You've Come a Long Way Baby?: Employment Issues for Women Educators

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Presented at the 2018 School Law Seminar, April 5-7, San Antonio, TX

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I. INTRO

Collectively, public schools are one of the largest employers in the U.S., and individually they are often the largest employer in their communities. With education a female-dominated profession, it could be easy to think that the public schools offer a work environment that is more immune from sex discrimination, sexual harassment, and other forms of gender bias.

But the numbers paint a different picture. For instance, according to an American Association of School Administrators (AASA) study conducted in 2016, women make up 76 percent of K-12 teachers, 52 percent of principals (heavily clustered at elementary schools), and 78 percent of central-office administrators. However, the numbers are worse for Superintendents. Of the districts that responded to the AASA survey, 77% of superintendents were reported to be men (that number was 87% in 2000), though other data from AASA suggests that number is lower. AASA also admits its information is limited, relying on a low response rate from districts. Therefore, the numbers may be worse. Or maybe they're better?

Other findings:

- Women educators generally enter leadership roles later, and with more experience, than their male counterparts.
- Except in small districts, male superintendents generally out-earn women superintendents.
    - The AASA 2013 Superintendent Salary and Benefits studies revealed that during the 2013-2014 school year, the median base pay for superintendents in districts with 300 to 2,499 students was $110,000 for men and $112,000 for women; the maximum base pay was $258,734 for men and $246,048 for women.
    - Similarly, in districts with 2,500 to 9,999 students the median base pay was $147,779 for men and $153,000 for women, while the maximum base pay was $288,000 for men and $268,766 for women.[1]

The gender disparities are similar for coaches in secondary education, where just over three-quarters of coaches are male. Interestingly, since Title IX's implementation, the number of women coaching girls' teams has steadily declined. Historically, educators who coach are often the ones pulled into the ranks of district leadership.

Not surprisingly, women also make up the bulk of the lowest paid jobs in school districts. Those positions lowest in the pecking order include: cafeteria staff, clerical support personnel, bus drivers, and teachers' aides.

Although the public school workforce may be primarily composed of women, public schools most certainly are not immune from sex discrimination and sexual harassment, or from claims related to other "women's issues" such as pregnancy, disparate pay, and breastfeeding. This paper and

[1] Leila Meyer, *Report on Superintendent Salaries Reveals Disparity Between Pay for Men and Women*, The Journal, Feb. 13, 2014, https://thejournal.com/articles/2014/02/13/report-on-superintendent-salaries-reveals-disparity-between-pay-for-men-and-women.aspx.

presentation focus on some of the key workplace legal issues that are typically perceived to be those affecting women.

II. SEX DISCRIMINATION

The Law:

Title VII: It shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's …sex…or.. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's …sex...." Initially the law exempted educational institutions, but it was amended in 1972 to include schools.

Title IX and Title VII: Title IX states that "no person," on the basis of sex, shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..." Title IX was enacted in the same year that Title VII was extended to state and local governmental employees; in other words, only then did Title VII include public school employees.

Title IX does not include the word employment and so it was assumed to be inapplicable to employment claims. But, in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), the U.S. Supreme Court, relying on the law's legislative history and the words of bill sponsor Senator Bayh, concluded that Title IX did encompass private rights of action to remedy employment discrimination. However, Congress responded to the *Bell* decision by amending Title IX and in looking at those amendments, plus reexamining the law at the time Title IX was authorized, the High Court concluded in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), that there were limits on the right of action under Title IX.

Title IX's lack of administrative exhaustion requirements has also led at least some courts to pronounce that potential Title IX employment discrimination claims must first be filed under Title VII if the relevant facts implicate Title VII. For example, in *Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995), the Fifth Circuit held that "[g]iven the availability of a private remedy under Title VII for aggrieved employees," there was no "implied private right of action for damages under Title IX for employment discrimination." Also, added that court, to claim that "Congress intended to create a [Title IX] bypass of Title VII's administrative procedures so soon after its extension to state and local governmental employees is an extraordinary proposition."

In *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), the Supreme Court determined that a former coach had a private right of action under Title IX, given his claim that he had been retaliated against after advocating for gender equity on behalf of his student-athletes. Said the Court, "The [Title IX] statute is broadly worded; it does not require that the victim of the retaliation also be the victim of the discrimination that is the subject of the original complaint . . .. Where the retaliation occurs because the complainant speaks out about sex discrimination, the 'on the basis of sex' requirement is satisfied. The complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint." In response to the

District's claim that students could or should have brought their own claims, the Court observed that "teachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators."

Similarly, in *Torres v. School Dist. of Manatee County, Fla.*, 2014 WL 4185364 (U.S. Dist. Ct., M.D. Fla., 2014) a school district employee brought a claim of Title IX retaliation for bringing complaints of sexual harassment against herself, and students. The Florida federal district court wrote that while "[t]here is no question that Title IX prohibits employment discrimination," teachers do not "have a private right of action for retaliation under Title IX when [they] complain that they are the victims of sexual harassment." That is because any such private right of action under Title IX "is preempted by Title VII of the Civil Rights Act of 1964." Citing to an earlier opinion from an Alabama district court, that court wrote that there is "no reason why Congress would intend that a plaintiff-employee of a federally funded education institution be allowed to circumvent the unique legal and administrative requirements imposed on employees asserting identical employment discrimination claims under Title VII merely because the plaintiff is employed by a federally funded education institution."

In some cases, coaches have brought Title VII and Title IX claims contemporaneously with student athletes. For instance, in *Paton v. New Mexico Highlands University*, 275 F.3d 1274 (10th Cir. 2002), female athletes asserted Title IX claims along with their coaches, who brought successful Title IX retaliation claims stemming from complaints of unequal treatment. *See also O'Connor v. Peru State College*, 781 F.2d 632 (8th Cir.1986) (noting that the facilities and supplies which a coach is provided are a part of the coach's conditions of employment even though the same factors might be asserted by the students in a Title IX action).

Now, whether a discrimination claim is brought under Title VII or Title IX is generally dictated by whether the "victim" of the alleged discrimination has been the employee/coach or the student/athlete.

Selected Case Law:

- In *Jackson v. Armstrong School District*, 430 F.Supp. 1050 (W.D. Penn., 1977), two female varsity and junior varsity girls' basketball coaches unsuccessfully alleged violations of Title VII concerning the compensation and treatment they received as compared to the male coaches of the boys' basketball team. They argued that they had to coach as many, if not more, players as are coached in the boys' basketball program. They also had to establish the girls' program, which was a duty not required of the male coaching staff. And, except for the exhibition season, their basketball schedule was equal to that of the male coaches' schedule.

  The boys' varsity basketball coaches were paid triple what the girls' coaches were paid: $972 for a first-year coach of the boys' teams, compared to $324 for the coaches of girls' teams. However, of the eight coaches of girls' basketball, four were men and four were women. Therefore, said the court, the pay differential was due, not to the sex of the coaches,

but rather to the sex of the participants. As such, there was no Title VII violation since women were not subjected to disparate treatment on the basis of their sex. See *Paton* above.

- *Wynn v. Columbus Mun. Separate School Dist*., 692 F. Supp. 672 (N.D. Miss. 1988): a female physical education teacher/coach sued her school district for sex discrimination based on Title VII for failure to hire her as the athletic director. Wynn had taught at a Mississippi high school since 1963, and had also coached and instituted a number of female teams including volleyball, basketball, and softball. In 1977, after years of various district administrators holding the title of Athletic Director, the school board advertised and hired for the combined position of athletic director/head football coach. The District claimed that it combined the Athletic Director and Head Football Coach functions because they believed that football, as the main revenue producer and greatest cost, was the "dominant" sport in the district. The teacher/coach, Wynn, said she felt that she was performing many of the Athletic Director's duties, adding that she was unaware that anyone else was even acting in the capacity of Athletic Director over the period of years. Wynn also pointed out that she had worked in all sports, including football and basketball and had been placed in charge of all money and ticket sales for varsity football.

  Wynn applied for the job and the male head coach of the boys' basketball team applied for the Athletic Director position, and a male assistant football coach applied for the combined position of Athletic Director/Head Football coach. After a series of administrative disruptions and changes in leadership, the male assistant football coach, with only five years of experience, was hired as Athletic Director over Wynn with her twenty years of experience. The school district argued that it was not discriminatory to hire a head football coach as the athletic director, even if it would effectively exclude virtually all women.

  The court found that the teacher/coach had put forth a *prima facie* case and the school district had not rebutted that case. Said the court, even if the district's alleged "preference for having the Head Football Coach serve as Athletic Director is a legitimate, non-discriminatory reason" for not hiring Wynn, the female teacher/coach had shown that reason to be a pretext for discrimination, especially in light of the district's history of having only one person serve as Athletic Director.

