

# **Baby Bump Blunders! Avoiding Pregnancy Discrimination in the Workplace**

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# How We Got Where We Are

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- In **1964**, Congress passed Title VII of the 1964 Civil Rights Act which prohibits sex discrimination.
- In **1976**, the Supreme Court ruled in *General Electric Company v. Gilbert* that discrimination on the basis of pregnancy was not sex discrimination, but rather discrimination between pregnant and non-pregnant persons which was not covered by Title VII.
- In **1978**, Congress passed the Pregnancy Discrimination Act to amend Title VII to make it clear that the prohibition on sex discrimination includes “*because of or on the basis of pregnancy, childbirth or related medical conditions.*”

# How We Got Where We Are

The PDA also states, “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.**”



# What about protecting the baby to be?

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- In **1991**, the Supreme Court granted certiorari to resolve a conflict between the Fourth, Seventh and Eleventh Circuits as to the legality of fetal protection policies, and to address "whether an employer, seeking to protect potential fetuses, may discriminate against women just because of their ability to become pregnant."
- The Court held that Title VII forbids sex-specific fetal protection policies even where the employer's motives are to help the female employees.
- *United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 55 EPD 40,605 (1991)

# What about protecting the baby to be?

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- Johnson Controls raised concerns about tort liability if an unborn fetus was harmed by exposure to lead on-the-job.
- According to the Court, the basis for holding an employer liable "seems remote at best" if, "under general tort principles, Title VII bans sex-specific fetal protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently . . ."



What happens next?

In 2012, the EEOC announced that part of its strategic enforcement plan would be a renewed focus on pregnancy discrimination and accommodations for pregnant workers.



**Pregnant Workers Face Routine  
Discrimination, Report Says**

**Latham & Watkins  
Settles Pregnancy  
Discrimination Lawsuit**

**Platinum P.T.S. To Pay \$100k  
to Settle EEOC Pregnancy  
Discrimination Lawsuit**

**Milwaukee Mom  
Awarded \$148,000 In  
Pregnancy  
Discrimination Lawsuit**

# Pregnancy Discrimination Lawsuits

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- *EEOC v. Reed Pierce's Sportsman' Grille*: In the first pregnancy discrimination lawsuit of 2013, the employer allegedly terminated Melody McKinley, who was four months pregnant with her first child.
- When firing McKinley, the defendant allegedly said, “The baby is taking its toll on you.”
- The EEOC subsequently filed suit in the U.S. District Court for the Southern District of Mississippi.
- After the defendant lost two motions to dismiss the case, it agreed to a \$20,000 settlement.

# Pregnancy Discrimination Lawsuits

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- *EEOC v. Adventures in Learning Aurora, Inc.*
- The employer allegedly forced a pregnant employee to quit after refusing to allow her to work after her fourth month of pregnancy.
- The EEOC filed suit in the U.S. District Court for the Northern District of Illinois, charging the defendant with pregnancy discrimination.
- Shortly after it was filed, the defendant settled the case for \$31,000.

# Pregnancy Discrimination Lawsuits

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- *EEOC v. Ramin, Inc.* The EEOC filed suit against Ramin Inc., the owner of a Comfort Inn & Suits, asserting it fired a housekeeper after she reported her pregnancy.
- The EEOC claimed that the employer would not allow the woman to continue to work as a housekeeper because of the potential harm that her job could cause the baby.
- The employer agreed to pay \$2,500 in back pay and \$25,000 in compensatory and punitive damages.

# Pregnancy Discrimination Lawsuits

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- *EEOC v. Landau Uniforms, Inc.*
- The EEOC asserted that the defendant treated its employee, Tara Smith, unequally because of her pregnancy.
- The EEOC also claimed that the employer disciplined and discharged Smith because of her pregnancy.
- The EEOC filed suit in the U.S. District Court for the Northern District of Mississippi.
- Subsequently, the parties settled the suit for \$80,000.

