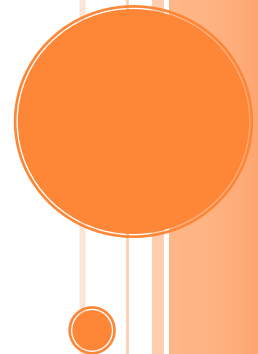


# PREGNANCY IN THE ACADEMY: QUESTIONS AND ANSWERS

*An AAUP Guidebook*

By Saranna R. Thornton



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## Contents

Author	iii
About the AAUP	iv
Acknowledgements	v
Introduction	vi

### Questions and Answers

I.	Pregnancy Disability, or Childbearing, Leave	1
II.	The Interview and Appointment Processes	7
III.	During a Pregnancy	9
IV.	Health Insurance Benefits	12
V.	Sabbaticals and Retirement Benefits	14
VI.	Tenure and Promotion	15
VII.	Parental, or Child-Rearing, Leave	17
VIII.	Termination of Employment	19
IX.	Legal Options after Denial of Appointment, Tenure, or Benefits	20
X.	Abortion	25

Notes	24
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<b>Appendix</b>	29
Resources on the Pregnancy Discrimination Act and Related Issues	

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## About the AAUP

Founded in 1915, the American Association of University Professors is the only faculty organization devoted solely to higher education. Its mission is to advance academic freedom and shared governance, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good. The AAUP has worked to achieve these goals through policies developed over many years on an array of subjects: academic freedom, tenure, and due process; professional ethics; research and teaching; discrimination; college and university government; collective bargaining; student rights and freedoms; college and university accreditation; and collateral benefits, such as retirement plans and leaves of absence.<sup>1</sup> Many of the key policy statements are the AAUP's alone, while others are the result of joint effort. The classic 1940 *Statement of Principles on Academic Freedom and Tenure*, for example, was issued by the AAUP and the Association of American Colleges and Universities. Nearly two hundred U.S. educational and scholarly organizations have endorsed it.

The Association's numerous programs, and the assistance of countless faculty volunteers on hundreds of college and university campuses, help to promote the economic and professional interests of all faculty members. The AAUP's staff, located in Washington, D.C., handles the Association's day-to-day activities. These include dealing with complaints from individual faculty members about an institution's administrative officers or, sometimes, about other members of the faculty; responding to inquiries about higher education law and submitting friend-of-the-court briefs in key appellate cases; lobbying in Washington and state capitals on higher education issues; advising and assisting campus AAUP chapters (among them those that engage in collective bargaining) and state AAUP conferences; and editing and producing *Academe*, the AAUP's bimonthly magazine.

The AAUP's efforts depend on the financial support of individuals. For the AAUP to continue as the pre-eminent voice for academic freedom and faculty rights, it needs the help of many hands. Please help by joining the AAUP. For membership information, call (800) 424-2973 or write to [aaup@aaup.org](mailto:aaup@aaup.org).

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<sup>1</sup> The text of many of these policies appears in the AAUP's *Policy Documents and Reports* (more commonly known as the "Redbook"), available for purchase at [www.aaup.org](http://www.aaup.org). (AAUP members receive a discount on the volume.)

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## Introduction

Several federal statutes govern how employers should treat employees who might become pregnant, do become pregnant, experience a miscarriage, go through childbirth, or have an abortion. (Although many state statutes also apply, state laws will generally not be addressed in this guidebook.) The federal employment laws most directly applicable are Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (PDA) of 1978; the 1993 Family and Medical Leave Act (FMLA); and the 1990 Americans with Disabilities Act (ADA).<sup>1</sup>

Title VII prohibitions against sex-based employment discrimination apply to all colleges and universities, whether public or private. Employees are protected whether they work part or full time, and there is no waiting period to be covered. The Pregnancy Discrimination Act's amendments to Title VII state:

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.<sup>2</sup>

The PDA's standard for the treatment of job applicants or faculty employees temporarily disabled by pregnancy or related medical conditions (for example, abortion or childbirth) is based on a comparison of how the institution treats other temporarily disabled job applicants or professors.<sup>3</sup> Specifically, colleges and universities must make employment decisions about a pregnant faculty member based on the faculty member's ability or inability to work. Under Title VII, a full-time pregnant professor who has no medical complications that compromise her ability to perform her job is similarly situated to a healthy full-time professor who is not pregnant. The terms and conditions of such a pregnant professor's employment cannot be changed. She cannot, for example, be fired, laid off, demoted, have her compensation reduced, or be denied a professional development or promotion opportunity because she is pregnant.

When childbirth or pregnancy-related medical conditions temporarily interfere with a professor's ability to do her job, she must be treated at least as favorably as other professors who are similar in their temporary inability to work. Institutions that make workplace accommodations for nonpregnant faculty must equally accommodate similarly situated pregnant faculty. The principle of equal treatment of similarly situated pregnant and nonpregnant faculty who are temporarily unable to perform one or more of their duties applies to all fringe benefits—whether the fringe benefits are governed by a collective bargaining agreement, a written personnel policy, or an employer's informal past practices.<sup>4</sup> A female professor who cannot work because of childbirth or pregnancy-related medical reasons is entitled to disability benefits, including sick leave, on terms at least as favorable as those that apply to professors who are not pregnant and cannot work owing to short-term medical disabilities.

Like the PDA, the Family and Medical Leave Act applies to public and private colleges and universities.<sup>5</sup> But compliance with the FMLA is mandatory only for employers that have fifty or more employees working at a single site, or at multiple sites that are within seventy-five miles of each other.<sup>6</sup> For example, a university that has a thousand employees on a main campus and twenty-five employees at an off-campus site must provide FMLA benefits to eligible employees at both locations if the sites are within seventy-five miles of each other.

To be eligible for FMLA benefits, a professor must work for a covered employer and must have done so for at least twelve months. The months need not be continuous, but the employee must have worked at least 1,250 hours in the twelve months preceding the start of the FMLA leave.<sup>7</sup> (The 1,250 hours are computed using all hours that a professor has worked for the college or university, not just those spent in the classroom or on teaching-related activities.) Under the FMLA, covered employers must grant an eligible employee up to a total of twelve weeks of unpaid leave during any twelve-month period for one

or more of the following reasons: to recover from a serious health condition (including childbirth and certain pregnancy-related complications); to care for a spouse, parent, or child with a serious health condition; or to care for a newborn or newly adopted child or a child in a foster-care placement.<sup>8</sup>

The Americans with Disabilities Act prohibits employers from discriminating against qualified employees or job applicants because of a disability. ADA prohibitions against disability-based employment discrimination apply to all private colleges and universities.<sup>9</sup> Faculty at state colleges and universities cannot sue their employers in federal court when they experience illegal disability discrimination. As a federal agency, the Equal Employment Opportunity Commission (EEOC) can, however, sue a state on behalf of an employee of a public school. Faculty employed at public institutions must therefore find relief from denial of ADA benefits by going through such channels.<sup>10</sup>

To be covered by the protections of the ADA, an employee or job applicant must have a physical or mental impairment that substantially limits a major life activity (for example, feeding oneself, walking, seeing, hearing, speaking, breathing, learning, performing manual tasks, and so on).<sup>11</sup> The job applicant or employee must also be qualified to perform the essential functions of the job with or without a reasonable accommodation provided by the employer.<sup>12</sup> Normal pregnancy and childbirth are not defined as “impairments” under the ADA. Still, medical complications resulting from pregnancy or childbirth may sometimes be so severe that they produce impairments that are defined as disabilities under the ADA.<sup>13</sup> In such cases, colleges and universities may be required to make reasonable accommodations (for example, to extend leave, permit part-time teaching schedules, provide special parking spaces, and so on) that will permit a qualified professor to return to work to perform her essential job functions.

For pregnancy and pregnancy-related conditions, the benefits mandated by the PDA and the FMLA often overlap. Less frequently, there will also be an overlap in the benefits mandated by the PDA, the FMLA, and the ADA. In circumstances in which two or more of these federal laws apply and call for different levels of benefits, employees are entitled to the more generous level of benefits.<sup>14</sup> Moreover, nothing in the federal FMLA supersedes any provision of a state or local law that provides more generous family or medical leave benefits than those mandated by the FMLA.<sup>15</sup>

The following questions and answers are designed to illustrate how the ADA, the FMLA, and the PDA govern the responses of academic employers to pregnancy, abortion, or childbirth among their faculty employees. Neither the questions nor the answers are meant to provide specific legal advice to individual faculty members. Please consult a lawyer experienced in higher education or employment law if you have questions about your specific circumstances.