- *Loomis v. Starkville Mississippi Public School District*, 150 F.Supp.3d 730 (N.D. Miss. 2014): The plaintiff in this case was an Assistant Principal who claimed that the District's higher pay for her lesser qualified male counterparts constituted sex discrimination under Title VII. The Superintendent at the time said that when he started at the district, he "noticed that some employees had 'pretty high' salaries" so he developed "a plan that, as people c[a]me in, [he would] try and make [pay] fair and equitable." *Id*. at 736. Under this "plan," the Superintendent calculated salaries "based on a daily rate times the number of days worked plus a responsibility factor [dependent on] whether [the assistant principal works at the] elementary, middle school or high school," adding that he used this salary calculation "to get at a ballpark" figure, at which point he said he applied his discretion. In other words, if he "need[s] to hire a high school principal, and I go out and find the best one I can, ... I've got to pay enough money to attract that person to come to Starkville....It's a negotiated salary....On assistant principal salary, most of the time they're people from within. It's a training job...and it's not a market-based economy." *Id*.

The plaintiff found out shortly after negotiating her contract and salary that two lesser qualified male assistant principals were paid significantly more than she. Each time she asked why, the Superintendent gave reasons he could not substantiate, and when she pointed this out to the Superintendent, he said he'd "get back to her." At trial, the Superintendent said he gave both of these assistant principals a 5% pay increase after their reassignment to another campus because "I was moving people from a position that they were comfortable with and actually forcing them into a new position [a]nd I felt they deserved some compensation for that."

Later in her employment, the Assistant Principal asked for 45 minutes of release time each week while she pursued a higher education degree. Even though at least two other employees were allowed such release time, the Assistant Principal claimed her supervisor was told "that if she could afford to let her leave" for that release time, "then she probably didn't need ... two assistant principals." *Id*. at 739-740. The Assistant Principal felt this was a threat to her continued employment and ultimately filed an EEOC claim alleging sex discrimination and retaliation for complaining about an unlawful employment act, both in violation of the Equal Pay Act and Title VII of the Civil Rights Act of 1964.

Initially, the court addressed whether Loomis had properly asserted a claim for salary discrimination or whether her claim should be limited to the decisions regarding her pay increase. The court determined that Loomis' complaint contained no reference to salaries apart from the allegations related to the allegedly discriminatory raises. Accordingly, the court found that Loomis' claim did not provide fair notice to the District of a salary compensation claim apart from the specific decision related to discriminatory pay raises. Thus, the court limited its analysis to the allegedly discriminatory decisions related to Loomis' pay increases.

The court found that Loomis had set out a valid claim of sex discrimination, observing that the raises for the two male assistant principals "were procedurally irregular and that the justification for the raises has been modified, if not outright changed" therefore the reason for the raise offered at trial amounted to pretext for unlawful discrimination. The retaliation claims were dismissed, however, after the court found that the employee had suffered no adverse employment action as defined under that circuit's case law.

Trends/Issues in this areas:

Gender-based discrimination/sex stereotyping: The United States Department of Justice (DOJ) says that LGBT employees have no protection from discrimination under Title VII; however, EEOC takes the opposite view. Since the U.S. Supreme Court's 1989 *Price Waterhouse* decision set out a more expansive standard for sex discrimination, holding that "sex stereotyping" was discriminatory disparate treatment under Title VII, Title VII jurisprudence has tended to support claims of Title VII discrimination based on gender nonconformity and sex stereotyping.

For instance, a federal court denied an employer's motion to dismiss a sex discrimination lawsuit filed by the EEOC, ruling that sexual orientation discrimination is a form of sex discrimination

prohibited by Title VII. *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F.Supp.3d 834 (W.D. Pa. 2016). In this case, the EEOC charged that a gay employee was subjected to sex discrimination in the form of harassment because of his sexual orientation because he was forced to quit his job rather than endure his supervisor's discriminatory harassment. *Id*. The district court held that discrimination on the basis of sexual orientation is a form of sex discrimination because "[t]here is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality." *Id*.

However, in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), *cert denied* 2017 WL 4012214 (December 11, 2017), the court upheld the lower court's dismissal of an employee because of her sexual orientation stating that "discharge for homosexuality is not prohibited by Title VII." *Id*. Although the lower court had noted that a claim an employer has discriminated on the basis of gender nonconformity is "just another way to claim discrimination based on sexual orientation," the Eleventh Circuit acknowledged that discrimination based on gender nonconformity was an actionable claim under Title VII and so remanded the case back to the lower court. (That lower court had written, in contradiction to *Price Waterhouse*, that "[t]o inflict an adverse employment action (unfair discipline, denied promotion, etc.) because a male is too effeminate or a female too masculine is to discriminate based on sexual orientation ('gender nonconformity'), which is reflected in the gender image one presents to others — that of a male, even if one is biologically a female. Hence, [Plaintiff's] allegations about discrimination in response to maintaining a male visage also do not place her within Title VII's protection zone, even if labeled a 'gender conformity' claim, because it rests on her sexual orientation no matter how it is otherwise characterized"). *See also, Burrows v. Coll. of Cent. Fla*., 2015 WL 4250427 (M.D. Fla. 2015), *reh'g denied* (holding that the employee's claim of gender-based discrimination failed because it constituted a "repackaged" claim of sexual orientation discrimination, which is not prohibited under Title VII and adding that while EEOC's recognition of sexual orientation discrimination as sex based discrimination "is relevant and would be considered persuasive authority, it is not controlling"). *See also, Zarda v. Altitude Express*, 855 F.3d 76 (2nd Cir. 2017) (rejecting the EEOC's position that discrimination based on sexual orientation constitutes sex discrimination in violation of Title VII, but noting the "longstanding tension in Title VII caselaw" in which the Second Circuit has "stated that Title VII does not prohibit discrimination based on sexual orientation…[though] the Supreme Court has held that Title VII does forbid discrimination based on a failure to conform to 'sex stereotypes.'")

In *Hively v. Ivy Tech Cmty. College*, 853 F.3d 339 (7th Cir. 2017) (*en banc*), the Seventh Circuit declined to follow the Eleventh Circuit and, *en banc*, held that discrimination on the basis of sexual orientation is a cognizable Title VII claim. Wrote the court, "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex[s]." Continued that court, the line between a gender nonconformity claim and one based on sexual orientation "does not exist at all." The case involved a part-time adjunct professor who claimed that she'd been denied full-time employment, and was ultimately terminated, on the basis of her sexual orientation. The Seventh Circuit also found credibility in the former employee's claim that, as in *Loving v. Virginia*, she has a legal "right to associate intimately with a person of the same sex" and that to discriminate against her based on who she chooses to love constitutes sex discrimination. Said the Court when comparing this claim to *Loving*: "So too, here. If we were to

change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex."

Old Fashioned Sex Discrimination Still Exists in the Female-Dominated School Setting: The term "glass escalator" was introduced in 1992 by Christine L. Williams in her research "The Glass Escalator: Hidden Advantages for Men in the 'Female' Professions." The term is the opposite side of the glass ceiling coin and refers to the notion that men are "fast-tracked" to higher positions and promoted at higher rates when they enter professions traditionally dominated by women, such as teaching and nursing. In that research, Williams found that males were given preference at nearly every level in Texas public schools' employment decisions. They were more likely to be hired as educators (given their relative scarcity) and were more likely solicited and tracked for positions as administrators. Even the male educators cited in that study believed that being a man in a women-dominated profession gave them an advantage in hiring and promotions.

Although the "glass escalator" concept is 25 years old, it has seen a resurgence as an identifiable obstacle for professional women. AASA's studies have found that:

- While roughly 75% of elementary classroom teachers are women, nearly 75% of superintendents did not teach at the elementary level before working as a central office administrator.

- Nearly all superintendents previously worked as building principals and assistant principals, but far fewer elementary schools (where women predominate) have assistant principals, even though 2/3rds of schools are elementary.

- Also coaching, where men dominate, has traditionally been the route to serving in an administrative position. Again, very few elementary teachers, primarily women, have opportunities for coaching assignments.

- School boards tend to prefer Superintendents with experience in budget and financial decisions, but fewer women tend to work in those areas in school districts.

- School boards still are majority male, and are perceived to be less likely to hire women as Superintendent.

Given this date, it is reasonable to anticipate that the glass escalator phenomenon may fuel more legal claims in school settings, if men, who make up a smaller percentage of the educator work force continue, as research seems to confirm, earning more, being promoted more quickly, and in higher numbers and at higher levels than their female counterparts.

III. SEXUAL HARASSMENT

The Law:

Title VII of the Civil Rights Act of 1964 ("Title VII"): It is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … sex…" 42 U.S.C. § 2000e-2(a) (1).

Courts have identified two forms of workplace sexual harassment: hostile work environment and quid pro quo. Often cases involve a hybrid of the two. If there is quid pro quo, there is generally a hostile work environment.

Hostile work environment harassment occurs where sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. *See Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

> The standard for determining school district liability due to a supervisor's sexual harassment depends on the type of sexual harassment that occurs. A plaintiff proceeding under a theory of quid pro quo harassment need not prove knowledge on the part of the School District employer. The employer is strictly liable for the supervisor's harassment. "This is logical. When a supervisor requires sexual favors as quid pro quo for job benefits, the supervisor, by definition, acts as the company." *Steele v. Offshore Shipbuilding*, Inc., 867 F.2d 1311 (11th Cir. 1989).