# Pregnancy Discrimination Lawsuits

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- *EEOC v. Engineering Documentation Systems, Inc.*  
EEOC claimed management official allegedly made derogatory remarks about the pregnant employee.
- The employer also allegedly refused to move the woman's office closer to the restroom to accommodate her nausea.
- While the pregnant employee was out on leave, the employer changed her job description and subsequently terminated her while she was out on leave.
- After the EEOC filed suit in the U.S. District Court for the District of Nevada, the parties reached a settlement agreement for \$70,000.

# Pregnancy Discrimination Lawsuits

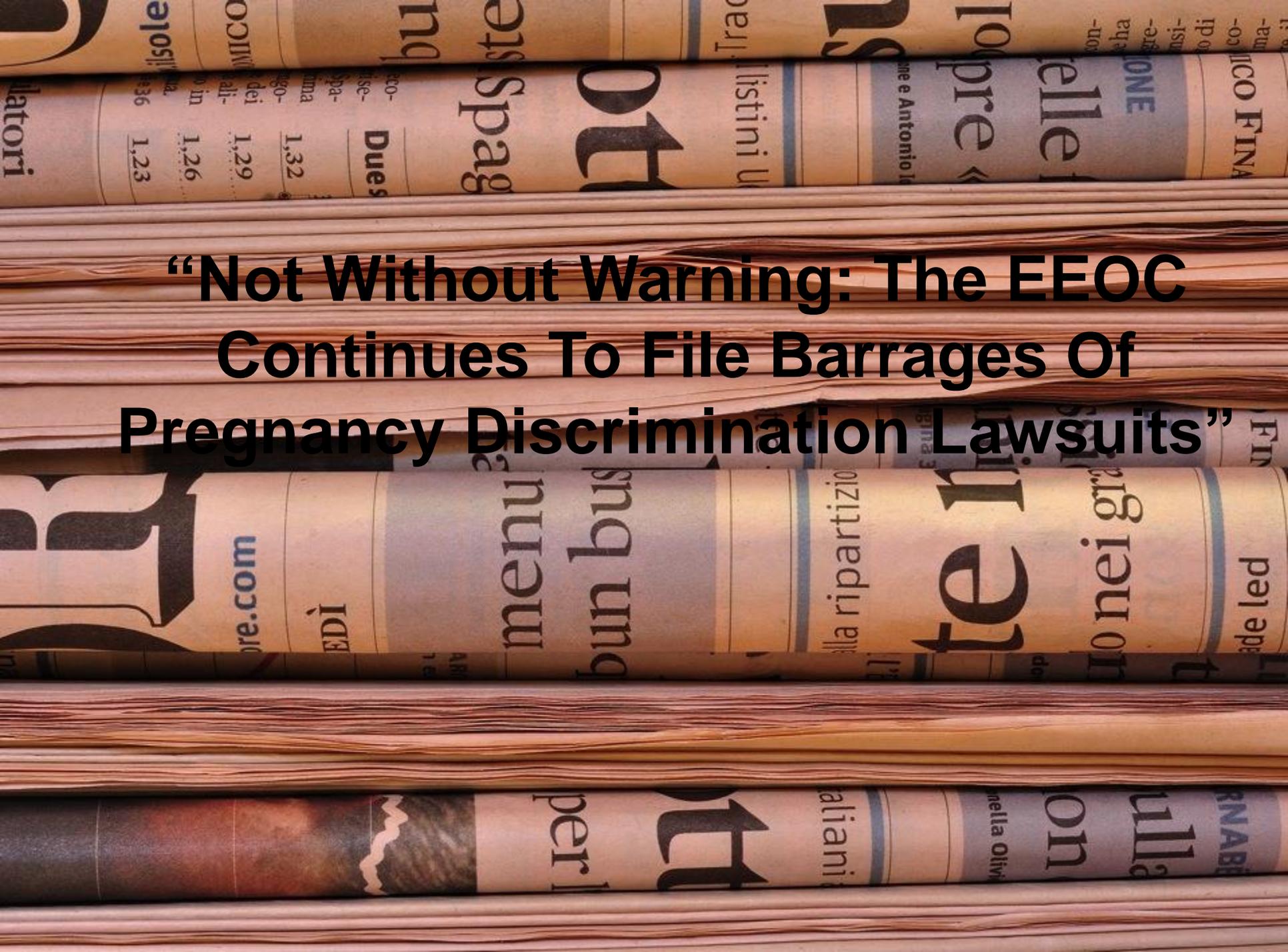
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- *EEOC v. James E. Brown & Associates, PLLC*: A Washington based law firm allegedly rescinded a job offer for an associate attorney position after the firm discovered the applicant was six months pregnant.
- The EEOC filed suit in the U.S. District Court for the District of Columbia.
- In June 2013, the parties settled the lawsuit for \$18,000.
- The firm also signed a two-year consent decree, agreeing to implement a policy that prohibits discrimination.
- Likewise, the consent decree provides for mandatory training to the firm's personnel.