## **I. PREGNANCY DISABILITY, OR CHILDBEARING, LEAVE**

**1. Question.** I am confused by all the terminology. Is there any difference between maternity leave, paternity leave, parental leave, and child-rearing leave?

**Answer.** Yes. The term “maternity leave” is no longer accurate, because it no longer corresponds to legally defined leaves. Today, we have to distinguish between pregnancy disability leave and parental leave. As defined by the EEOC and the federal courts, pregnancy disability leave is for women experiencing pregnancy-related, short-term medical disabilities (for example, those resulting from an abortion, pregnancy complications, or childbirth). Because pregnancy disability leave is a specific type of short-term medical leave (which is also known as “disability leave” or “sick leave”), some employers do not refer to pregnancy disability leave separately in their benefits policies, assuming that employees will recognize that pregnancy disability leave is covered under medical leave.

Paternity leave, parental leave, and child-rearing leave are names given to leaves to care for newborn or newly adopted children. These leaves must be provided to covered employees under the FMLA. Consequently, biological mothers may be eligible for leave under both the PDA and the FMLA (if they meet the minimum-hours and length-of-service requirements). Some employers also have collective bargaining agreements or benefits policies that grant paid parental leave or parental leave in excess of the FMLA’s mandated twelve weeks to adoptive or foster parents. In reference to biological mothers, parental leaves are leaves that extend beyond the period of physical disability following childbirth (for example, in the case of an uncomplicated delivery, a leave that extends beyond six weeks following childbirth).

**2. Question.** I just found out that I am pregnant, but my due date is still eight months away. I will need to take leave during the school year. How soon do I need to notify my department chair of my pregnancy?

**Answer.** Assuming your employer provides temporary disability leave to other employees, you are entitled to take temporary pregnancy disability leave under the PDA. If you plan to take leave under the FMLA, you are required to provide your employer thirty days’ notice of your need for leave.<sup>1</sup> Whether you expect to take leave under the PDA, the FMLA, a more generous college benefits policy, or some combination of these three, you should check the medical leave or the temporary disability plan described in your faculty handbook or collective bargaining agreement. The plan might request (but not demand) more than thirty days’ notice of your need for leave in order to aid your colleagues in locating a replacement for you. Your faculty handbook or collective bargaining agreement should also contain information about notification procedures (for example, whom to notify of your need for leave, leave request forms to fill out, and so on) that are required under either the FMLA or your institution’s medical leave plan.

**3. Question.** I have been teaching at my university for two months. When I visited my nurse practitioner yesterday, I discovered I was six weeks pregnant. Will I be entitled to either paid or unpaid maternity leave?

**Answer.** If your university’s benefits policy or faculty collective bargaining agreement provides paid (or unpaid) medical leave, then you are entitled to paid (or

unpaid) pregnancy disability leave for childbirth and any pregnancy-related complications you may experience under terms and conditions that are at least as favorable as those provided to faculty who experience other types of short-term disabilities.<sup>2</sup> For example, if faculty qualify for up to ninety days of paid medical leave on their first day of employment, you will be entitled to up to ninety days of paid pregnancy disability leave. However, by the time you need parental or child-rearing leave, you will not have been employed by your university long enough to be eligible for it under the FMLA.

**4. Question.** I am a pregnant professor, teaching full time. My due date is early in the summer when my college is not in session. Am I entitled to paid leave?

**Answer.** If you are on a nine-month contract and your pregnancy-disability leave will begin and conclude during the three months of the year you are not under contract, you will not be entitled to paid leave—unless your employer provides paid medical leave to faculty on nine-month contracts who experience other types of short-term medical disabilities during the three months they are not under contract. However, if you are on a nine-month contract *and* paid over a twelve-month period, you should continue to get your regular pay during the summer months. If you are a professor on a twelve-month contract (with nonteaching job duties during the summer), you will be entitled to paid leave under the same terms and conditions that other full-time faculty on twelve-month contracts are entitled to. Suppose, for example, that full-time, twelve-month faculty accumulate paid sick days based on length of service that they may then use as needed for short-term medical disabilities they experience during the summer. Then you will be entitled to draw on your accumulated medical leave to take paid leave during the summer following the birth of your child or for any other pregnancy-related medical disability.

**5. Question.** I am a pregnant professor, teaching part time. My due date is during the fall semester. Am I entitled to paid or unpaid leave?

**Answer.** If part-time faculty are entitled to take paid (or unpaid) medical leave as part of your faculty benefits plan or collective bargaining agreement, then you are entitled to take paid (or unpaid) pregnancy disability leave on the same terms and under the same conditions. For example, if part-time faculty accumulate paid medical leave on a pro-rated basis (for example, one-half a day of leave for each month of half-time teaching), then you are entitled to use the paid medical leave you have accumulated to take paid pregnancy disability leave. As a part-time employee, you may also qualify for FMLA leave. If you have worked for your university for at least twelve months (which need not be continuous) and you will have worked at least 1,250 hours in the twelve months prior to the commencement of your leave, you will, at least, qualify for unpaid FMLA leave of up to twelve weeks in any twelve-month period.<sup>3</sup> The 1,250 hours includes all your work for the university (for example, grading papers, advising students, writing letters of recommendation, committee work, and so on), not just the work you do in the classroom.

**6. Question.** I am a full-time, associate professor. After I return from my leave, will I be able to resume my regular appointment, with my current pay and benefits?

**Answer.** Yes. If you take leave under the FMLA, you are entitled to resume your regular appointment (or an equivalent position) upon your return to work if you are able to perform all the essential functions of your position.<sup>4</sup> Suppose, for example, you recover from childbirth and return to work three weeks before the end of the semester. Your department chair may ask you to return to your regular classes for the last few weeks of the semester, or the chair may just ask you to resume committee assignments, your own research, and advising of students on a full-time basis—with your normal pay and benefits. Under the PDA, your right to job-protected pregnancy disability leave is the same as the right of other faculty at your university to a job-protected medical leave. For example, if other full-time faculty are entitled to take a job-protected medical leave to recover from a broken leg, hernia surgery, heart attack, and so on, then you are entitled to job-protected pregnancy disability leave.<sup>5</sup>

**7. Question.** I am the dean of faculty and academic vice president of my college. After I return from my pregnancy disability or parental leave, will I be able to resume my regular job, with my current pay and benefits?

**Answer.** Probably. Under the PDA, your right to job-protected leave is the same as the right of all deans and vice presidents at your college to job-protected medical leaves. For example, if the vice president and dean of students is entitled to take a job-protected medical leave to recover from a heart attack, then you are entitled to job-protected pregnancy disability leave.<sup>6</sup> If you request additional child-rearing leave under the FMLA, your right to job-protected parental leave will be qualified if you are a “key employee” of your institution. Key employees are those who are among the highest-paid 10 percent of those who work for the institution.<sup>7</sup> If you are a key employee, the administration is not required to let you return to your previous position (or an equivalent one) following your leave if such restoration would cause a “substantial and grievous economic injury” to the institution’s operations. Whether or not your absence would cause such an injury may not be considered.<sup>8</sup>

**8. Question.** My due date is October 15. Because my pregnancy disability leave is likely to extend through the second to last week of our semester, my department chair has told me I will have to stay out on leave until the beginning of the spring semester. I would like to return to work before then. Can I?

**Answer.** Yes, if you are able to perform your job functions upon your return. Colleges and universities may not have rules or policies that prohibit employees from returning to work for a predetermined length of time following childbirth—whether or not the leave is paid.<sup>9</sup>

**9. Question.** I am nearing the end of my leave. My dean has asked me to get a note from my doctor or nurse midwife certifying that I am fit to return to work. Must I do this?

**Answer.** Possibly. Under the PDA, if faculty returning from other types of medical leaves are required to submit a “doctor’s note” certifying that they are fit to return to work, you may also be required to produce a doctor’s note following your pregnancy disability leave.<sup>10</sup> Also, under the FMLA, your administration may require you to produce a “fitness for duty certification” before you return to work, but only if

such notes are also required of faculty taking other types of medical leave under the FMLA.<sup>11</sup>

**10. Question.** I am the dean of faculty. One of our female professors had a complicated surgical delivery of her baby. She has already used up six weeks of pregnancy disability leave, and her doctor has written a note saying that she will probably need several more weeks to recover from postpartum complications. Must I require that she return to work after six weeks of leave, even though she has not fully recovered from her delivery?