In a hostile work environment case, liability exists where a defendant knew, or should have known, of the harassment and fails to take prompt remedial action against the supervisor. A defending employer in a hostile work environment case may raise the following affirmative defense to liability or damages:

- That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and

- That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

Selected Case Law:

- *Jeffers v. Russell County Board of Education*, 2007 WL 2903012 (M.D. Ala., 2008). Two employees (one a guidance counselor, the other a bus driver) allege they were subjected to sexual harassment by the principal. The teacher's allegations included the Principal making regular comments that he had to have sex every night, claiming that he and employees had sex in his college workplace, and bragging of his sexual prowess. He also frequently commented on the anatomy of female teachers, said one was "losing it" sexually, and stating that a pregnant teacher "appeared to be pregnant in her buttocks." He once hosted a staff pool party at his home where he squeezed the buttocks of one of the teachers, and another teacher, sat naked behind her with his legs around her, then leap-frogged over her

head into the pool, while naked. The Principal later claimed he was too drunk so did not remember doing any of those things. Another time he reportedly picked up the teacher, rolled her toward him, and "bit [her] on the right breast." As to that incident, the Principal admitted that he picked her up and that her breast made contact with his lips, but he denied "chomping down on her" and called the incident "one of those, oh-crap type of things."

The bus driver claimed that when the Principal rode her bus to inspect a bus stop, he told her she had "nice legs," then rubbed them and told her how soft they were. When she pushed his hand away and said, "don't even go there," the Principal continued, later rubbing her hair and "rubbing up toward [her] crotch." She pushed his hands off, but he reportedly laughed and said she "wanted him." This type of behavior occurred repeatedly and at one time he massaged her shoulders from behind in front of at least six employees.

While the court dismissed some of the claims, it ruled in the plaintiffs' favor on some of their allegations of sexual harassment. Of note is that the district could have avoided liability by proving (1) it exercised reasonably care to prevent or correct harassing behavior or (2) the employee failed to pursue preventative or corrective opportunities that the employer provided. Here, the district was unable to successfully assert such a defense because the court found the district's sexual harassment policy to be "unclear" and "inconsistent." It also was not widely published with only a single copy being kept at each school in the principal's front office. Even the district official to whom sexual harassment complaints were to be directed misstated how a report of sexual harassment was to be made and said of the policy, "we've got to fix it."

- *Wisniewski v. Pontiac School Dist*., 862 F.Supp.2d 586 (E.D. Mich. 2012). McAllister was one of the school district's police authority officers (PAOs). During the first several weeks Plaintiff admits she carried on a flirtation with McAllister. During this period, McAllister began to make sexual jokes and comments, first discreetly but later openly. The flirtation culminated in the parties having sexual relations in a patrol car. A month later, the parties again had sexual relations in a patrol car. This time, however, Plaintiff says she felt pressured and that the act was not fully consensual. Plaintiff does not allege that McAllister used force or the threat of force, although she says she felt as if her job was in jeopardy if she did not participate. According to the plaintiff, McAllister's comments became lewd and aggressive after that incident. Later, Plaintiff was among the 7 of 24 officers who were not recalled after a department wide layoff due to budget cuts. She sued, alleging quid pro quo sexual harassment. Her claim failed. According to the court, "A successful *quid pro quo* claim requires that the sexual advance or request was unwelcome." The court noted that the plaintiff had two sexual encounters with McAllister and acknowledged that one was voluntary. As to the plaintiff's claim that the second sexual interaction was not voluntary, the court found that she had not "explain[ed] why her understanding of their relationship changed so dramatically…[nor did she] advance[] evidence to suggest she communicated to McAllister that a continued sexual relationship was unwanted."

  The court found no causal link between her termination and the encounter with McAllister, further observing that McAllister was not Plaintiff's supervisor. Though the plaintiff alleged that McAllister "influenced" her work conditions, the court said that influence "is

not authority…[and] [b]ecause McAllister was not a 'supervisor' within the meaning of Title VII and did not control job benefit or detriments, his behavior cannot form the basis of a quid pro quo claim." *See also, Blake v. MJ Optical, Inc.*, 870 F. 3d 820 (8th Cir. 2017) (affirming summary judgment in favor of the employer because the employee did not show that the conduct at issue was unwelcome and the employee never complained about the alleged harassment.)

- *Pullen v. Caddo Parrish Sch. Bd.*, 830 F.3d 205 (5th Cir. 2016). This case involved a clerical assistant who alleged she had been sexually harassed by a co-worker, who served as her supervisor during a period of her employment with the school district. She did not report any of the harassment when it occurred. However, another staff member reported to the personnel department that the same individual had harassed her and said that Pullen, the plaintiff, might also have been subjected to sexual harassment. The alleged harasser was placed on leave, and the claims were investigated in accordance with the sexual harassment policy. A report was prepared by the investigator, who concluded that while conduct at issue was not sexual harassment, it was nonetheless unprofessional and inappropriate. The employee was disciplined and required to attend counseling. During the course of the investigation, Pullen filed a sexual harassment complaint with EEOC and she ultimately sued the district. The court overturned the lower court's grant of summary judgment in favor of the district finding evidence that employees were given no training or information about the sexual-harassment policy and they were not even aware of its existence. There was also no evidence the policy was posted in a conspicuous location. Therefore, held the court, there was a genuine dispute of material fact as to whether the board took reasonable steps to prevent sexual harassment in its central office.

- *Moody v. Atl. City Bd. of Edu.*, 870 F.3d 206 (3rd Cir 2017). Michelle Moody was a substitute custodian for Atlanta Public Schools. When she wasn't scheduled for many shifts, she spoke with approximately ten custodial foremen for different schools in the district. One of those custodial foremen was Maurice Marshall, who began assigning Moody more regular work. According to Moody, Marshall started making sexual comments to her and told her that he would assign her more hours if she performed sexual favors for him. She said he "would often be very touch feely and grab [Moody's] breasts or buttocks at the work place." She claims that he also called her into his office, where he once tried to remove her shirt and on a second time where she found him sitting naked on his office chair. One evening he reportedly came to her house and told her that she would get an employment contract if she had sex with him. Moody claims she felt her job was at risk and so reluctantly had sex with him, telling him the next day that it would never happen again. She claims her hours were reduced then and she filed a complaint with the district. HR investigated and did not reach a conclusion as to whether Moody was sexually harassed. When Moody filed an EEOC charge, an outside law firm was retained to investigate. That investigation also found that Moody had not been sexual harassed or discriminated against. The two were again ordered to avoid any contact with each other. The Board argued that under an *Ellerth/Faragher* defense, it had no liability. This affirmative defense to liability for a supervisor's creation of a hostile work environment is established by an employer showing: "(1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to

take advantage of any preventive or corrective opportunities that were provided." *Vance v. Ball State Univ.*, ___ U.S. ___, 133 S.Ct. 2434, 2442 (2013) (*citing Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)).

In vacating the lower court's grant of summary judgment in favor of the school district, the court noted that the *Ellerth/Faragher* defense is only available where the plaintiff did not experience a "tangible employment action." Here, said the court, it was undisputed that Marshall was Moody's supervisor and that he had the authority to significantly reduce her hours. Further, said the court, a reasonable fact finder could find the foreman's conduct to be sufficiently severe or pervasive so as to constitute a hostile work environment.

- *Nichols, v. Tri-National Logistics, Inc.*, 809 F.3d 981 (8th Cir. 2017). Rebecca Nichols drove a semi-truck for Tri–National. Nichols claimed that during the period of May 25 until June 1, 2012, her fellow driver, James Paris, made unwelcome sexual advances towards her. She said that during a mandatory layover on a long-distance drive, he took away her truck keys and cell phone while continuing to proposition her. She first reported his behavior on May 25, 2012 and reported it on multiple occasions throughout the days' long drives. Her employment was terminated on June 25, 2012, for an alleged poor safety record.

  Nichols had been assigned to her male partner driver in May of 2012. She claimed that he propositioned her and exposed himself to her. During a long-distance, multi-day drive with her alleged harasser in late May of 2012, Nichols called the dispatcher to report sexually harassing behavior by her partner driver. The dispatcher allegedly told her to try to "endure it" until the trip was over and then the company would help find her another driving partner. The two then drove to the male driver's home during a mandatory rest period.

  Her request to take the truck to a place where she could stay overnight was denied because Paris had personal possessions in the cab. Nichols again complained to the dispatcher who told her to "[t]ry to get along with him until you guys get back out on the road," though he offered to pay half the cost of a motel room. Nichols ultimately slept in the truck, while the male driver slept in his home. At Nichols' request, the male driver took her to a motel the next night, where he asked her to sleep with him in exchange for forgiving an eight-hundred-dollar debt she owed him. When she refused, the male driver became " 'excessively mad,' verbally degraded her, and twice forcibly took away her keys and cell phone." She ultimately got on the truck of another driver, Chris Loya, and reported her harasser's conduct to the company. That driver reported to the company that Nichols "had driven over the speed limit, kept her tractor brakes on, failed to anticipate traffic light changes, run through at least one red light, and talked on her handheld cell phone while driving."

  Nichols did not have a sterling driving record with her employer. Within the first month or so of being hired in mid-2011, she had been cited for nonoperational turn signals and tail lights, and had twice damaged her truck in incidents the company found to have been preventable. The company rehired her a month later, in October of 2011 on the condition

that she had to drive with a partner. The next partner driver to which she was assigned complained about Nichols' unsafe driving habits and refused to continue driving with her. In early May of 2012, she was cited for driving through a stop sign, causing a three-car accident and thousands of dollars in damage.

