only if the practice actually poses an undue hardship on the operation of the business. The employer should not assume that the accommodation would pose an undue hardship. While safety, security, or health may justify denying accommodation in a given situation, the employer may do so only if the accommodation would actually pose an undue hardship. In many instances, there may be an available accommodation that will permit the employee to adhere to religious practices and will permit the employer to avoid undue hardship.

**EXAMPLE 14**
**Long Hair**

David wears long hair pursuant to his Native American religious beliefs. He applies for a job as a server at a restaurant that requires its male employees to wear their hair "short and neat." When the restaurant manager informs David that if offered the position he will have to cut his hair, David explains that he keeps his hair long based on his religious beliefs and offers to wear it in a ponytail or held up with a clip. The manager refuses this accommodation and denies David the position because he has long hair. Since David could have been accommodated without undue hardship by wearing his hair in a ponytail or held up neatly with a clip, the employer violated Title VII.\[13\]

**EXAMPLE 15**
**Facial Hair**

Prakash, who works for CutX, a surgical instrument manufacturer, does not shave or trim his facial hair because of his Sikh religious observance. When he seeks a promotion to manage the division responsible for sterilizing instruments, his employer tells him that he must shave or trim his beard because it may contaminate the sterile field. All division employees are required to be clean shaven and wear a face mask. When Prakash explains that he does not trim his beard for religious reasons, the employer offers to allow Prakash to wear two face masks instead of trimming his beard. Prakash thinks that wearing two masks is unreasonable and files a Title VII charge. CutX will prevail because it offered a reasonable accommodation that would eliminate Prakash's religious conflict with the hygiene rule.\[14\]

**EXAMPLE 16**
**Facial Hair**

Raj, a Sikh, interviews for an office job. At the end of the interview, he receives a job offer but is told he will have to shave his beard because all office staff are required to be "clean shaven" to promote discipline. Raj advises the hiring manager that he wears his beard unshorn because of his Sikh religious practice. Since no undue hardship is posed by allowing Raj to wear his beard, the employer must make an exception as an accommodation.\[15\]

**EXAMPLE 17**
**Clothing Requirements Near Machinery**

Mirna alleges she was terminated from her job in a factory because of her religion (Pentecostal) after she told her supervisor that her faith prohibits her from wearing pants as required by the company's new dress code. Mirna requested as an accommodation to be permitted to continue
wearing a long but close-fitting skirt. Her manager replies that the dress code is essential to safe and efficient operations on the factory floor, but there is no evidence regarding operation of the machinery at issue to show that close-fitting clothing like that worn by Mirna poses a safety risk. Because the evidence does not establish that wearing pants is truly necessary for safety, the accommodation requested by Mirna does not pose an undue hardship.

EXAMPLE 18
Head Coverings That Pose Security Concerns

A private company contracts to provide guards, administrative and medical personnel, and other staff for state and local correctional facilities. The company adopts a new, inflexible policy barring any headgear, including religious head coverings, in all areas of the facility, citing security concerns about the potential for smuggling contraband, interfering with identification, or use of the headgear as a weapon. To comply with Title VII, the employer should consider requests to wear religious headgear on a case-by-case basis to determine whether the identified risks actually exist in that situation and pose an undue hardship. Relevant facts may include the individual's job, the particular garb at issue, and the available accommodations. For example, if an individual's religious headgear is or can be worn in a manner that does not inhibit visual identification of the employee, and if temporary removal may be accomplished for security screens and to address smuggling concerns without undue hardship, the individual can be accommodated.[16]

EXAMPLE 19
Kirpan

Harvinder, a Sikh who works in a hospital, wears a small (4-inch), dull, and sheathed kirpan (symbolic miniature sword) strapped and hidden underneath her clothing, as a symbol of her religious commitment to defend truth and moral values. When Harvinder's supervisor, Bill, learned about her kirpan from a co-worker, he instructed Harvinder not to wear it at work because it violated the hospital policy against weapons in the workplace. Harvinder explained to Bill that her faith requires her to wear a kirpan in order to comply with the Sikh code of conduct, and gave him literature explaining that the kirpan is a religious artifact, not a weapon. She also showed him the kirpan, allowing him to see that it was no sharper than the butter knives found in the hospital cafeteria. Nevertheless, Bill told her that her employment at the hospital would be terminated if she continued to wear the kirpan at work. Absent any evidence that allowing Harvinder to wear the kirpan would pose an undue hardship in the factual circumstances of this case, the hospital is liable for denial of accommodation.[17]

13. Are applicants and employees who request religious accommodation protected from retaliation?

Yes. Title VII prohibits retaliation by an employer because an individual has engaged in protected activity under the statute, which includes requesting religious accommodation. Protected activity may also include opposing a practice the employee reasonably believes is made unlawful by one of the employment discrimination statutes, or filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the statute.