**Answer.** No. Under the PDA, if the college allows other employees with temporary disabilities as much time as they need to recover, then this professor is eligible for extra pregnancy disability leave to recover from complications. While the American College of Obstetricians and Gynecologists has determined that the typical recovery period following a normal vaginal delivery is six weeks, there is no federal law limiting pregnancy disability leave to a maximum of six weeks. Several options may be available to permit you to provide additional maternity leave for this professor. For example, if the professor is entitled to leave under the FMLA (and didn't use any of her allotted FMLA leave prior to childbirth), you may provide her with up to six more weeks of leave to recover from her complicated delivery.<sup>12</sup> Moreover, if a collective bargaining agreement or your college's or university's medical leave policy allows faculty as much paid (or unpaid) leave as necessary to recover from a short-term medical disability, subject to some maximum, (for example, 90 days, 180 days, or as many sick days as the employee has accumulated), then you must grant your colleague additional paid (or unpaid) maternity leave under that medical leave policy. If the professor's complicated delivery has resulted in a permanent disability (as defined by the ADA), and she will ultimately be able to perform her essential job functions with reasonable accommodations (including additional maternity leave), then you may be able to provide her with additional paid or unpaid leave under the ADA.<sup>13</sup>

**11. Question.** I am the academic dean of my college. I recently noticed that we have two different pregnancy disability leave policies; one for our faculty and one for our administrative staff. Is this legal?

**Answer.** Faculty and staff benefits may differ from each other. Under the PDA, employers must not discriminate against employees who are similarly situated (that is, in the same job classification). Thus it is legal to have different sets of pay scales and fringe-benefits policies for employees who are in different job categories. In determining the legality of your respective pregnancy disability leave policies, the relevant comparison is not the leave policies of faculty versus staff. Instead, you should compare the short-term medical disability leave policy for faculty to the pregnancy disability leave policy for faculty. And also compare the short-term medical disability leave policy for staff to the pregnancy disability leave policy for staff. Your goal should be to ensure that you are providing pregnancy disability leave on terms at least as generous as the terms under which you provide medical leave for the employees in each separate job category.

**12. Question.** Our university president has suggested that our paid pregnancy disability leave policy be available only to married women employees. Is this legal?

**Answer.** No. Under the PDA, pregnancy disability leave must be provided to women employees on terms at least as favorable as those extended to employees taking other types of short-term disability leave. This requirement applies whether or not the pregnant employee is married.<sup>14</sup>

**13. Question.** I am a department chair employed by a college with an ad hoc pregnancy disability leave policy. A professor in my department recently told me she is pregnant. How should I handle her leave?

**Answer.** Her leave should be handled according to terms and conditions that are at least as generous as the terms and conditions under which other types of short-term medical leaves have been provided to faculty at your college. Under the PDA, if there is no paid disability for other temporarily disabled employees, the college is not obligated to provide her with paid pregnancy disability leave. However, colleges and universities are required to provide leave to covered employees following the birth of a child under the FMLA. If the professor in your department meets the criteria to be covered by the FMLA, she is entitled to up to twelve weeks unpaid leave following the birth of her child. (See the discussion of FMLA criteria in the introduction to this guidebook.)

**14. Question.** I am on my university's benefits committee. After years of having an ad hoc pregnancy disability and parental leave policy for faculty, our provost has asked us to write a formal leave policy. What do we need to consider as we do this?

**Answer.** You will want to make sure that your formal leave policy complies with relevant state laws and the mandates of the FMLA, the PDA, and the ADA (if applicable). Faculty who are eligible for FMLA leave must be provided with up to twelve weeks of unpaid, job-protected leave in a twelve-month period. During the period that the faculty member is on FMLA leave, the university must continue to pay its normal share of the employee's health insurance premiums. Eligible faculty who become pregnant must be allowed to use their total annual twelve-week allotment of FMLA leave, if needed, for any of the following: prenatal care, recovery from pregnancy-related medical complications, recovery from childbirth, or care of a newborn child.<sup>15</sup>

Under the PDA, your university may need to provide more generous pregnancy disability leave benefits than those mandated by the FMLA. Specifically, the terms and conditions under which your institution provides pregnancy disability leave must be at least as generous as the terms and conditions under which it offers other types of short-term disability leaves. For example, if the institution's medical leave policy provides faculty with up to three months of paid medical leave each year, then women professors must be able to use their allotment of paid medical leave to take paid pregnancy disability leave. If faculty on medical leave continue to accrue service time toward eligibility for sabbaticals or promotion or retirement benefits, then women professors on pregnancy disability leave must be able to accrue service time for these same purposes. Keep in mind that the PDA was meant to provide a floor below which pregnancy disability leave benefits may not drop—not a ceiling above which they may not rise.<sup>16</sup> Thus your university may elect to provide pregnancy disability leave on more generous terms than those extended to faculty taking other types of medical leaves. It is not, however, required to do so.

Under the ADA, if a qualified professor experiences a pregnancy-related complication that results in physical or mental impairment that substantially limits her ability to perform a major life activity (for example, feeding herself, walking, seeing, hearing, speaking, breathing, learning, performing manual tasks, and so on), then reasonable accommodations, such as extended leave or a part-time assignment, must be provided if the professor will eventually be able to perform the major functions of her job again—unless it can be shown that making these accommodations would cause undue hardship on the operation of the institution.<sup>17</sup>

## II. THE INTERVIEWING AND APPOINTMENT PROCESSES

**1. Question.** I am on a search committee at my university. One member of the committee thinks we should ask all women candidates for our tenure-track position about their plans to have children because this information will help us better plan to cover future leaves of absence if we hire one of the women. Is asking this question a good idea?

**Answer.** No. Under Title VII, an employer may not treat job applicants differently on the basis of sex.<sup>1</sup> Asking only your female applicants about their plans to have children may violate the law. To avoid even the appearance of discrimination, the American Bar Association recommends that employers make job interviews as uniform as possible, addressing the same set of questions to all job applicants for a given position.<sup>2</sup>

**2. Question.** I am on a search committee. Although we didn't ask, one of the job candidates we interviewed mentioned she is pregnant. May we consider this information when evaluating her candidacy?

**Answer.** No. Employers must treat pregnant job candidates in the same way they treat other job candidates with similar abilities or limitations.<sup>3</sup> If a pregnant candidate can perform the duties of the job advertised, you may not consider her pregnancy as a factor in your decision to offer or deny her an appointment.

**3. Question.** I am a dean. I recently offered a position to a candidate who now tells me she is pregnant and due to deliver her baby in early September. She did not disclose her pregnancy during the interview process. May I rescind the job offer now that I know she is pregnant?

**Answer.** No. You may not refuse to hire a pregnant woman who has been found qualified and offered an appointment—as long as she is able to perform the major functions of her job. If she experiences a short-term medical disability that limits her ability to perform major job functions (because of a medical complication associated with her pregnancy or with childbirth), then you must provide her with the same benefits package that you would extend to her if she were experiencing a non-maternity-related short-term medical disability such as a broken leg or a heart attack.<sup>4</sup>

**4. Question.** A colleague on my departmental search committee thinks we shouldn't hire any woman who has young children in her home. My colleague believes that the demands of our position are so time-consuming that a woman with children would probably not succeed. However, my colleague is not averse to hiring a man with children in the house. May we ask our women job candidates how many children they have and the ages of those children?

**Answer.** No. Employment policies regarding parents must be applied equally to mothers and fathers.<sup>5</sup> Title VII mandates that if you do not exclude fathers from your pool of acceptable candidates, then you can not exclude mothers. Federal government employers are held to even more stringent standards regarding parental discrimination. Under an executive order signed in 2000, federal institutions (such as the U.S. Military Academy or the U.S. Naval Post Graduate School) cannot discriminate

in employment against current or prospective faculty members because of their status as parents.<sup>6</sup>



### III. DURING A PREGNANCY

**1. Question.** I am a department chair. A faculty member in my department is pregnant and experiencing many severe medical problems. Do I need to make accommodations for her under the ADA?