After receiving Loya's report of Nichols' continued unsafe driving, and reviewing her driving history with the company, her employment was terminated on June 25, 2012. She sued, alleging that she had been discriminated against on the basis of her sex and had been retaliated against because she complained about sexual harassment.

The court found that the employer had failed to take prompt remedial action once being notified of the alleged harassment and sexual misconduct. They did not remove the male driver from the truck he shared with Nichols, they did not investigate her claims, nor did they reprimand her alleged harasser. Instead, they required her to continue the nearly week-long drive, and stranded her at the home of her alleged harasser with no available alternate form of transportation. For that reason, the court overturned the lower court's summary judgment in favor of the employer with respect to the sexual harassment claim.

However, the court upheld summary judgment for the employer on the retaliation claim, finding that there was ample evidence the employer had been concerned about her unsafe driving before she reported the alleged harassment.

Trends/Issues in this areas:

Greater awareness of sexual harassment and misconduct in the workplace: Obviously recent public attention has been focused on sexual harassment, largely in the context of misconduct towards subordinates. However, this public conversation has also raised several important reminders and some valuable takeaways for our clients:

- Staff knowledge and dissemination of policy matter, both practically and legally.
- Prompt and effective investigations are critical.
- Be aware of and take preventative measures to avoid potential claims of retaliation:
    - Be sure clients understand the importance of promptly documenting performance or conduct issues.
- Sexual harassment training is necessary, and it should include a review of the policy, as well as how to report and investigate complaints of sexual harassment.
- Sexual harassment is more frequent among peers, and in low-wage settings, than traditionally depicted supervisory situations.
- Have protocol in place for workplace relationships, especially those involving supervisors and subordinates.
- Research shows that the required training is not terribly effective, but that training of by-standers, and by-stander intervention, has a greater impact on stopping sexual harassment.
- Also, the climate our clients create goes a long way towards tolerating, or prohibiting, sexual harassment and other unacceptable workplace behavior.

IV. EQUAL PAY ACT OF 1963

The Law:

Equal Pay Act (EPA): The Equal Pay Act was enacted in 1963 as an amendment to the Fair Labor Standards Act (FLSA). It did not initially cover public employers, but was amended in 1972 to do so. The Equal Pay Act prohibits "[s]ex discrimination in the compensation afforded employees [when it is] at a rate less than the rate at which the employer pays wages to employees of the opposite sex," under certain explicit conditions. The Act states: "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d). Some states have also adopted expanded equal pay laws, including California, New York, Massachusetts, and Maryland.

As the courts have noted, "Congress enacted the Equal Pay Act to remedy what was perceived as a serious and deeply engrained problem of employment discrimination in private industry: the fact that [t]he wage structure of all too many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." *Corning Glass Works v. Brennan*, 417 U.S. 188, 818 F.2d 1148 (1974).

To prevail on an equal pay claim, an employee of one sex is required to prove that the employer pays different wages to employees of the opposite sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions[.]" Job duties, not titles, are what matters. Unlike Title VII, the jobs being compared need not be identical or the same, rather they need only be "substantially equal" (sometimes the term "substantially equivalent" is also used*). See, e.g., Shultz v. Wheaton Glass Co.*, 421 F.3d 259 (3rd Cir. 1970) (referring to the "substantially equal" standard); *Buntin v. Breathitt County Bd. of Educ.*, 134 F.3d 796, 799 (6th Cir.1998) (writing that "'Equal work' does not require that the jobs be identical, but only that there exist 'substantial equality of skill, effort, responsibility and working conditions.'").

Generally, remedies for violations of the Equal Pay Act include back pay, liquidated damages equal to amount of lost wages, attorneys' fees, and injunctive relief. Unless an employer can establish an affirmative defense, an Equal Pay Act violation results in a sort of strict liability; a plaintiff does not have to prove an employer acted with discriminatory intent. *See, e.g., Pollis v. New School for Social Research*, 132 F.3d 115, 118 (2nd Cir.1997); *Strecker v. Grand Forks County Soc. Serv. Bd.*, 640 F.2d 96, 99 n. 1 (8th Cir.1980).

Selected Case Law:

- *Weaver v. Ohio State Univ.*, 71 F. Supp. 2d 789 (S.D. Ohio 1998). Weaver was the head field hockey coach for OSU. She sued alleging that she had been retaliated against for her

complaints about the condition of the artificial turf at the athletic field on which her team practiced, and for complaints of gender discrimination made to the NCAA, in violation of Title IX; she also put forward a Title VII sex discrimination complaint, alleging that she was terminated for inconsequential matters while male coaches were permitted to keep their jobs, despite serious allegations of misconduct.

Her equal pay claim came from her allegation that she was not paid as much as the coach of the men's ice hockey team, a position she asserted to be comparable to her job as head coach of the women's field hockey team. During 1994–1995, Weaver's annual salary was $35,592 based on a nine-month work year. In 1995–1996, her salary was increased to $47,460 based on a twelve-month work year. In comparison, the male ice hockey coach was paid $41,304 in 1994–1995, and in the 1995–1996 school year, OSU hired a new ice hockey coach at an annual salary of $65,000. The court noted that courts are reluctant to "find an equality of work between coaches of different sports." *Id*. at 800, citing to *EEOC v. Madison Comm. Unit School Dist. No. 12*, 818 F.2d 577 (7th Cir.1987) (rejecting findings of equality between boys' soccer and girls' volleyball and basketball teams and between boys' track and girls' basketball teams); *Deli v. University of Minnesota*, 863 F.Supp. 958, 961 (D. Minn. 1994) (impliedly overruled on other grounds) (women's gymnastics coach not substantially equal to men's football, hockey and basketball coaches). Rather, in "determining whether men's and women's coaching positions are equal, courts have looked to such factors as team size, the number of assistant coaches, recruiting responsibilities, the amount of spectator attendance and community interest in the sport, the amount of revenue generated by the sport, the degree of responsibility in the area of public and media relations and promotional activities, and the relative importance of the sport in the athletic program as a whole." *Id*.

In evaluating Weaver's claim, the court observed that the competition season for field hockey was "a little over two months, with nineteen to twenty-one games" while the competition season for ice hockey during that same period was "five months, with thirty-five to thirty-eight games." The average team size for field hockey ranged from sixteen to twenty players, while the ice hockey team included from twenty-three to twenty-seven players. OSU contended that field hockey was more analogous to men's soccer and men's lacrosse where both male coaches were paid less than Weaver. Also, observed the court, the female soccer, swimming and volleyball coaches were paid more than the male soccer, swimming and volleyball coaches.

Added the court, men's ice hockey "is one of the more popular sports at OSU and is one of the few sports to generate revenue[.]" Therefore, the coach of that team had a high level of public relations and management duties. There was no evidence that coaching the women's field hockey team involved a similar degree of public relations responsibilities or that the field hockey team generated any revenue for OSU. OSU also offered evidence that they were paying market rate for coaches' salaries in the Big Ten, and in Division 1–A schools across the country. The court noted approvingly that "[u]nequal wages that reflect market conditions of supply and demand are not prohibited under the Equal Pay Act."

Finding that Weaver failed to produce evidence sufficient to show that she could prove a prima facie case under the Equal Pay Act, and that OSU "produced sufficient evidence to prove their defense that the difference in wages between plaintiff and the ice hockey coach was based on merit and seniority factors and on market rate, a factor other than sex," the court granted the university summary judgment on the Equal Pay Act claim.

- *Horner v. Mary Institute*, 613 F.2d 706 (8th Cir. 1980). The Mary Institute was a private not-for-profit school. It had no formal faculty salary schedule. Each spring the administrative head of the school allocated faculty salaries based on "personal reactions, the reactions of students, parents, and faculty, and the recommendations of department and school heads." Principal evaluations of teachers were also used to set teacher salaries.

  One male PE teacher was paid significantly more than the other two: one male and one female. Over a period of three years, that same male PE teacher received a larger annual pay increase than Horner, the female PE teacher. He also negotiated an even higher annual salary, after telling the Mary Institute that he was being offered a higher paying job by the nearby public school district. While the Principal noted to the Headmistress Horner's perceived lack of "enthusiasm" for the PE program, no performance issues were documented or shared with her. In the meantime, the male PE teacher was considered by the Principal to be "prompt, enthusiastic, and innovative." Parents also liked the male PE teacher and made endowment gifts to the Mary Institute.

  Eventually Horner sued, alleging that even though she and the male PE teacher had substantially similar jobs, she was paid less in violation of the Equal Pay Act. According to the court, "[t]he only questions are (1) whether their jobs were substantially equal and (2) if so, whether the wage differential was related to sex." According to the court, Horner failed to show that her job required substantial equal "skill, effort, and responsibility" to that of her male counterpart, even though "[t]he jobs are superficially identical in that both involve teaching of physical education."

  Said the court vaguely, there "was evidence from which the court could conclude that [the male PE teacher's] job required more experience, training, and ability," and that his job was "not substantially equal to Horner's in terms of 'responsibility.'"