# Pregnancy Discrimination Lawsuits

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- *EEOC v. Platinum P.T.S. Inc. D/B/A/ Platinum Production Testing Services* A clerk requested time off for medical treatment to address a miscarriage.
- The woman missed several days of work and anticipated staying home to deal with her medical situation. After she took five days off, the employer terminated her position.
- The EEOC's San Antonio office found reasonable cause to believe the employer violated the PDA, and settlement discussions ensued.
- The employer agreed to pay \$100,000 to settle the pregnancy discrimination suit.

A stack of rolled-up newspapers, likely from Italy, with various words and numbers visible on the edges. The text is oriented vertically, reading from right to left. Some visible words include "CO FINA", "elle", "pre", "Dues", "1.32", "1.29", "1.26", "1.23", "menu", "un bus", "la ripartizio", "te", "nei", "per", "per", "aliani", "nella Oliv", "on", "ulle", "RNABE".

**“Not Without Warning: The EEOC  
Continues To File Barrages Of  
Pregnancy Discrimination Lawsuits”**

# **“Supreme Court Weighs Whether to Hear Pregnancy Discrimination Case that Could Affect Workers' Rights Nationwide”**



# ***Young v. UPS, Inc.***

UPS had a policy of giving light duty assignments to various categories of employees who are physically unable to do their usual job.

# Young v. UPS, Inc.

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Under the policy, these categories of employees are entitled to light duty assignments:

- ✓ employees who have been injured on the job;
- ✓ employees who have a qualifying disability under the ADA; and
- ✓ employees who have temporarily lost their DOT certifications.

# Ms. Young argued

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- When employers give a benefit to some employees who are similar to a pregnant employee in their limitations on working, employers must give that same benefit to the pregnant employee.
- So if UPS gives light duty assignments to an employee injured on the job who has temporary lifting restrictions, they should also give light duty assignments to pregnant employees who have temporary lifting restrictions.

# UPS argued

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- The policy is a pregnancy-blind policy and that to win her case Young needed to prove she was denied the accommodation because of bias against her as a pregnant woman.



# UPS Argued

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- Many non-pregnant employees were also denied light duty.
- In other words, UPS argued that its policy is not biased against pregnant workers, it's just that pregnant workers don't fit into any of its categories of workers entitled to accommodations.

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# **What did the Fourth Circuit Court of Appeals say about the arguments of the parties?**

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The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars . . . , require employers to offer maternity leave or take other steps to make it easier for pregnant women to work. Employers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees . . . ." ***Troupe v. May Dep't Stores Co.***, 20 F.3d 734, 738 (7th Cir. 1994)

# The Bottom Line

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- According to the Court of Appeals, as long as an employer's policy can be described without reference to pregnancy—by identifying in pregnancy-neutral terms the preferred classes of conditions that are entitled to light-duty accommodations—the policy does not discriminate on the basis of pregnancy.