**Answer.** Although leaves to recover from pregnancy-related complications are typically referred to as “pregnancy disability” leaves, normal pregnancy does not qualify as a “disability” under the ADA. The term “pregnancy disability” typically refers to disabilities that are expected to be short term, while the ADA’s definition of disability refers to conditions that are expected to be long term. Nevertheless, pregnancy-related medical complications, including those following childbirth, can sometimes be so severe that they constitute a disability as defined by the ADA (for example, a physical or mental impairment that substantially limits one or more of a person’s major life activities, such as caring for oneself, eating, breathing, walking, seeing, hearing, performing manual tasks, and so on). If your pregnant colleague is suffering from such an impairment, she may qualify for reasonable accommodations such as extended leave or a part-time schedule under the ADA.<sup>1</sup> On the other hand, she may qualify for accommodations under the PDA if you would normally accommodate other temporarily disabled employees. She may also be entitled to take leave under the FMLA, which provides for leave in cases in which complications from a pregnancy render a person unable to work.

**2. Question.** I teach five days a week. It will be difficult for me to schedule my prenatal appointments for times when I do not have classes or other meetings at the university. May I take any paid or unpaid leave for prenatal care?

**Answer.** If you are an FMLA-eligible employee, you may take unpaid leave for prenatal care under the FMLA.<sup>2</sup> You should also determine whether your faculty handbook, collective bargaining agreement, or informal college policy allows faculty to use sick leave to take paid time off for medical appointments. If so, you may be able to use this policy to take paid time off for prenatal appointments, subject to notification and other requirements of the policy.

**3. Question.** My department chair has suggested that I go on pregnancy disability leave at the beginning of my third trimester, because teaching is stressful. I would like to continue to work until I go into labor, if possible. Am I entitled to continue working beyond my sixth month of pregnancy?

**Answer.** Yes. A healthy pregnant employee who is capable of performing her essential job functions may decide for herself whether or not to work throughout her pregnancy. Your employer may not usurp this choice, even if your employer’s only motivation is to help you.<sup>3</sup>

**4. Question.** I am seven months pregnant, and my dean has suggested that because teaching is stressful work, I should get a note from my physician or nurse midwife stating that I am healthy enough to continue working. Am I required to do this?

**Answer.** No. Employers may not impose impediments to work on healthy pregnant employees that are not also imposed on healthy nonpregnant employees.<sup>4</sup> A federal district court has ruled that under the PDA, even a woman employee who had previously suffered a work-related miscarriage could not be required to obtain a doctor's note to continue working during a subsequent pregnancy.<sup>5</sup>

**5. Question.** I am a pregnant biology professor. I often take students on field trips for lab work in a local wetlands area. My department chair says she is worried that I might slip and fall out in the wetlands. Consequently, she wants to reassign me to teach other biology classes that meet in college classrooms. I enjoy teaching my outdoors labs and do not want to switch courses. Can I be reassigned to teach these other classes?

**Answer.** No. If the possibility that you might fall poses a risk only to you, the decision to bear this risk is yours to make. Your department chair cannot use her concerns for your safety or that of your fetus, or fears about potential tort liability should you fall, to make decisions about whether or not you can continue with your usual work while you are pregnant.<sup>6</sup>

**6. Question.** I am on the research faculty at my university, where I work in a medical laboratory where infectious diseases are studied. My physician has advised me, for medical reasons, to discontinue my work in the lab during my pregnancy. Should I tell my dean that I desire an alternative job assignment for the remainder of my pregnancy?

**Answer.** Yes. The PDA does not require employers to provide alternative assignments for pregnant employees. But under the PDA, employers must treat pregnant faculty members who require alternative job assignments for medical reasons as favorably as other faculty are treated when they require alternative job assignments for medical reasons.<sup>7</sup> Any alternative assignment provided to you must be on terms and conditions (that is, with pay and benefits) at least as favorable as those provided to other faculty members who require alternative job assignments for other medical reasons. For example, if a research faculty member temporarily experienced an immune deficiency because of chemotherapy and received an administrative assignment, with full pay and benefits for the duration of his or her medical disability, you would be entitled to receive an administrative reassignment with full pay and benefits until your physician stated it was medically safe for you to return to the lab.

**7. Question.** I have developed a complication resulting from my pregnancy that makes it difficult for me to walk. I normally sit down when I teach my classes so I can still do all my teaching, research, and service, but I need some accommodations to continue working, such as a special parking sticker and key to the building elevator. How far must my university go to accommodate me during my pregnancy?

**Answer.** Employers are required to treat pregnant professors who require accommodations to continue working as favorably as they treat other temporarily disabled faculty members who need job accommodations.<sup>8</sup> The list of potential accommodations can be broad and include parking stickers, elevator keys, modified job duties, alternative assignments, and so on. If your university would provide the above-

mentioned accommodations if you were having difficulty walking because of a broken leg, then it must respond favorably to your requests for accommodations needed as a result of a pregnancy-related complication.

**8. Question.** I had a miscarriage and will need several days off from work to recover. Am I entitled to any paid or unpaid leave?

**Answer.** Temporary physical disability resulting from a miscarriage is a pregnancy-related medical condition. If you are an employee eligible for FMLA benefits, you are entitled to use your annual allotment of FMLA leave to take unpaid leave to recover from your miscarriage.<sup>9</sup> Moreover, if you are entitled to paid medical leave under a collective bargaining agreement or under your institution's formal or informal medical leave policy, you may use this paid leave to recover from your miscarriage, subject to notification and other requirements of the policy.

#### IV. HEALTH INSURANCE BENEFITS

**1. Question.** Under my employer's health insurance plan, faculty are covered for various medical procedures (doctor's visits, hospital stays, prescription medication, and so on) beginning on the first day of employment. But there is a one-year waiting period for coverage for pregnancy-related expenses. Is this allowable?

**Answer.** No. Female employees must become eligible for pregnancy-related health insurance benefits under the group health insurance plan as soon as employees become eligible for coverage of other types of medical conditions under the plan.<sup>1</sup>

**2. Question.** How do I determine the deductible and co-payments on my employer's health insurance coverage for my pregnancy-related medical expenses?

**Answer.** There can be no additional deductible for pregnancy-related medical expenses. Suppose your pregnancy-related expenses are the first expenses you incur under your policy. Then you must pay the same deductible that you would have paid had you incurred other medical expenses first. Once that deductible has been paid, you cannot be charged any additional deductible for other medical procedures. For example, if your deductible is \$400 a year and you paid \$400 for pregnancy-related medical expenses incurred in the first trimester of your pregnancy, you cannot be charged any additional deductible during the policy year for either pregnancy-related or non-pregnancy-related medical expenses. Alternatively, if you have already paid your plan's deductible for other medical expenses you incurred at the beginning of the plan year, no additional deductible can be required if you seek pregnancy-related medical services later in the year. Co-payments for pregnancy-related health care must not be higher than the co-payments for similar types of non-pregnancy-related health care. For example, the co-payment for prenatal visits to your obstetrician cannot be higher than the co-payment required for other types of doctor's visits.<sup>2</sup>

**3. Question.** My employer provides two health insurance plans, one that provides individual employee coverage for doctor's visits, inpatient hospital procedures, laboratory tests, and so on. The other plan covers these medical services for the employee and his or her family. Only the family plan (which costs more) provides coverage for pregnancy-related expenses. I am single, but want coverage for pregnancy-related expenses in case I need them. Must I be forced to buy the family plan to get the coverage I desire?

**Answer.** No. When an employer provides several different types of health insurance plans to its employees, each plan must include coverage for pregnancy-related conditions that is equal to the coverage provided for other medical conditions under the plan. For example, an individual plan that pays 80 percent of the charges for inpatient hospital procedures must pay 80 percent of the charges for a hospital delivery of a baby. An individual plan that pays 100 percent of the cost of office visits to physicians must pay 100 percent of the costs of prenatal and postpartum doctor's appointments.<sup>3</sup>

**4. Question.** I am a male professor. Is my university required to provide health insurance coverage for my wife's pregnancy-related medical expenses?

**Answer.** If your university provides a health insurance plan that covers the medical expenses of spouses (that is, a family plan), then that health insurance plan must cover those medical expenses related to a spouse's pregnancy.<sup>4</sup>

**5. Question.** My employer's group health insurance doesn't cover treatments or medications for infertility. Isn't such coverage required by federal law?

**Answer.** No. So far, federal courts have refused to rule that employers are required to cover treatments for infertility under either the PDA or the ADA.