  But the ultimate factor for the court was that the Headmaster at the time did attempt to hire the male teacher "at the same $7,500 salary at which he had hired other teachers, both male and female" but that offer was rejected due to the teacher's belief he could earn more at another school. Thus, said the court, that the higher salary of the male teacher was based, not on his sex, but because his "experience and ability made him the best person available for the job and because a higher salary was necessary to hire him." *But see, Rizo v. Yovino*, 854 F.3d 1161 (9th Cir.), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 29, 2017) (the Ninth Circuit will rehear a panel decision which held that employee pay differential based on the employer's use of prior salary can be "a differential based on any other factor other than sex," under the EPA, even where it resulted in unequitable pay for male and female employees).

- *Morris v. Fordham University*, 2004 WL 906248 (S.D. N.Y. 2004). The former male head coach of the women's basketball team alleged, among other things, that he was paid less than the male head coach of the men's basketball team. Noting that the plain language of the statute required "the identification of a comparator employed by the same employer and of the opposite gender [as] an indispensable requirement for a plaintiff bringing an Equal Pay Act Claim," the court dismissed the plaintiff's claim. Thus, the Equal Pay Act only applies to complaints based on the gender of the coach alleging unfair compensation. It does not apply to a coach whose unfair compensation claim is based on the gender of the athletes whom the coach supervises.

- *Schleicher v. Preferred Solutions, Inc*., 831 F.3d 746 (6th Cir. 2016) *cert. denied*, 137 S. Ct. 531 (2016). Schleicher was a male employee who performed the same job, had the same responsibilities, and earned a share of company profits as did a female counterpart. However, they each asked to be paid under different compensation models: one that paid only a specific share of profits, while the other was paid a base salary, plus a lower share of profits. Schleicher earned more under his chosen compensation model, but after he had repeated workplace disputes with others, his supervisor later modified his compensation model so that it matched that of his female colleague. At the end of that year, his employment was terminated after he disobeyed a directive from his supervisor.

  He sued, alleging that the company had violated the Equal Pay Act in two ways: 1) by "maintaining the pay disparity" between he and his female colleague for more than three years; and, 2) by "curing" that pay disparity by lowering his compensation to match hers. In essence, he argued that the EPA forbids an employer from lowering an employee's wages if it does so to remedy an underlying EPA violation. The court found that both of plaintiff's arguments failed because both employees had the option of initially choosing their preferred compensation plan, and when his compensation was reduced there was no equal pay violation because there was "no underlying EPA violation to 'cure.'" *Id*. At 753.

- *Gauen v. Board of Education of Highland Community Unit School District No. 5*, 2017 WL 2869942 (S.D. Ill. 2017). In this Memorandum and Order, the district court denied summary judgment for the school district in this EPA claim from a principal, Karen Gauen, who claimed she made less than her male counterparts because she was female. When Gauen was promoted to assistant principal, after 24 years in the district and 40 years in education, she had a doctorate in education administration and was the only district administrator who had earned National Board Certification. When hired she was paid $79,000, though her male predecessor had been paid $105,000. Another male assistant principal was earning over $95,000 at the time. Both had more experience in administration than Gauen.

  Two years later, Gauen applied and was selected for a Principal position, where she was paid $89,000. Her predecessor in that position had been paid $107,000. The male applicant hired to fill Gauen's vacant Assistant Principal position was paid $90,000. Both men had relocated their families to the community when they accepted their respective positions.

While the district claimed that her lower pay was based on her fewer years of experience in administration, Gauen asserted that when she asked the superintendent why she was paid less, he stated that she was "a hometown girl" and "could not expect to get as much as a man moving his family." In denying summary judgment for the district, the court found that Gauen made out a prima facie case under the EPA and that, despite the district's explanation for Gauen's lower pay, a reasonable jury could find that she received less pay because of her gender.

Trends/Issues in this area:

The EEOC has amended the EEO rules to require employers to include compensation information as part of their annual EEO-1 reporting, effective March of 2018. The agency has said that data may be used for an employer's own wage audit, and it may be used against an employer in litigation.

Public school districts must be keenly aware of their obligation to make certain that their employees are paid fair and equal wages to avoid lawsuits brought under the Equal Pay Act (EPA) and other laws. So how might client school districts avoid EPA claims?

- Ensure creation of and compliance to salary schedules that specify the range of pay for particular positions. If deviating from those ranges, appropriately document the grounds for doing so. Exceptions to salary range should be limited to objective and defensible reasons, unrelated to an employee's sex. For raises, consider step increases granted to all employees in the same category.
- Similarly, at the time of hiring, be sure that the salary is vetted through the appropriate district department to ensure it conforms with salary schedules and to the compensation for other employees in similar positions in the school district.
- Routinely conduct salary audits to ensure that salaries are consistent and do not deviate from the district's salary schedule. Likewise, review job descriptions and current salaries to be sure that "substantially equal" jobs are properly titled and equitably compensated. Also, avoid giving generalized job titles to jobs that are different from one another.

Help clients who make compensation decisions become familiar with the EPA, and a school district's obligations under the Act. This may include steering clients away from hire-by-hire pay negotiations, or simply paying based on what an applicant earned or could have earned in a previous job (studies show that negotiated compensation tends to benefit men's and impair women's pay).

Clients may want to take advantage of services like school board association salary audits.

V. PREGNANCY DISCRIMINATION ACT

The Law:

Pregnancy Discrimination Act (PDA): The Pregnancy Discrimination Act (1978) amended Title VII and it protects against discrimination "because of or on the basis of pregnancy, childbirth, or

related medical conditions." The Act also states that employers must 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."

The courts have written that the following four elements establish a prima facie pregnancy discrimination case: 1) the employee is or was pregnant and her employer knew she was pregnant; 2) she was qualified for her job; 3) she suffered an adverse employment decision; and 4) there was some nexus between her pregnancy and the adverse employment decision. *E.g, Geraci v. Moody–Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir.1996). In 2015, the U.S. Supreme Court issued a landmark ruling in *Young v. UPS*, holding that the PDA requires employers 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."

Although not all pre-*Young* case law found a failure to accommodate breastfeeding to be sex discrimination, since the *Young* decision, courts have more often found that breastfeeding can be considered a related medical condition under the PDA. *See E.E.O.C. v. Houston Funding II, Ltd*., 717 F.3d 425, 428 (5th Cir. 2013) ("Lactation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth.") and *Hicks v. City of Tuscaloosa* (below).

Selected Case Law:

- *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791 (1974). While FMLA and the PDA have changed this area of the law, it is worth noting this landmark case in which the U.S. Supreme Court struck down a school district's 1952 policy that required pregnant teachers to take unpaid maternity leave five months before the scheduled birth of the child. The employees also could not return to work until the baby was at least three months old. Also, a doctor's certificate attesting to the health of the teacher was required before she could return to work and upon her return, the teacher was not assured of re-employment. Rather, she would get priority reassignment to a position for which she was qualified. While all of the lower courts had upheld the policy, the High Court held that the policy was unconstitutional as it unduly burdened her "freedom of personal choice in matters of marriage and family life…[,] one of the liberties protected by the Due Process Clause." Acknowledging the district's "necessity for continuity of instruction nor the state interest in keeping physically unfit teachers out of the classroom" where there are "many instances of teacher pregnancy," the Court nevertheless held that the policy "wholly arbitrary and irrational" and it "unduly penalize[d] a female teacher for deciding to bear a child," a protected constitutional liberty.

- *Doe v. C.A.R.S. Protecting Plus, Inc.*, 527 F.3d 358 (3rd Cir. 2008). C.A.R.S. Protection Plus, Inc., hired Jane Doe as a graphic artist in June 1999; Doe's supervisor was Fred Kohl, who was also Vice–President and part-owner of the company. In May of 2000, Doe learned that she was pregnant. When she told Kohl of her pregnancy, and asked about making up any time missed for doctor's appointments. Kohl told Doe they would "play it by ear."

On Wednesday, August 9th, Doe learned that her baby had severe deformities and her physician recommended that her pregnancy be terminated. That afternoon, Doe's husband telephoned Kohl and told him that Doe would not be at work the next day. Kohl approved the absence and asked that Doe's husband call him the following day.

Doe's husband called C.A.R.S. the next day and told Kohl that the employee's pregnancy would be terminated on the following day. Doe's husband requested that she be permitted to take one week of vacation the following week. Doe's husband said that Kohl verbally approved the request for a one-week vacation. Doe's pregnancy was terminated on Friday, August 11, 2000.

A funeral was arranged for Doe's baby on Wednesday, August 16th. Kohl gave the office manager (Does' sister-in-law) permission to take one hour off work to attend the funeral. As she was leaving for the funeral, the office manager noticed that Doe's personal belongings were being packed from her desk. When this was reported to Doe, she called Kohl who told her that she had been discharged.

After filing a timely charge with the EEOC and being issued a right-to-sue letter, Doe filed a lawsuit, alleging a violation of the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k). Doe maintained that C.A.R.S. terminated her employment because she underwent a surgical abortion.

Because Doe did not assert a typical pregnancy discrimination claim, but instead argued that she was discharged because she underwent a surgical abortion, the question of whether the protections afforded pregnant women under the PDA also extend to women who elected to terminate their pregnancies was one of first impression in the Third Circuit.