EXAMPLE 20
Retaliation for Requesting Accommodation

Salma, a retail employee, requests that she be permitted to wear her religious headscarf as an exception to her store's new uniform policy. Joe, the store manager, refuses. Salma contacts the human resources department at the corporate headquarters. Despite Joe's objections, the human resources department instructs him that in the circumstances there is no undue hardship and that he must grant the request. Motivated by reprisal, Joe shortly thereafter gives Salma an unjustified poor performance rating and denies her request to attend training that he approves for her co-workers. This violates Title VII.

14. What constitutes religious harassment under Title VII, and what obligation does an employer have to stop it?

Religious harassment under Title VII may occur when an employee is required or coerced to abandon, alter, or adopt a religious practice as a condition of employment. Religious harassment may also occur when an employee is subjected to unwelcome statements or conduct based on religion. Harassment may include offensive remarks about a person's religious beliefs or practices, or verbal or physical mistreatment that is motivated by the victim's religious beliefs or practices. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, such conduct rises to the level of illegal harassment when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment action (such as the victim being fired or demoted). The harasser can be the victim's
supervisor, a supervisor in another area, a co-worker, or even a third party who is not an employee of the employer, such as a client or customer.

An employer is liable for harassment by co-workers and third parties where it knew or should have known about the harassment and failed to take prompt and appropriate corrective action. An employer is always liable for harassment by a supervisor if it results in a tangible employment action, such as the harassment victim being fired or demoted.\[18\] Even if the supervisor's harassment does not result in a tangible employment action, the employer will still be liable unless it exercised reasonable care to prevent and correct promptly any harassing behavior (such as having an effective complaint procedure) and the harassed employee unreasonably failed to take advantage of opportunities to prevent or correct it (such as failing to use the complaint procedure).

**EXAMPLE 21**

**Co-Worker Harassment**

XYZ Motors, a large used car business, has several employees who are observant Sikhs or Muslims and wear religious head coverings. A manager becomes aware that an employee named Bill regularly calls these co-workers names like "diaper head," "bag head," and "the local terrorists," and that he has intentionally embarrassed them in front of customers by claiming that they are incompetent. Managers and supervisors who learn about objectionable workplace conduct based on religion or national origin are responsible for taking steps to stop the conduct by anyone under their control.\[19\]

Workplace harassment and its costs are often preventable. Clear and effective policies prohibiting ethnic and religious slurs and related offensive conduct are essential. Confidential complaint mechanisms for promptly reporting harassment are critical, and these policies should encourage both victims and witnesses to come forward. When harassment is reported, the focus should be on action to end the harassment and correct its effects on the complaining employee. Employers should have a well-publicized and consistently applied anti-harassment policy that clearly explains what is prohibited, provides multiple avenues for complaints to management, and ensures prompt, thorough, and impartial investigations and appropriate corrective action.

The policy should also assure complainants that they are protected against retaliation.

Employees who are harassed based on religious belief or practice should report the harassment to their supervisor or other appropriate company official in accordance with the procedures established in the company's anti-harassment policy.

Once an employer is on notice of potential religious harassment, the employer should take steps to stop the conduct. To prevent conflicts from escalating to the level of a Title VII violation, employers should immediately intervene when they become aware of abusive or insulting conduct, even absent a complaint.

**15. What should an applicant or employee do if he believes he has experienced religious discrimination?**

Employees or job applicants should attempt to address concerns with management. They should keep records documenting what they experienced or witnessed and any complaints they have made about the discrimination, as well as witness names, telephone numbers, and addresses. If the matter is not resolved, private sector and state and local government applicants and employees may file a charge of discrimination with the EEOC.

To locate the EEOC office in your area regarding questions or to file a charge of discrimination within applicable time deadlines, call toll free 1-800-669-4000 or 1-800-669-6820 (TTY) for more information.

Federal sector applicants and employees should contact the EEO office of the agency responsible for the alleged discrimination to initiate EEO counseling. For more details, see "How to File a Charge of Employment Discrimination," http://www.eeoc.gov/employees/charge.cfm.

**16. Where can employers and employees obtain more information?**

In addition to Title VII's prohibitions on religious, race, color, national origin, and sex discrimination, the EEOC enforces federal statutes that prohibit employment discrimination based on age, disability, or genetic information of applicants or employees. The EEOC conducts various types of training and can help you find a format that is right for you. More information about outreach and training programs is available at http://www.eeoc.gov/eeoc/outreach/index.cfm. You should also feel free to contact the EEOC with questions about effective workplace policies that can help prevent discrimination, or for more specialized questions, by calling 1-800-669-4000 (TTY 1-800-669-6820), or sending written inquiries to: Equal Employment Opportunity Commission, Office of Legal Counsel, 131 M Street, NE, Washington, D.C. 20507.

**Other resources related to this topic:**
Questions and Answers About Employer Responsibilities Concerning the Employment of Muslims, Arabs, South Asians, and Sikhs
http://www.eeoc.gov/eeoc/publications/backlash-employer.cfm

Questions and Answers About the Workplace Rights of Muslims, Arabs, South Asians, and Sikhs Under the EEO Laws
http://www.eeoc.gov/eeoc/publications/backlash-employee.cfm

Questions and Answers on Religious Discrimination in the Workplace
http://www.eeoc.gov/policy/docs/qanda_religion.html

Best Practices for Eradicating Religious Discrimination in the Workplace
http://www.eeoc.gov/policy/docs/best_practices_religion.html

Compliance Manual on Religious Discrimination
http://www.eeoc.gov/policy/docs/religion.html

Guidelines on Discrimination Because of Religion, 29 C.F.R. Part 1605


[4] Id.