**6. Question.** Should my prescription contraceptives be covered under my university employer's group health insurance plan?

**Answer.** Probably. A collective bargaining agreement or college benefits policy for faculty may require the coverage of prescription contraceptives under your health insurance plan. In addition, the EEOC and a federal court have ruled that under the Civil Rights Act of 1964, an employer's group medical insurance plan must cover all prescription contraceptives approved by the federal government to the same extent that other prescription medications, devices, and preventative services are covered (for example, vaccinations, blood pressure medications, oxygen tanks, preventative physical examinations, lab services, and so on).<sup>5</sup> Twenty states have also adopted legislation that requires health insurance policies regulated under state law to cover prescription contraceptives on terms as favorable as those applied to other prescription medications or devices.<sup>6</sup> Under these state laws and the EEOC decision and district court ruling cited above, if your employer's plan covers a month's supply of a generic prescription medication with a \$10 co-payment required, then your monthly generic prescription contraceptive medication should also be covered with only a \$10 co-payment required.<sup>7</sup>

## V. SABBATICALS AND RETIREMENT BENEFITS

**1. Question.** I am pregnant, and my baby is due at the beginning of the spring semester. I was expecting to be on sabbatical leave the following fall. But my dean has just informed me that because I am taking leave when my baby arrives, I must postpone my sabbatical by one semester. Can I be required to do this?

**Answer.** Probably not. This postponement may be seen as illegal retaliation for taking leave under the PDA and the FMLA. Moreover, if faculty members who take other types of medical disability do not have to postpone their sabbaticals, you may not be required to postpone yours.

**2. Question.** I just discovered I am pregnant and that my baby is due at the beginning of the fall semester—which is when I expected to be on sabbatical. When I told my department chair that I am pregnant, she said, “Great news! Now you can take your pregnancy disability and parental leave while you are on sabbatical.” I would like to postpone my sabbatical so I won’t have to work on my book at the same time I am trying to recover from childbirth. Must I take my pregnancy disability or parental leave and sabbatical leave simultaneously? Or may I postpone my sabbatical?

**Answer.** You are entitled to pregnancy disability leave and parental leave (if you meet the FMLA’s eligibility requirements). Moreover, the time spent on these leaves should not count as part of your sabbatical. The dean can require that you renegotiate the terms of your sabbatical leave, however.

**3. Question.** I am now a full professor. Earlier in my career, I had two children and took pregnancy disability leave during two different semesters. Our university has a policy that permits faculty to go on phased retirement. We can work half time at full pay for two years before retiring permanently. To qualify for phased retirement, a faculty member must have been employed by the university for twenty semesters and be at least sixty years old. Do the two semesters I was on pregnancy disability leave count toward the time I must wait to be eligible for phased retirement?

**Answer.** When computing the eligibility of faculty for retirement benefits, colleges and universities must count periods during which faculty were on pregnancy disability leave as service to the extent that they count the time spent on nonmaternity medical leave as service. Suppose a professor takes medical leave during a semester to have knee-replacement surgery. If that professor’s time on medical leave counts as service in computing his or her eligibility for retirement benefits, then your time on pregnancy disability leave must count as service in computing your eligibility for retirement benefits.<sup>1</sup>

## VI. TENURE AND PROMOTION

**1. Question.** I am an assistant professor. I would like to “stop the tenure clock” while I am on pregnancy disability or FMLA leave. Am I allowed to do so?

**Answer.** “Stopping the tenure clock” typically refers to formal or informal policies that allow tenure-track faculty not to count one or more of their probationary years in their progression toward a tenure decision. So if the probationary period is normally six years, a faculty member who stops the tenure clock for one year will be evaluated for tenure one year later than usual. Check your faculty handbook or collective bargaining agreement to determine if your institution has a formal policy on stopping the tenure clock. If you have heard that such a policy exists but appears to be informal, check with your department chair and dean to see if you can learn more about using the policy. If your institution allows faculty to stop the tenure clock when they take non-pregnancy-related short-term medical disability during the probationary period, then you must be allowed to stop the tenure clock under the same terms and conditions. For example, if the stop-the-clock policy can be used by faculty members who experience a short-term medical disability without regard to how much medical leave they take, then you must be allowed to stop the tenure clock following childbirth without regard to how much leave you need to take. The AAUP’s *Statement of Principles on Family Responsibilities and Academic Work* recommends permitting faculty to stop the tenure clock for up to one year to care for a newborn or newly adopted child.

**2. Question.** Many of my female assistant professor colleagues have chosen to stop the tenure clock during the year that they gave birth to a child. However, I am pregnant and do not want to stop the tenure clock. I already have many publications, great teaching evaluations, and significant service to the university. I don’t see any benefit from waiting an additional year to apply for tenure. Must I delay my tenure decision for one year?

**Answer.** Probably not. The terms and conditions of employment for pregnant professors who experience a temporary medical disability following childbirth must not be more onerous than those that apply to faculty who experience non-pregnancy-related medical disabilities. If probationary faculty who experience other types of short-term medical disabilities do not have to delay their tenure decision, then you cannot be made to do so. Check your faculty handbook or collective bargaining agreement. Many stop-the-clock policies are available at the discretion of the user. If this is so at your university, you certainly may choose not to stop the clock. At universities (e.g., Princeton University) where an extension of the tenure clock is the default policy for a professor who has a child, the faculty member retains the option to stand for tenure at an earlier date.

**3. Question.** I am on my college’s promotion and tenure committee, which will evaluate a woman assistant professor for tenure this year. During her probationary period, she had a child and took six weeks of pregnancy disability leave during one semester. She did not, however, stop the tenure clock. Can the committee consider the fact that she took pregnancy disability leave when evaluating her for tenure?

**Answer.** She should not be penalized for taking leave to which she is entitled, nor should she be penalized for opting not to stop the tenure clock. Negative employment actions, such as failing to promote or tenure a probationary professor *because* she became pregnant and used pregnancy disability leave, violates the PDA. When deciding whether or not to grant her tenure, the committee should treat her the same as it treats other candidates it is reviewing for tenure.

**4. Question.** I am on my college's promotion and tenure committee. A woman assistant professor will be evaluated for tenure this year. During her probationary period, she had a child and took six weeks of pregnancy disability leave during one semester. She stopped the tenure clock for one year. How should the committee consider the fact that she took leave and stopped the tenure clock when evaluating her for tenure?

**Answer.** The committee should not count the year that the faculty member stopped the tenure clock when evaluating her for tenure. Administrations should not penalize faculty members who choose to use a stop-the-clock policy. Such a faculty member should be reviewed under the same academic standards that apply to faculty who did not stop the tenure clock. Presumably, care of a newborn or a newly adopted child reduces a professor's productivity below what is typical for that professor. One reason behind the adoption of stop-the-clock policies was to give tenure committees a more accurate picture of the future productivity of a professor. This goal can be accomplished under a stop-the-clock policy by evaluating a tenure candidate's record as if the candidate spent one year less on probation for each year that the clock was stopped. For example, an assistant professor who was on probation for seven years, because she stopped the tenure clock for one year during which she had a baby, should be evaluated as if she had been on probation for only six years. Check your faculty handbook or collective bargaining agreement for instructions on how to evaluate a tenure candidate who has stopped the tenure clock. If these documents contain no written instructions, seek written instructions from your dean. You may also want to consult the AAUP's *Statement of Principles on Family Responsibilities and Academic Work*.

**5. Question.** I was expecting to be reviewed for promotion to full professor next year. One of my colleagues just suggested that because I took a pregnancy disability and child-rearing leave last year, I will have to wait an additional year to be reviewed for promotion. Is this correct?

**Answer.** No. Under the PDA, that would be the case only if the university required postponements for all other employees who took temporary disability leave. Further, under the FMLA, mandatory postponement could be retaliation for taking leave. Your institution may have a policy entitling you to choose to stop the clock (but not requiring you to do so). Check your faculty handbook or collective bargaining agreement to determine if this is so.



## VII. PARENTAL, OR CHILD-REARING, LEAVE

**1. Question.** Our faculty handbook states that “female faculty may elect to take up to one year of paid maternity leave following the birth of a child.” Shouldn’t paid parental leave be available to male faculty too?