The court noted that under the PDA: "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." Also, the court gave deference to the EEOC guidelines interpreting that section which expressly state that an abortion is covered by Title VII:

> The basic principle of the [PDA] is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired ... merely because she is pregnant or has had an abortion.

Appendix 29 C.F.R. pt. 1604 App. (1986). Finally, added the court, the legislative history of the PDA contains the following:

> Because [the PDA] applies to all situations in which women are "affected by pregnancy, childbirth, and related medical conditions," its basic

> language covers women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have 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. So noting, the court held that the term "related medical conditions," as used in the PDA, includes an abortion.

Observing that there was no dispute that: 1) Doe was pregnant and that her employer knew she was pregnant; 2) she was qualified for her job; and, 3) she suffered an adverse employment decision, it set out to determine whether there is some nexus between her pregnancy and her employment termination. The court commented on the employer's "somewhat less than compassionate leave policies" for all employees, which Kohl said required any absent employee (or a spouse) to call him or another designated supervisor on a daily basis during the absence. Doe's failure to call him every day is why she was fired, claimed the employer. However, multiple examples of extended absences by non-pregnant employees, without daily calls, and without adverse action were proved. Also, Kohl had remarked in the workplace that Doe had not "taken responsibility" for her abortion and this, said the court, indicates that Kohl may have had other, discriminatory, reasons for terminating Doe's employment than her alleged 'abandonment' of her job." Having made these findings, the court remanded the matter to district court for further proceedings.

- *Greenan v. Bd. of Educ. of Worcester County*, 783 F. Supp. 2d 782 (D. Md. 2011). One of the claims in this case was that of "pregnancy harassment" under the PDA. The court observed that PDA pregnancy harassment claims are analyzed as a subset of gender discrimination claims under Title VII. Therefore, to succeed on a PDA harassment claim, a plaintiff must establish that the offending conduct (1) was unwelcome, (2) was "based not simply on the employee's sex but on the condition of pregnancy", (3) was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) was imputable to her employer. Finding enough to support the inference that the harassing behavior at issue was due to the plaintiff's pregnancy, the court denied the district's motion to dismiss.

- *Young v. United Parcel Service, Inc*., 135 S.Ct. 1338 (2015). This highly publicized case involved a pregnant part-time UPS driver, Young, whose doctor advised her not to lift more than 20 pounds. However, UPS required its drivers to be able to lift up to 70 pounds. UPS told Young that she could not work while under the 20-pound lifting restriction, which resulted in her losing pay and her medical insurance. Young pointed out that UPS accommodated other drivers with disabilities that created work restrictions similar to hers. She argued that UPS discriminated against its pregnant employees because it had a light-duty-for-injury policy for numerous "other persons," but not for pregnant employees. UPS countered that the light-duty accommodations to which Young pointed were for those employees who had on-the-job injuries, who lost DOT certification, or who had a disability covered by the Americans with Disabilities Act, which Young did not. Therefore, said UPS, it treated Young the same as it did all "other" relevant "persons." The lower courts had sided with UPS, with the Fourth Circuit concluding that "'UPS has crafted a

pregnancy-blind policy' that is 'at least facially a 'neutral and legitimate business practice,' and not evidence of UPS's discriminatory animus toward pregnant workers.'"

The High Court focused on the provision of the PDA which states that an employer must 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." In doing so, this said the Court, required "courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work." As with other disparate treatment claims, it would be necessary to "consider any legitimate, nondiscriminatory, nonpretextual justification for these differences in treatment."

In vacating the Fourth Circuit's opinion, the Court wrote that "a plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause may make out a prima facie case by showing, as in *McDonnell Douglas*, that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'" *Id*. at 1354.

Then the employer can offer "legitimate, nondiscriminatory" reasons for denying the requested accommodation. However, said the Court, "consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ("similar in their ability or inability to work") whom the employer accommodates." *Id*.

Finally, if the employer offers what seems a "legitimate, nondiscriminatory" reason for its actions, the plaintiff may attempt to show that the employer's proffered reasons are pretextual. Added the Court: "We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination." *Id*.

Applying its analysis, the Supreme Court observed that UPS had three separate accommodation policies and Young had put forward evidence that these policies "significantly burdened pregnant women." (for instance, the shop steward testified that "the only light duty requested [due to physical] restrictions that became an issue" at UPS "were with women who were pregnant"). Asked the Court: "when the employer accommodated so many, could it not accommodate pregnant women as well?" *Id*. at 1355.

- *Hannis-Miskar v. North Schuylkill School District*, 2016 WL 3965209 (M.D. Pa. 2016). The plaintiff, Amy Hannis-Miskar was the Assistant Principal at an Elementary school from 2008-2013, and then the High School Assistant Principal from 2014-2015. In September of 2013, when she was four months pregnant, Hannis-Miskar made a written allegation of harassment and retaliation due to her pregnancy. During the summer of 2014, while she was on maternity leave, the school board transferred Hannis-Miskar to the High

School Assistant Principal position. She alleged that the reassignment from Elementary School Assistant Principal to High School Assistant Principal after her pregnancy was to force her to resign, in violation of the ADA and the PDA.

Among other things, the district defended the action by asserting that the plaintiff had not sufficiently pled an adverse employment action as required for both discrimination and retaliation claims under Title VII, and that even if an adverse employment action occurred, plaintiff did not sufficiently plead a temporal or causal connection to sustain a claim for retaliation.

Although the district argued that the move was a lateral one, with no changes in compensation, terms, or benefits of her employment, the Court nevertheless found credible the plaintiff's claims that the high school position was "less desirable" than that at the elementary, and that "other employees also believed that defendant wanted her to quit," pointing to longer hours and last minute work assignments as well as being excluded from a training session and having duties reassigned that properly belonged to her. The Court also did not look favorably on the fact that the reassignment had occurred while she was on leave, that the principal commented on her pregnancy when she returned to work, and that the defendant was "inconsist[ent] in the reason[ing]" for the job transfer.

- *Hicks v. City of Tuscaloosa*, 2017 WL 3910426 (11th Cir. Sept 7, 2017). Hicks was an investigator on the narcotics task force of the Tuscaloosa police force. When she became pregnant in January 2012, she was allowed to work cases that permitted her to avoid working nights and weekends. Her supervisor admitted to being annoyed by that arrangement and told Hicks several times that she should take only six weeks of FMLA leave when she gave birth. Hicks, however, took twelve weeks of FMLA leave from August 2012 to November 2012.

  Prior to her FMLA leave, Hicks received a performance review from her supervisor that said Hicks "exceeded expectations." But on Hicks's first day back from FMLA leave, she was written up. Hicks overheard her supervisor saying of Hicks, "that bitch" and claiming she would find a way to write Hicks up and get her out of there. Another officer overheard the supervisor talking loudly about Hicks saying "that stupid "c*** thinks she gets 12 weeks. I know for a fact she only gets six."

  Eight days after returning to work, Hicks was reassigned to the patrol division, which was considered a demotion as she lost her vehicle and weekends off, and she had a pay cut and different job duties. As a patrol officer, she was also required to wear a ballistic vest all day.

  Before starting in the patrol division, Hicks took time off when a physician diagnosed her with postpartum depression. Her doctor wrote a letter to the Chief recommending that Hicks be considered for alternative duties because the ballistic vest she would be required to wear on patrol duty was restrictive and could cause breast infections that lead to an inability to breastfeed. But the Chief did not believe that Hicks had any limitations because other breastfeeding officers had worn ballistic vests without any problems. Hicks requested

a desk job where she would not be required to wear a vest and assurances that she would be allowed to take breaks to breastfeed. But the Chief did not consider breastfeeding a condition that warranted alternative duty, and he told Hicks that her options were (1) not wearing a vest or (2) wearing a vest that could be "specially fitted" for her. He also told her that she would be assigned to a beat that allowed her access to lactation rooms, and that she could get priority to take two breastfeeding breaks per shift. Hicks felt that the vest options offered were dangerous and she resigned.

The court struggled with the application of breastfeeding to the PDA writing: "The line between discrimination and accommodation is a fine one. Taking adverse actions based on a woman's breastfeeding is prohibited by the PDA but employers are not required to give special accommodations to breastfeeding mothers. Hicks's case presents a scenario that appears to straddle that line. While the City may not have been required to provide Hicks with special accommodations for breastfeeding, the jury found that the City's action in refusing an accommodation afforded to other employees compelled Hicks to resign." *Id*. at 1260.

Ultimately, the court ruled that Hicks was discriminated against, in violation of the PDA, when she was reassigned only eight days after returning from FMLA leave following childbirth. In addition, said the court, a jury properly found that the failure to accommodate Hicks's breastfeeding requests, when it allowed accommodations to others similarly situated, constituted discriminatory constructive discharge, in violation of the PDA. Of note is that the court held that a plain reading of the PDA covers discrimination against breastfeeding mothers (a holding that is "consistent with the purpose of PDA and will help guarantee women the right to be free from discrimination in the workplace based on gender-specific physiological occurrences").

<u>Trends/Issues in this area</u>:

According to EEOC, in fiscal year 2016, the agency received over 3,400 charges of pregnancy discrimination and PDA case law seems to be on the rise after *Young v. UPS*.