# The Bottom Line

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- Under the Fourth Circuit's analysis, the pregnant employee cannot even make out a *prima facie* case of discrimination if all she has for proof is a consistently applied policy like the one used by UPS.



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**Ms. Young appeals to the U.S. Supreme Court and waits over a year before the Justices decide to hear the case. Meanwhile, . . . the rest of the country continues to move forward on the issue of greater rights for pregnant workers.**

# EEOC Issues Pregnancy Discrimination Guidelines July 14, 2014

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# New EEOC Guidelines

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- [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm)
- Covers the interaction between the ADAAA and pregnancy discrimination
- Clarifies who the pregnancy discrimination law covers.
- Defines who is similarly situated to a pregnant female with work restrictions for the purpose of analyzing discrimination claims
- Discusses EEOC's position on light duty and pregnancy.

# EEOC Defines Similarly Situated

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- An employer is obligated to treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly temporarily unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave, or fringe benefits.
- An employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job).
- *NOTE: Courts differ on this issue.*

# EEOC's Position on Pregnancy and the ADAAA

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- Pregnancy itself is still not a disability.
- Changes to the definition of the term "disability" make it much easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADAAA.
- Reasonable accommodations available to pregnant workers with disabilities might include allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a work station, or to use a stool; altering how job functions are performed; or providing a temporary assignment to a light duty position.

# EEOC Says The PDA Prohibits Discrimination Based On:

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- **Medical Conditions Related to Pregnancy or Childbirth**
  - Lactation Issues – also covered by other laws (ACA)
  - Abortion – Title VII protects women from being fired for having an abortion or contemplating having an abortion.
  - Medical Conditions -- Title VII prohibits discrimination against a woman with a medical condition relating to pregnancy or childbirth and must treat her the same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth, or related medical conditions.

# EEOC Says The PDA Prohibits Discrimination Based On:

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- **Potential or Intended Pregnancy**

- As one court has stated, "Discrimination against an employee because she intends to, is trying to, or simply has the potential to become pregnant is . . . illegal discrimination." In addition, Title VII prohibits employers from treating men and women differently based on their family status or their intention to have children.
- Because surgical impregnation is intrinsically tied to a woman's childbearing capacity, an inference of unlawful sex discrimination may be raised if, for example, an employee is penalized for taking time off from work to undergo such a procedure.

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HOW DO YOU  
RESPOND TO  
CHARGES OF BEING  
A "DO-NOTHING"  
CONGRESS?



# Pregnant Workers Fairness Act (PWFA) H.R. 5647 -- S. 3565

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The bill sponsored by Democrats required employers to make the same sorts of accommodations for pregnancy, childbirth, and related medical conditions that they do for disabilities.



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**While waiting for the  
Supreme Court to  
decide *Young v. UPS*,  
juries, continue to  
decide pregnancy  
discrimination cases.**



# Pregnancy Discrimination Suit Stings Autozone

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- A California jury stuck Autozone Inc. for a whopping \$186 million in a gender and pregnancy discrimination case
- The verdict includes roughly \$185 million in punitive damages to punish Autozone for egregious behavior.





Tick  
Tock



STAND WITH PREGNANT WORKERS  
#StandWithPeggy

PROTECT PEOPLE NOT PACKAGES  
www.nationalpartnership.org

Child -OR- job! We shouldn't have to CHOOSE!  
www.nationalpartnership.org

STAND WITH PREGNANT WORKERS  
#StandWithPeggy

# Long Awaited Supreme Court Ruling

## March 25, 2015

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- Court rejected the employee's and UPS's arguments about the proper legal standard for judging pregnancy discrimination.
- **HOLDING:** An employee claiming denial of accommodation due to pregnancy makes out a prima facie case of discrimination if she proves:
  - she belongs to the protected class;
  - she sought accommodation;
  - the employer did not accommodate her; and
  - the employer did accommodate others similar in their ability or inability to work.