**Answer.** Yes. Leave that extends beyond any period of medical disability following childbirth is not strictly pregnancy disability leave. It is parental leave. And under Title VII of the Civil Rights Act and the FMLA, parental leave (also known as child-rearing leave) must be granted to male and female employees on equally favorable terms. For example, if female faculty are entitled to paid leave extending beyond the period of medical disability (for example, six months of leave following recovery from childbirth), then male faculty must be granted the same amount of paid leave (that is, six months) following the birth of a child.<sup>1</sup>

**2. Question.** I am a male professor. Last year, a woman faculty member received six weeks of paid pregnancy disability leave following the birth of her child. My wife told me last night that she is pregnant and that our baby is due on October 1. Am I entitled to receive six weeks of paid paternity leave?

**Answer.** No. Men are not entitled to paid pregnancy disability leave. Pregnancy disability leave is a type of short-term, medical disability leave available to women only for recovery from childbirth or pregnancy-related medical complications. Because men are not physically disabled by the birth of a child, there is no leave that is analogous to pregnancy disability leave for men. However, check your faculty handbook or collective bargaining agreement to determine if your institution provides paid parental leave following the birth of a child. If your wife is not employed by your college or university, the FMLA entitles you to up to twelve weeks of unpaid leave following the birth or adoption of a child.<sup>2</sup> If you both work for the same employer, you and your wife may split the twelve-week allotment of FMLA parental leave between you, or one of you may take the whole twelve weeks.<sup>3</sup> You must conclude your FMLA leave within one year of the birth or adoption of a child.<sup>4</sup> Your institution can go beyond the minimum time required by the federal government for concluding FMLA leave, and you may be entitled to take some or all of your FMLA leave as paid leave if your institution provides paid vacation or paid personal leave for such purposes.

**3. Question.** I have used up almost all of my allotted paid leave. I plan to breastfeed my baby and would like to take an additional four months of leave to do so. Am I permitted to do this?

**Answer.** Check your employee benefits handbook or collective bargaining agreement to determine if your employer provides either paid or unpaid extended child-rearing leave or personal leave. If it does, you may be able to take extended time off from work following your pregnancy disability leave to breastfeed your baby. Under the FMLA, you are entitled to up to twelve weeks of unpaid leave in any twelve-month period to recover from your own serious health condition; to care for a spouse, parent, or child with a serious health condition; or to care for your new baby.<sup>5</sup> Unfortunately, your employer has the right to require any pregnancy disability leave you took to run concurrently with FMLA leave, if you are so notified in advance.<sup>6</sup> So, depending on how much FMLA leave you have used to date, you may be entitled to up to twelve weeks of

FMLA leave to stay out of work and exclusively breastfeed your baby. Alternatively, if your nursing schedule will accommodate it, and your employer is agreeable, you may consider using what is left of your FMLA leave allotment to work part time, thus extending the number of work weeks over which you can take leave.<sup>7</sup> For example, if you work half time (that is, one half the hours of your usual schedule) and take FMLA leave for the other half of your typical work week, each two weeks that you work this schedule will use up only one week of your remaining FMLA leave. To date, no federal court has ruled that employers are required to provide leave to breastfeed under the PDA's prohibitions on employment discrimination.<sup>8</sup>

## VIII. TERMINATION OF EMPLOYMENT

**1. Question.** I have an appointment as an instructor at a religiously affiliated college. I delivered my full-term baby five months after my wedding date. I have recently been notified that my contract will not be renewed because I engaged in sex outside of marriage, which is against the teachings of the religious sect with which my college is affiliated. Is this legal?

**Answer.** Maybe not. Title VII does permit religiously affiliated educational institutions to discriminate based on religion (for example, by showing a preference for hiring members of a particular faith). However, Title VII requires religiously affiliated colleges and universities to abide by all prohibitions against discrimination based on race, sex, or national origin in their nonministerial positions, such as faculty appointments.<sup>1</sup> Discriminating against an employee because of her pregnancy equates to discrimination based on sex, and religiously affiliated colleges and universities cannot discriminate against faculty employees on this basis. A few employers have been successful under Title VII in enforcing policies prohibiting sex outside of marriage, but only if the policy is applied equally to both male and female professors. Employers cannot use either observation or knowledge of a professor's pregnancy as the sole method of detecting violation of a policy prohibiting sex outside of marriage, because this approach would subject only women faculty to termination.<sup>2</sup> You therefore cannot be dismissed from your position for having sex outside of marriage, unless your college applies the policy equally to male and female professors.

**2. Question.** I am a department chair. A professor in my department recently mentioned that she is thinking about becoming pregnant. This woman's contract is up for renewal and, although she is well qualified, I am now inclined not to renew it because I don't believe she will have the same commitment to work during her pregnancy that she has had since we hired her. Is this permissible?

**Answer.** No. Under federal civil rights law, employees have the right to be judged as individuals and not have judgments about their actual or prospective performance be based on stereotypes, including stereotypes about the work commitment or abilities of pregnant women. Moreover, the U.S. Supreme Court has ruled that a woman need not actually be pregnant to be a victim of illegal pregnancy discrimination.<sup>3</sup> Pregnancy discrimination exists when an employment decision is based on actual or prospective pregnancy, childbirth, or a pregnancy-related medical condition.

## **IX. LEGAL OPTIONS AFTER DENIAL OF APPOINTMENT, TENURE, OR BENEFITS**

**1. Question.** I received a written job offer from a university, which I accepted. I then mentioned that I was pregnant. One week later, the job offer was rescinded. I think I was discriminated against because of my pregnancy. What can I do?

**Answer.** If the university rescinded an offer after you accepted it, the university is in breach of contract. You should consult an attorney. Depending on which state the university is located in, you may want to file a charge with the EEOC or with the appropriate state agency. After the EEOC consideration is complete, you also may be able to pursue a lawsuit. Check your telephone directory or state Web site for information on contacting the appropriate state agency. You will need to file your charge with the appropriate regional federal EEOC office within three hundred days of the alleged discriminatory act, or thirty days after receiving notice that the state or local agency has terminated its processing of the charge, whichever is earlier. If there is no state or local agency that enforces antidiscrimination legislation, then you must file your charge directly with the EEOC within 180 days of the alleged discriminatory act. You must file local or federal charges within the specified timelines to preserve the ability of the EEOC to act on your behalf and to protect your right to file a private lawsuit, should you ultimately need to. For information on how and where to file a charge, go to the EEOC's Web site: <http://www.eeoc.gov/facts/howtofil.html>. If the university you believe discriminated against you is a federal institution of postsecondary education (for example, the U.S. Military Academy or the U.S. Coast Guard Academy), you must follow a different set of procedures to file a charge. Within forty-five days of the alleged discriminatory action, you must contact an equal employment opportunity counselor at the university. The counselor will inform you of the process for filing a complaint against a federal agency. For details about filing a complaint against a federal agency, visit the EEOC's Web site: <http://www.eeoc.gov/facts/fs-fed.html>.

**2. Question.** I had two children during my probationary period and took pregnancy disability leave each time. I was just recently denied tenure, despite an excellent record of published research, teaching, and service to the university. I think I was discriminated against because of my pregnancies or because I am a mother. What can I do?

**Answer.** You may have been the victim of sex discrimination. You should consult an attorney to help you determine whether to file a charge against the university with the EEOC.

**3. Question.** I expected to have six weeks of pregnancy disability leave following my delivery. Two weeks after the birth of my baby, my department chair called me and told me I needed to come back to work because the department is having a hard time finding replacements to cover my classes. What can I do?

**Answer.** Under the PDA, your leave must be treated the same as any other temporary disability leave. If staffing problems are not grounds for calling back faculty on other types of medical leave, they are not grounds for calling you back from leave. Furthermore, if you qualify for FMLA leave, you are entitled to take as much of your (remaining) annual twelve-week allotment of FMLA leave as you choose following the

birth of your child—without regard to your department’s staffing problems. Your department chair’s attempts to have you return to work are an illegal restraint on your ability to take FMLA leave.<sup>1</sup>

## **X. ABORTION**

**1. Question.** I am having an elective abortion next week. Am I permitted to take paid or unpaid leave to recover physically from that procedure?