In the context of public schools, a large percentage of the workforce are women and many of them are working mothers. It is a commonplace to have numerous pregnant employees, including those on maternity leave/FMLA, or recently returned from maternity leave/FMLA. Indeed, some attribute the proverbial glass escalator for men, and glass ceiling for women, to breaks taken due to pregnancy and/or child rearing.

While accommodating so many pregnancies, while maintaining educational and operational continuity can be challenging, the Pregnancy Discrimination Act (PDA) forbids discrimination based on pregnancy in employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment.

To avoid such claims, clients may want to consider the following:

- Timely documentation of any performance or conduct concerns that pre-date or occur concurrently with pregnancy or related medical conditions.
- Treat employees affected by pregnancy, childbirth, or related medical conditions exactly the same as other employees with similar disabilities or limitations. The PDA requires equal treatment for pregnant employees, not preferential treatment.
- The PDA prohibits employers from refusing to hire a woman because of a pregnancy-related condition as long as she is able to perform the major functions of her job. Be sure hiring officials do not ask whether the applicant is pregnant or plans to become so in the future. In determining whether a pregnant applicant is capable of performing the major functions of her job, districts should use the same criteria used for other non-pregnant employees with similar limitations.
- Impairments resulting from pregnancy may be disabilities under the Americans with Disabilities Act (ADA). So, employers may have to provide a reasonable accommodation for any disability related to pregnancy, absent undue hardship.

VI. NURSING MOTHERS – BREASTFEEDING BREAKS

The Law:

EEOC Guidance - Discrimination Based on Lactation and Breastfeeding: The EEOC warns 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. The EEOC reasons that 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. The EEOC cautions that 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. Whether the employer would be required to provide a female employee ***multiple*** breaks throughout the day to express breastmilk, if the employer does not allow other employees to do so, remains a question, and so may likely be an issue for employers.

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 activities, 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, as discussed below, that requires employers to provide reasonable break time and a private place for hourly employees who are breastfeeding to express milk.

FLSA/ACA: When the Affordable Care Act (ACA) was signed into law on March 30, 2010, it contained an amendment to the Fair Labor Standards Act (FLSA) requiring an employer to provide reasonable break time for a non-exempt employee to express breast milk for her nursing child for one year after the child's birth each time the employee has need to express milk. Employees do not have to be compensated for reasonable break time for any work time spent for such purpose. The employer must also provide a place, other than a bathroom, for the employee to express breast milk. If these requirements impose undue hardship, an employer that employs fewer than 50 employees is not subject to these requirements. The federal requirements do not preempt any state law that provides greater protections to employees. Also, this law does not apply to employees who are exempt under the FLSA.

State laws: Forty-nine states, the District of Columbia and the Virgin Islands have laws that specifically allow women to breastfeed in any public or private location. Many of those laws contain language that allows a mother to breastfeed in any place she has a right to be. Further, many states explicitly provide for exempt workers reasonable break times to express breast milk.[2]

Selected Case Law:

- *Dike v. Sch. Bd. of Orange County, Fla*., 650 F.2d 783, 787 (5th Cir. 1981), overruled by *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997*)*: In this decades-old case, a teacher sued over the district's refusal to permit her to breastfeed her child during her duty-free lunch period. She argued that she could breastfeed privately without any disruption of school activities or interfering with her discharge of work responsibilities. Indeed, she characterized breastfeeding as a constitutional right. The lower court had dismissed the case as frivolous, and the Fifth Circuit overturned that decision.

  Dike had arranged for her husband or babysitter to bring the child to school during her lunch period, when she was free from any duties, and she would privately nurse the child in a locked room. If she was asked to perform duties during her lunch period she would hand the baby to her husband or babysitter. After three months of this routine, the principal directed Dike to stop nursing her child on campus, citing a school board directive prohibiting teachers from bringing their children to work with them for any reason.

  She abided by that directive until the baby developed an allergy to formula milk. She then used a breast pump and left it for the mid-day feeding. She claimed that this resulted in observable psychological changes to her baby and to her own emotional well-being, so she asked to be able to either resume her previous practice, or to leave to nurse the child off campus during her non-duty time or in her camper van in the school parking lot. The school board denied these requests, relying on a policy that prohibited teachers from leaving school premises during the school day.

[2] See Appendix.

When the baby began refusing to nurse from a bottle, and she was denied permission to breastfeed on campus or off, Dike took an unpaid leave of absence for the remainder of the school term. She then sued, alleging that the District had interfered with a constitutionally protected right to nurture her child by breastfeeding.

According to the court, the Constitution protects a woman's liberty interest in breastfeeding her child. The court likened the decision to breastfeed to the protected liberties found in "individual decisions respecting marriage, procreation, contraception, abortion, and family relationships." According to the court, a public employer's interference with a woman's decision to breastfeed must "further sufficiently important state interests, and [be] closely tailored to effectuate only those interests." The case was remanded, with the court writing: "The school board's interests in avoiding disruption of the educational process, in ensuring that teachers perform their duties without distraction, and in avoiding potential liability for accidents are presumably legitimate. Whether these or other interests are strong enough to justify the school board's regulations, and whether the regulations are sufficiently narrowly drawn, must be determined at trial."

- *EEOC v. Houston Funding, Ltd*. 717 F.3d. 425 (5th Cir. 2013): The EEOC brought this action against the employer on behalf of former employee, Donnicia Venters, alleging that the employer unlawfully discharged employee because she was lactating and wanted to express milk at work.

  Venters worked as an account representative/collector for Houston Funding from March 2006 until she was fired in February 2009. In December 2008, she had taken a leave of absence to have her baby. Houston Funding has no maternity leave policy, and neither Venters nor her supervisors specified a date for her return. Shortly after giving birth, Venters told Harry Cagle ("Cagle"), Houston Funding's Limited Partner, that she would return to work as soon as her doctor released her. Venters suffered complications from her C-section, however, and ended up staying home through mid-February.

  During her absence, Venters regularly contacted her supervisor, Robert Fleming ("Fleming"), as well as other Houston Funding managers. Fleming testified that Venters called him at least once a week from the beginning of her leave in December 2008 through his departure from the company in January 2009. During one conversation, Venters told Fleming that she was breastfeeding her child and asked him to ask Cagle whether it might be possible for her to use a breast pump at work. Fleming stated that when he posed this question to Cagle, Cagle "responded with a strong 'NO.' Maybe she needs to stay home longer.'"

  On February 17, 2009, Venters called Cagle and told him her doctor had released her to return to work. Again, she mentioned she was lactating and asked whether she could use a back room to pump milk. After a long pause, Cagle told her that they had filled her spot. On February 20, Houston Funding mailed a termination letter, dated February 16, to Venters. This letter stated Venters was discharged due to job abandonment.

After Venters filed a charge of sex discrimination with the EEOC, Houston Funding responded that Venters had not contacted her supervisor during her maternity leave and had not attempted to return to work. After investigating Venters' charge, the EEOC brought a Title VII action against Houston Funding in district court, asserting that when she was terminated, Houston Funding unlawfully discriminated against Venters based on her sex, including her pregnancy, childbirth, or related medical conditions.

Houston Funding argued Title VII does not cover "breast pump discrimination" and moved for summary judgment. The district court agreed and granted the motion, finding that "[f]iring someone because of lactation or breast-pumping is not sex discrimination," and that lactation is not a related medical condition of pregnancy.

When the EEOC appealed, the Fifth Circuit reversed and held that an adverse employment action against a female employee because she was lactating or expressing milk constituted sex discrimination in violation of Title VII.

Trends/Issues in this area:

Practical challenges for schools: Accommodating lactating employees can be difficult, especially in an instructional setting. Many school district employees have no private, secure area, such as their own office, in which to express breastmilk. This is especially true for employees in classified positions, such as janitors, cafeteria workers and bus drivers who are entitled to express milk on breaks, in secure, private areas, under the FLSA amendments.

More problematic, perhaps, is the time away from the instructional setting for teachers who need to express breastmilk. In Texas, for example, state law requires school districts to provide reasonable breaks for employees to express breastmilk "each time the employee needs" to do so. No case law has established what would be "reasonable" or how to determine who decides when an employee "needs" to express milk. It may be that an employee's schedule can be modified, even temporarily, to allow sufficient breaks and where an employee demands what seem to be excessive breaks, perhaps a physician's confirmation of the number of times an employee "needs" to express milk during the work day would be in order. Certainly, as with other physical needs or "conditions," having an instructional employee out of the classroom for a significant amount of time can be a legitimate hardship for a school and can negatively impact the quality of the instruction students receive.

School districts would be wise to address proactively these issues before a conflict arises by establishing clear regulations or policies for employees needing to express breastmilk. As the case law has established, prohibiting an employee from expressing breastmilk can be actionable under Title VII if male employees outside the protected class are provided breaks for things such as blood sugar monitoring, delivery of insulin, or other similar medical needs. Similarly, if expression of breastmilk or breastfeeding is ordered by a physician, then an ADA analysis should be applied.

APPENDIX – STATE-BY-STATE BREASTFEEDING LAWS

Arkansas: Ark. Stat. Ann. § 11-5-116 (2009) requires an employer to provide reasonable unpaid break time each day to an employee who needs to express breast milk for her child and requires an employer to make a reasonable effort to provide a private, secure and sanitary room or other location other than a toilet stall where an employee can express her breast milk. (2009 Ark. Acts, Act 621, HB 1552).