# Long Awaited Supreme Court Ruling

## March 25, 2015

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- The employer may then seek to justify its refusal to accommodate the employee by relying on “legitimate, nondiscriminatory” reasons for denying accommodation.



# Timeline Explosion

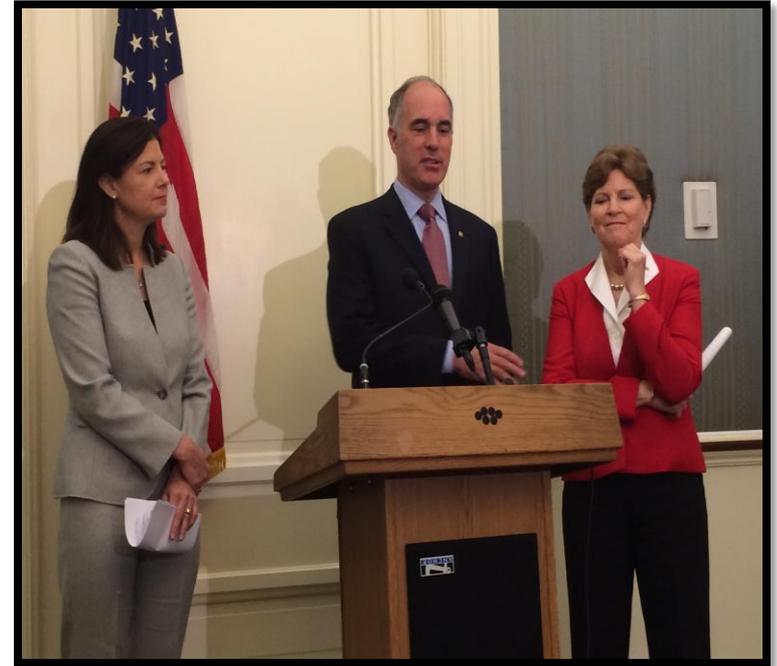


- **2012/2013** Pregnant Workers Fairness Act Bill
- **2014** EEOC Pregnancy Discrimination Guidance;
- **2014** Florida Supreme Court recognizes the the state's prohibition against sex discrimination applies to pregnancy discrimination;
- **2015** Supreme Court *Young v. UPS* decision
- **2015** In the last six months 5 states and 3 cities have passed laws imposing a reasonable accommodation obligation related to pregnancy employees.

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**June 4, 2015**

**Pregnancy Workers  
Fairness Act  
reintroduced with bi-  
partisan support this time.**



**It shall be an unlawful employment practice for a covered entity to—**

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**(1) not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.**

**It shall be an unlawful employment practice for a covered entity to ---**

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**(4) require an employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee.**

# What about after the birth?

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# Potential legal claims based on family responsibilities

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- EEOC Guidelines on caregiver discrimination.
- State laws protecting familial status from being the basis for discrimination.
- Nursing mothers have rights to express milk in the workplace under the FLSA, ACA, and many state laws.
- But the law still does not require preferential or favored treatment of those who choose to have children. *EEOC v. Bloomberg*

# EEOC v. Bloomberg (2011)

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- EEOC alleged that Bloomberg reduced pay for pregnant women or women who had just returned from maternity leave, demoted them, excluded them from management or subjected them to stereotypes about female caregivers.
- “In a company like Bloomberg, which explicitly makes all-out dedication its expectation, making a decision that preferences family over work comes with consequences,” the judge said, “But those consequences occur for anyone who takes significant time away from Bloomberg, not just for pregnant women and mothers.”

# EEOC v. Bloomberg (2011)

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Judge Preska quoted former General Electric CEO Jack Welch,

“There’s no such thing as work-life balance. There are work-life choices, and you make them, and they have consequences.”



I'M AFRAID YOU'LL HAVE TO STAY LATE TONIGHT,  
I WANT YOU TO ATTEND THIS TALK ON WORK-LIFE BALANCE



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Keep in mind you can  
always be more generous than  
just meeting minimum legal  
requirements.