[9] EEOC v. 704 HTL Operating, LLC and Investment Corporation of America, d/b/a MCM Elegante Hotel, 11-cv-00845 JCH/LFG (D.N.M. consent decree entered Nov. 2013) (settlement on behalf of individual whom employer hired for hotel housekeeping position but then barred from working unless she removed her Muslim head scarf); EEOC v. Lawrence Transportation Systems, Civil Action No. 5:10CV 97 (W.D. Va. consent decree entered August 2011) (settlement on behalf of applicant for storage company loading position who alleged he was not hired due to his Rastafarian dreadlocks); EEOC v. LAZ Parking, LLC, Case No. 1:10-CV-1384 (N.D. Ga. consent decree entered Nov. 2010) (settlement on behalf of Muslim parking facility employee who was terminated for refusing to remove her hijab); EEOC v. Comair, Inc., Civil Action No. 1:05-cv-0601 (W.D. Mich. consent decree entered Nov. 2006) (settlement on behalf of Rastafarian airline applicant alleging he was not hired because he refused to cut his hair to conform with the company's grooming standards); EEOC v. Pilot Travel Ctrs. LLC, Civil Action No. 2:03-0106 (M.D. Tenn. consent decree entered April 2004) (settlement on behalf of Messianic Christian maintenance worker who wore beard as part of his religious practice, and was terminated for refusing to shave in compliance with employer's no-beard policy).

[10] EEOC v. United Galaxy Inc., d/b/a Tri-County Lexus, No. 2:10-CV-04987 (D.N.J. consent decree entered Nov. 2013) (settlement of case alleging car dealership violated Title VII religious accommodation obligation when it refused to hire as a sales associate an applicant who wore a beard, uncut hair, and a turban pursuant to his Sikh faith, unless he agreed to shave his beard to comply with the dealership's dress code).
[11] Draper v. Logan County Pub. Library, 403 F. Supp. 2d 608 (W.D. Ky. 2005) (public library employee's First Amendment free speech and free exercise rights were violated when she was prohibited from wearing a necklace with a cross ornament).

[12] U.S. v. Washington Metro. Area Transit Auth., No. 1:08-CV-01661 (RMC) (D.D.C. consent decree entered Feb. 2009) (lawsuit filed and settled by U.S. Department of Justice on behalf of city bus driver applicants and employees who were denied religious accommodation to wear skirts instead of pants, and to wear religious head coverings); EEOC v. Brink's Inc., No. 1:02-CV-0111 (C.D. Ill.) (consent decree entered Dec. 2002) (settlement of case alleging that messenger employee was denied reasonable accommodation when she sought to wear culottes made out of uniform material, rather than the required trousers, because her Pentecostal Christian beliefs precluded her from wearing pants); see also EEOC v. Scottish Food Systems, Inc. and Laurinburg KFC Take Home, 1:13-CV00796 (M.D.N.C. consent decree entered Dec. 2013) (settlement of case alleging denial of accommodation to Pentecostal Christian employee in food service position who adhered to a scriptural interpretation that women should wear only skirts or dresses, and therefore needed an exception to restaurant's requirement of uniform pants); EEOC v. Fries Restaurant Management d/b/a Burger King, No. 3:12-CV-3169-M (N.D. Tex. consent decree entered Jan. 2013) (same).

[13] EEOC Compliance Manual on Religious Discrimination (2008) at Example 35. See also EEOC v. Grand Central Partnership, Civil Action No. 08-8023 (S.D.N.Y. consent decree entered Aug. 2009) (settlement, along with policy and procedure changes and related training, in case alleging failure to accommodate long dreadlocks and short beards worn pursuant to Rastafarian religious practice by workers performing sanitation, maintenance and public safety duties; company grooming policy had required that long hair, including dreadlocks, be worn inside hats, which was impracticable; settlement included agreement to allow the dreadlocks to be worn down but clipped back in neat ponytails).


[16] EEOC v. Imperial Security, Inc., Civil Action No. 2:10-CV-04733 (E.D. Pa. consent decree entered Nov. 2011); see also United States v. New York State Dept of Corr. Servs., Civil Action No. 07-2243 (S.D.N.Y. consent decree entered Jan. 2008) (settlement of case brought by U.S. Department of Justice, providing for individualized review of correctional officers' accommodation requests with respect to uniform and grooming requirements, and allowing employees to wear religious skullcaps such as kufis or yarmulkes if close fitting and solid dark blue or black in color, provided no undue hardship was posed).


[18] In Vance v. Ball State University, 133 S. Ct. 2434, 2443 (2013), the Supreme Court held that the term "supervisor" applies only to those who are "empowered by the employer to take tangible employment actions against the victim," including "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."