California: Cal. Labor Code § 1030 et seq. (2001) provides that employers need to allow a break and provide a room for a mother who desires to express milk in private.

Colorado: Colo. Rev. Stat. § 8-13.5-101 et seq. (2008) requires an employer to provide reasonable break time for an employee to express breast milk for her nursing child for up to two years after the child's birth. The employer must make reasonable efforts to provide a place, other than a toilet stall, for the employee to express breast milk in privacy. The law also requires the Department of Labor and Employment to provide, on its website, information and links to other websites where employers can access information regarding methods to accommodate nursing mothers in the workplace. (2008 Colo., Sess. Laws, Chap. 106, HB 1276).

Connecticut: Conn. Gen. Stat. § 31-40w (2001) requires employers to provide a reasonable amount of time each day to an employee who needs to express breast milk for her infant child and to provide accommodations where an employee can express her milk in private. (HF 5656).

District of Columbia: The law also specifies that an employer shall provide reasonable daily unpaid break periods, as required by the employee, so that the employee may express breast milk for her child. These break periods shall run concurrently with any break periods that may already be provided to the employee. Requires that an employer make reasonable efforts to provide a sanitary room or other location, other than a bathroom or toilet stall, where an employee can express her breast milk in privacy and security. The location may include a childcare facility in close proximity to the employee's work location. (2007 D.C. Stat., Chap. 17-58; B 133).

Georgia: Ga. Code § 34-1-6 (1999) allows employers to provide daily unpaid break time for a mother to express breast milk for her infant child. Employers are also required to make a reasonable effort to provide a private location, other than a toilet stall, in close proximity to the workplace for this activity. The employer is not required to provide break time if to do so would unduly disrupt the workplace operations.

Hawaii: Hawaii Rev. Stat. § 367-3 (1999) requires the Hawaii Civil Rights Commission to collect, assemble and publish data concerning instances of discrimination involving breastfeeding or expressing breast milk in the workplace. The law prohibits employers to forbid an employee from expressing breast milk during any meal period or other break period. (HB 266).

Hawaii Rev. Stat. § 378-2 provides that it is unlawful discriminatory practice for any employer or labor organization to refuse to hire or employ, bar or discharge from employment, withhold pay from, demote or penalize a lactating employee because an employee breastfeeds or expresses milk at the workplace. (2000 Hawaii Sess. Laws, Act 227; HB 2774) Hawaii Rev. Stat. § 489.21 and § 489-22 provide that it is a discriminatory practice to deny, or attempt to deny, the full and equal enjoyment of the goods, services, facilities, privileges,

advantages, and accommodation of a place of public accommodations to a woman because she is breastfeeding a child. The law allows a private cause of action for any person who is injured by a discriminatory practice under this act.

Illinois: Ill. Rev. Stat. Ch. 820 § 260 (2001) creates the Nursing Mothers in the Workplace Act. Requires that employers provide reasonable unpaid break time each day to employees who need to express breast milk. The law also requires employers to make reasonable efforts to provide a room or other location, other than a toilet stall, where an employee can express her milk in privacy. (SB 542).

Indiana: Ind. Code § 5-10-6-2 and § 22-2-14-2 (2008) provide that state and political subdivisions shall provide for reasonable paid breaks for an employee to express breast milk for her infant, make reasonable efforts to provide a room or other location, other than a toilet stall, where the employee can express breast milk in private and make reasonable efforts to provide for a refrigerator to keep breast milk that has been expressed. The law also provides that employers with more than 25 employees must provide a private location, other than a toilet stall, where an employee can express the employee's breast milk in private and if possible to provide a refrigerator for storing breast milk that has been expressed. (2008 Ind. Acts, P.L. 13, SB 219).

Louisiana: 2013 La. Acts, P.A. 87 requires public school boards to adopt a policy to require each school to provide an appropriate, private room, other than a restroom, that may be used by an employee to express breast milk. The school must also provide a reasonable amount of break time to accommodate an employee needing to express breast milk for up to one year following the birth of her child. (HB 635).

Maine: Me. Rev. Stat. Ann. tit. 26, § 604 (2009) requires an employer to provide adequate unpaid or paid break time to express breast milk for up to 3 years following childbirth. The employer must make reasonable efforts to provide a clean place, other than a bathroom, where an employee may express breast milk in privacy. The employer may not discriminate against an employee who chooses to express breast milk in the workplace. (2009 Me. Laws, Chap. 84, HB 280).

Minnesota: Minn. Stat. § 181.939 (1998, 2014) requires employers to provide daily, unpaid break time for a mother to express breast milk for her infant child. Employers are also required to make a reasonable effort to provide a private location, other than a bathroom or toilet stall, in close proximity to the workplace that is shielded from view, free from intrusion and has an electrical outlet. The law specifies that an employer may not retaliate against an employee for asserting rights or remedies under this act. (1998 SB 2751; 2014 HB 2536).

Mississippi: Miss. Code Ann. Ch. 1 § 71-1-55 (2006) prohibits against discrimination towards breastfeeding mothers who use lawful break time to express milk.

Montana: Mont. Code Ann. § 39-2-215 et seq. specifies that employers must not discriminate against breastfeeding mothers and must encourage and accommodate breastfeeding. Requires employers to provide daily unpaid break time for a mother to express breast milk for her infant child and facilities for storage of the expressed milk. Employers are also required to make a reasonable effort to provide a private location, other than a toilet stall, in close proximity to the work place for this activity.

New Mexico: N.M. Stat. Ann. § 28-20-2 (2007) requires employers to provide a clean, private place, not a bathroom, for employees who are breastfeeding to pump. Also requires that the employee be given breaks to express milk, but does not require that she be paid for this time.

New York: N.Y. Labor Law § 206-c (2007) states that employers must allow breastfeeding mothers reasonable, unpaid break times to express milk and make a reasonable attempt to provide a private location for her to do so. Prohibits discrimination against breastfeeding mothers.

North Dakota: N.D. Cent. Code § 23-12-16 allows a woman to breastfeed her child in any location, public or private, where the woman and child are otherwise authorized to be. (2009 SB 2344) N.D. Cent. Code § 23-12-17 provides that an employer may use the designation "infant friendly" on its promotional materials if the employer adopts specified workplace breastfeeding policies, including scheduling breaks and permitting work patterns that provide time for expression of breast milk; providing a convenient, sanitary, safe and private location other than a restroom for expressing breast milk; and a refrigerator in the workplace for the temporary storage of breast milk. The law also directs to the state department of health to establish guidelines for employers concerning workplace breastfeeding and infant friendly designations. (2009 SB 2344).

Oklahoma: Okla. Stat. tit. 40, § 435 (2006) requires that an employer provide reasonable unpaid break time each day to an employee who needs to breastfeed or express breast milk for her child. The law requires the Department of Health to issue periodic reports on breastfeeding rates, complaints received and benefits reported by both working breastfeeding mothers and employers. (HB 2358) Okla. Stat. tit. 63, § 1-234 (2004) allow a mother to breastfeed her child in any location that she is authorized to be and exempts her from the crimes and punishments listed in the penal code of the state of Oklahoma. (HB 2102).

Rhode Island: R.I. Gen. Laws § 23-13.2-1 (2003) specifies that an employer may provide reasonable unpaid break time each day to an employee who needs to breastfeed or express breast milk for her infant child. The law requires the department of health to issue periodic reports on breastfeeding rates, complaints received and benefits reported by both working breastfeeding mothers and employers, and provides definitions. (2003 HB 5507, SB 151; 2008 R.I. Pub. Laws, Chap. 475, HB 7906) R.I. Gen. Laws § 23-13.5-1 and § 23-13.5-2 (2008) allow a woman to feed her child by bottle or breast in any place open to the public and would allow her a private cause of action for denial of this right. (2008 R.I. Pub. Laws, Chap. 223 and Chap. 308, HB 7467 and SB 2283).

Tennessee: Tenn. Code Ann. § 50-1-305 (1999) requires employers to provide daily unpaid break time for a mother to express breast milk for her infant child. Employers are also required to make a reasonable effort to provide a private location, other than a toilet stall, in close proximity to the workplace for this activity. (1999 Tenn. Law, Chap. 161; SB 1856).

Texas: Tex. Gov't Code Chapter 619 requires public employers, including school districts, provide a reasonable amount of break time for an employee to express breast milk each time the employee has need to express the milk; and provide a place, other than a multiple user bathroom, that is shielded from view and free from intrusion from other employees and the public where the employee can express breast milk.

Utah: 2012 Utah House Joint Resolution 4 encourages employers to recognize the benefits of breastfeeding and to provide unpaid break time and an appropriate space for employees who need to breastfeed or express their milk for their infant children.

Vermont: Vt. Stat. Ann. tit. 21, § 305 requires employers to provide reasonable time throughout the day for nursing mothers to express breast milk for three years after the birth of a child. Also requires employers to make a reasonable accommodation to provide appropriate private space that is not a bathroom stall, and prohibits discrimination against an employee who exercises or attempts to exercise the rights provided under this act. (2008 Vt. Acts, Act 144, HB 641; 2013 Vt. Acts, Act 31, HB 99).