**Answer.** All fringe benefits, with the exception of health insurance, that are typically provided by your college or university to employees for other medical conditions that cause short-term disabilities must be made available on equally favorable terms to a woman employee who has an abortion, whether or not the abortion is elective.<sup>1</sup> Although Title VII states that health insurance doesn't have to cover abortion except where medically necessary to protect the life or health of the mother, the employer may choose to cover it in some instances. Make sure to check your health insurance policy to determine if abortion is covered. If your college or university provides faculty with paid medical leave, and you are eligible for this leave, then you may use this benefit to take paid leave to recover from your abortion. If you are eligible for FMLA leave, at a minimum you will be entitled to take some of your annual twelve-week FMLA allotment as unpaid leave to recover from your abortion.<sup>2</sup>

**2. Question.** I teach at a Catholic college. I am having an abortion next week. Must this procedure be covered by my college's group health insurance plan?

**Answer.** Abortions performed because the life or health of the mother would otherwise be endangered must be covered by your college's group health insurance plan, whether or not your institution maintains a religious affiliation. All college and university employers may choose to cover elective abortions under their group health insurance plans. They are not, however, required to do so. If your college chooses to cover elective abortions, the coverage must be on terms at least as favorable as that for other medical procedures (having the same co-payments, deductibles, and so on). In addition, suppose your employer does not cover elective abortions, and such an abortion results in medical complications such as excessive hemorrhaging. Although your employer's plan does not have to cover the cost of the actual abortion, it must cover the health care costs of the complications.<sup>3</sup>

**3. Question.** I am an assistant professor at a religiously affiliated college. I have great teaching evaluations and a good record of scholarship and service to the college. I told a colleague, who apparently told my dean, that I had an elective abortion several years ago. My dean subsequently asked me if I did indeed have an abortion, and I confirmed that I had. A week later, I received a letter from the college president notifying me that women who have abortions violate church teachings, and that my contract will not be renewed for next year as a result of my doing so. Can I be let go for this reason?

**Answer.** Probably not. Under Title VII religiously affiliated institutions cannot discriminate against employees on the basis of sex.<sup>4</sup>

**4. Question.** I am on my college's promotion and tenure committee. A woman assistant professor will be up for tenure this year. I have learned that during her probationary period, she had an abortion. How should the committee consider this fact when evaluating her for tenure?

**Answer.** Generally, the committee should not consider this information in your evaluation of this female assistant professor's application for tenure. If the committee does consider this information, it should consider it in the same way that it considers other short-term disabilities. Under the PDA, it is illegal to discriminate in hiring, promotion, or any other terms and conditions of employment against a woman who has had an abortion.<sup>5</sup>

## NOTES

### Introduction

1. Civil Rights Act of 1964, 42 U.S.C. § 2000e (2004); Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2004); Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (1993); and Americans with Disabilities Act of 1990, 42 U.S.C. § 12,101 (1990).
2. PDA, 42 U.S.C. § 2000e(k) (2004).
3. 29 Code of Federal Regulations (C.F.R.) § 1604 appendix (2003).
4. *Id.* § 1604.10(b).
5. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), which holds that state employees can recover monetary damages when the state fails to comply with the FMLA.
6. 29 C.F.R. § 825.110(a)(3) (2003); *Id.* § 825.111.
7. *Id.* § 825.110(a)(1)-(2).
8. *Id.* § 825.112. For more specific information on the FMLA, see the AAUP publication *The Family and Medical Leave Act: Questions and Answers*, <http://www.aaup.org/catalogue/pubs.htm>.
9. *Board of Directors of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).
10. See also *Equal Employment Opportunity Commission v. Board of Regents of the University of Wisconsin System*, 288 F. 3d 296 (7th Cir. 2002), which involves the EEOC's suit for violations of the Age Discrimination in Employment Act.
11. *Id.* § 1630.2(g) and 2(i).
12. *Id.* § 1630.2(m).
13. 2 U.S. Equal Employment Opportunity Commission, Compliance Manual § 902.2.c(3) (1995), <http://www.eeoc.gov/policy/docs/902cm.html> (last modified on February 1, 2000; hereinafter referred to as the EEOC Compliance Manual).
14. *Id.* § 825.702(a).
15. *Id.* § 825.701(a).

### Pregnancy Disability, or Childbearing, Leave

1. 29 C.F.R. § 825.301(a) (2003).
2. *Id.* § 1604 appendix, question 5.
3. *Id.* § 825.110.
4. *Id.* § 825.214-.215.
5. *Id.* § 1604 appendix, question 9.
6. *Id.*
7. *Id.* § 825.217.
8. *Id.* § 825.218(a).
9. *Id.* § 1604 appendix, question 7.
10. *Id.* question 6.
11. 29 C.F.R. § 825.310 (2003).
12. *Id.* § 825.200(c).



13. Disabilities under the ADA are defined as physical or mental impairments that substantially limit a major life activity. Major life activities include being able to care for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. The EEOC Compliance Manual § 902 defines “disability”; see <http://www.eeoc.gov/policy/docs/902sum.html> (last modified February 1, 2000).
14. 29 C.F.R. § 1604 appendix question 13 (2003).
15. *Id.* § 825.112.
16. *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 285 (1987).
17. EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, <http://www.adaproject.org/TitleITAM.htm> (last modified January 1992).

### **The Interviewing and Appointment Processes**

1. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2004).
2. American Bar Association, *The American Bar Association Guide to Workplace Law 27* (New York: Three Rivers Press, 1997).
3. EEOC, “Pregnancy Discrimination,” <http://www.eeoc.gov/facts/fs-preg.html> (last modified January 15, 2004).
4. 29 C.F.R. § 1604 appendix, questions 12, 15 (2003); EEOC, Sex Discrimination: Technical Assistance Program Manual 175 (2002) (hereinafter EEOC Technical Assistance: Sex Discrimination); EEOC, “Pregnancy Discrimination.”
5. See *Philips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Trezza v. The Hartford, Inc.*, 98 Civ. 2204 (MBA), 1998 U.S. Dist. LEXIS 20,206 (S.D.N.Y. December 28, 1999).
6. Executive Order 13,152, 65 Fed. Reg. 26,115 (May 2, 2000).

### **During a Pregnancy**

1. EEOC Compliance Manual.
2. 29 C.F.R. § 825.112 (2003).
3. *Id.* § 1604 appendix, questions 6, 8; EEOC Technical Assistance: Sex Discrimination, 173; *U.S. Equal Employment Opportunity Commission v. W&O, Inc.*, 213 F.3d 600 (11th Cir. 2000).
4. 29 C.F.R. § 1604 appendix, question 6 (2003).
5. *Peralta v. Chromium Plating & Polishing Corp.*, 99-CV-3996, 2000 U.S. Dist. 17416 (E.D.N.Y. May 30, 2000). (The court held that the defendants’ justifications for prohibiting the employee from working without a doctor’s note, that is, concerns about her health and possible danger to the unborn child, did not qualify as a bona fide occupational qualification because none of the concerns were related to the essential business of the employer.)
6. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), in which the court found that a fetal protection policy that prohibited women employees from working in positions that exposed them to concentrations of lead in battery manufacturing jobs, which could be harmful to a fetus and increase the possibility of miscarriage, discriminated against fertile women but not fertile men and therefore violated Title VII. The court

indicated that the mother is charged with making decisions concerning any risk factors to the fetus. Therefore, an employer's fear of tort liability could not justify such a fetal protection policy; *Dimino v. New York City Transit Authority*, 64 F. Supp. 2d 136 (E.D.N.Y. 1999), in which the court held that preventing a pregnant female police officer from her job based on fear of liability both to the employee and to third parties was not a valid justification for preventing her from performing her full duties; *Peralta v. Chromium Plating & Polishing Corp.*, 99-CV-3996, 2000 U.S. Dist. LEXIS 17,416 (E.D.N.Y. May 30, 2000), in which the court held that the employer's stated concerns about future tort liability for an employee at a metal plate manufacturing and polishing plant, who had previously miscarried, could not be used as a basis for requiring her to stop work.

7. 29 C.F.R. § 1604 appendix, question 5 (2003).

8. *Id.*

9. *Id.* § 825.114(a)(2)(ii).

### **Health Insurance Benefits**

1. 29 C.F.R. § 1604 appendix, question 25.

2. *Id.* questions 25–27.

3. *Id.* questions 24–25.

4. *Id.* question 21.

5. The EEOC ruling appears in EEOC, Decision on Coverage of Contraception, <http://www.eeoc.gov/policy/docs/decision-contraception.html> (last modified December 14, 2000); the federal court ruling appears in *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001); see also, *Cooley v. DaimlerChrysler Corp.* 281 F. Supp. 2d 979 (E.D. Mo. 2003), in which the court ruled that the defendant's exclusion of prescription contraceptives from its health care insurance plan had a disparate impact on women under Title VII of the Civil Rights Act of 1964, despite the plan's facially neutral application to both genders; and *U.S. Equal Employment Opportunity Commission v. United Parcel Service, Inc.*, 141 F. Supp. 2d 1216 (D. Minn. 2001), in which the court ruled against the defendant for not offering prescription contraceptive coverage, which in plaintiff's circumstances, was for the treatment of a female hormonal disorder, and ruled in favor of the plaintiff's disparate impact and treatment claim, but not under the PDA specifically. Contraceptives currently approved by the federal government include Norplant, IUD, diaphragm, Depo-Provera, and "the pill."

6. National Women's Law Center, "Contraceptive Equity Laws in Your State: Know Your Rights—Use Your Rights," <http://www.nwlc.org/pdf/ConCovStateGuide2003.pdf> (last updated November 2003).

7. For more information on this topic, see the following Web sites of the National Women's Law Center, <http://www.nwlc.org/pill4us>; Planned Parenthood, <http://www.covermypills.org>; and the AAUP, <http://www.aaup.org/publications/Academe/2001/01SO/SO01NB.htm>.

### **Sabbaticals and Retirement Benefits**

1. 29 C.F.R. § 1604 appendix question 10 (2003).

### **Parental, or Child-Rearing, Leave**

1. *Schafer v. Board of Public Education of the School District of Pittsburgh, Pa.*, 903 F.2d 243 (3d Cir. 1990).
2. 29 C.F.R. § 825.200 (2003).
3. *Id.* C.F.R. § 825.202.
4. *Id.* C.F.R. § 825.201.
5. *Id.* C.F.R. § 825.200.
6. *Id.* C.F.R. § 825.207(a); *Miller v. Personal-Touch of Virginia*, 342 F.Supp.2d 499 (E.D. Va. 2004), in which the court held that “an employer may require the employee to substitute any period of accrued vacation, sick, or other leave for any part of the twelve-week period of FMLA leave”; *Ruder v. Maine General Medical Center*, 204 F.Supp.2d 16 (D. Maine 2002), in which the court noted that “courts, including the Supreme Court, have rejected interpretations of the FMLA that operate to give employees more than twelve weeks of leave within a twelve-month period.”
7. *Id.* C.F.R. § 825.203.
8. *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988), in which the court held that under the PDA, pregnancy and related conditions are illnesses “only when incapacitating”; (*Barrash*, 846 F.2d at 931); *Wallace v. Pyro Mining Co.*, 951 F.2d 351 (6th Cir. 1991), in which the court did not address the issue of the PDA’s applicability because the plaintiff failed to provide sufficient evidence to support her claim that breastfeeding was a medical necessity.

### **Termination of Employment**

1. *U.S. Equal Employment Opportunity Commission v. Mississippi College*, 626 F.2d 477, 484 (5th Cir. 1980), in which the court held that a college owned and operated by the Mississippi Baptist Convention was not entitled to the § 702 exemption under Title VII for religious educational institutions because the college was not a church and the college’s faculty and staff did not function as ministers. Accordingly, the EEOC could not be prevented from investigating whether the college discriminated against any blacks that applied for faculty positions. See also, *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985), in which the court held that churches are not exempt from scrutiny under Title VII when employment decisions do not involve the church’s spiritual functions. Although the church could discriminate on the basis of religious beliefs based on the § 702 exemption under Title VII for religious institutions, it could not discriminate on the basis of race or sex.
2. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 667 (6th Cir. 1999).
3. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991).

### **Legal Options after Denial of Appointment, Tenure, or Benefits**

1. 29 C.F.R. § 825.220 (2003).

### **Abortion**

1. 29 C.F.R. § 1604, appendix, question 35.
2. *Id.* § 825.114(a).

3. *Id.* § 1604 appendix, questions 35–37.
4. See note 1 under “Termination of Employment” above.
5. 29 C.F.R. § 1604 appendix, question 34.

## **APPENDIX**

### **RESOURCES ON THE PREGNANCY DISCRIMINATION ACT AND RELATED ISSUES**

#### **Law and Federal Regulations**

Code of Federal Regulations on Employment Policies Relating to Pregnancy and Childbirth (29 C.F.R. § 1604.10). [http://a257.g.akamaitech.net/7/257/2422/08aug20031600/edocket.access.gpo.gov/cfr\\_2003/julqtr/pdf/29cfr1604.10.pdf](http://a257.g.akamaitech.net/7/257/2422/08aug20031600/edocket.access.gpo.gov/cfr_2003/julqtr/pdf/29cfr1604.10.pdf).

Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978. <http://www.eeoc.gov/policy/vii.html>.

#### **General Information on the Pregnancy Discrimination Act**

American Federation of State, County, and Municipal Employees. "Your Rights During Pregnancy and Childbirth." <http://www.afscme.org/wrkplace/wrfaq06.htm>.

Equal Employment Opportunity Commission (EEOC). "Pregnancy Discrimination." <http://www.eeoc.gov/types/pregnancy.html>.

National Partnership For Women and Families. "The Pregnancy Discrimination Act: 25 Years Later—Pregnancy Discrimination Persists." <http://www.nationalpartnership.org/portals/p3/library/WorkplaceDiscrimination/Pregnancy25thAnnivFacts.pdf>.

Raisner, Jack A. *Pregnancy Discrimination and Parental Leave Handbook*. New York: Aspen Publishers, 2000.

U.S. Department of Labor. "Frequently Asked Questions: Pregnancy." <http://www.dol.gov/dolfaq/dolfaqBYsubtopic.asp?subtopicid=167&title=Pregnancy&topicid=13&thetopicname=Women>

Vogel, Lise. *Mothers on the Job: Maternity Policy in the U.S. Workplace*. New Brunswick, N.J.: Rutgers University Press, 1993.

Women Employed. "Your Rights When You Are Pregnant." <http://www.womenemployed.org/docs/PregnancyRights.pdf>

#### **Information Pertaining Specifically to Prescription Contraceptive Coverage**

Center for Reproductive Rights. "Contraceptive Equity Laws In the States." [http://www.reproductiverights.org/st\\_equity.html](http://www.reproductiverights.org/st_equity.html).

National Women's Law Center. "Contraceptive Equity in Your State: Know Your Rights, Use Your Rights." <http://www.nwlc.org/pdf/ConCovStateGuide2003.pdf>.

National Women's Law Center. "Coverage of Contraceptives in Health Insurance: The Facts You Should Know." <http://www.nwlc.org/pdf/concovbackgrounder2003.pdf>.

### **Legal Information on the Pregnancy Discrimination Act and Related Issues**

- Decker, Kurt H. *Family and Medical Leave in a Nutshell*. St. Paul, Minn.: West Group, 2000.
- EEOC. Decision on Coverage of Contraception. <http://www.eeoc.gov/policy/docs/decision-contraception.html>.
- EEOC. "Questions and Answers: Commission Decision on Coverage of Contraception." <http://www.eeoc.gov/policy/docs/qanda-decision-contraception.html>.
- EEOC. List of Appellate and Amicus Briefs referencing "pregnancy discrimination." [http://search.access.gpo.gov/eeoc\\_briefs/SearchRight.asp?ct=eeoc\\_briefs&q1=%22pregnancy+discrimination%22](http://search.access.gpo.gov/eeoc_briefs/SearchRight.asp?ct=eeoc_briefs&q1=%22pregnancy+discrimination%22).
- Lareau, N. Peter, et al. *Labor and Employment Law*. Conklin, N.Y.: Matthew Bender, 2004.
- Law, Sylvia A. "Sex Discrimination and Insurance for Contraceptives." Center for Reproductive Rights. [http://www.reproductiverights.org/pub\\_art\\_sylvialaw.html](http://www.reproductiverights.org/pub_art_sylvialaw.html). (Reprinted from the *Washington Law Review* 73 (1998).)
- Magid, Julie Manning. "Contraception and Contractions: A Divergent Decade Following Johnson Controls." *American Business Law Journal* 41 (fall 2003).
- Stewart, Sean. "PDA, FMLA, and Beyond: A Brief Look at Past, Present, and Future Sex Discrimination Laws and Their Effects on the Teaching Profession." *Brigham Young University Education and Law Journal* 835 (2003).