

# PREGNANCY DISCRIMINATION

WEBINAR PRESENTED BY

Tennessee Human Rights Commission (THRC)

And

Equal Employment Opportunity Commission  
(EEOC)



# PRESENTERS



Beverly Watts  
Executive Director - THRC



Katharine W. Kores  
Memphis District Director  
- EEOC



# EEOC-THRC



## MISSION

To Stop and Remedy  
Unlawful Employment  
Discrimination

## MISSION

To Safeguard Individuals  
From Discrimination  
Through Enforcement  
and Education



# EEOC-THRC



## EEOC Jurisdiction

Workplace discrimination based on:

- Race
- Color
- National Origin
- Gender
- Religion
- Age
- Disability
- Genetic Information

## THRC Jurisdiction

Workplace discrimination based on:

- Race
- Color
- National Origin
- Gender
- Age
- Religion/Creed (No Accommodation Issues)
- Disability (No Accommodation Issues)



# EEOC-THRC



## Employers subject to EEOC Jurisdiction

- Employers with 15 or more employees
- If age is alleged, employers must have 20 or more employees
- If the employer has fewer than 15 or 20 employees, the charge is automatically transferred to THRC

## Employers subject to THRC Jurisdiction

If you believe you have been discriminated against, you have a right to file a charge of discrimination. The employer must employ:

- 8 or more employees
- At least 1 employee for retaliation claims



# EEOC-THRC



## EEOC charges must be filed within:

- 300 days of the last discriminatory act unless it is a continuing violation.

## THRC charges must be filed within:

- 180 days of the last discriminatory act unless it is a continuing violation.
- If it is filed with THRC outside of 180 days but within EEOC's 300 day time frame the charge will be automatically transferred to EEOC.



# EEOC-THRC



## EEOC Notice to Employer:

- Within 10 days of filing the complaint EEOC will send notice to the employer that a complaint has been filed.
- However, EEOC may dismiss a charge without any further investigation if the charge is untimely or if the allegations do not support a violation of the law.

## THRC Notice to Employer:

- Within 10 days of filing the complaint, THRC will send notice to the employer that a complaint has been filed. The employer will receive the actual complaint form that was completed by the charging party, with the exception of the witness list.



# EEOC-THRC



## Mediation Opportunity

- Before we investigate your charge, EEOC and THRC will extend the opportunity to mediate. Mediation is voluntary and both parties must agree to meet face-to-face with a neutral third party in an attempt to settle the charge.
- If an agreement is reached during mediation, the charge will be closed.
- If unsuccessful, the investigative process will continue.

# Why Should You Consider Mediation?

- Free
- Fair and Neutral
- Saves time and money
- Confidential
- Avoids litigation
- Fosters cooperation
- Improves communications
- Discovers real issues in the workplace
- Design your own solution
- Everyone Wins





# EEOC- THRC



## EEOC

- A Right to Sue (RTS) is issued by EEOC and is required before a complainant can file a private lawsuit in **federal court**.
- It can be issued if more than 180 days have passed since filing the charge.

## THRC

- No Right to Sue Required for THRC Cases Pursued in State Court
- A complainant may file a private lawsuit in **state court** at any time.
- If a private lawsuit is filed, THRC will stop investigating and administratively close the case.

# Legal Framework for THRC

- Tennessee Human Rights Act
- Tennessee Disability Act
- Maternity Leave



# Tennessee

## Human Rights Act & Disability Act

- Prohibits discrimination based on race, color, national origin, gender, age (40 and over), creed, religion and retaliation.
  - Does not cover religious accommodations
- Prohibits housing discrimination based on race, color, national origin, gender, creed, religion, disability, retaliation and **familial status**.
  - One or more individuals under the age of 18 years living with a parent or the designee of such parent or legal custodian.
- Prohibits public accommodations discrimination based on race, color, national origin, creed, religion and retaliation.
- Prohibits discrimination in employment based on disability.
  - In employment, excludes reasonable accommodations and disability by association.

# Maternity Leave

Employees employed by same employer for at least 12 consecutive months as full-time:

- May be absent for a period not to exceed 4 months for adoption, pregnancy, childbirth and nursing an infant.
- With regard to adoption, the 4 month period begins at the time an employee receives custody of child.



# THRC Cases – Employment Case 1



## **What occurred:**

- Complainant subjected to unwelcomed harassment
- Complainant noted she was asked to wear revealing clothing for the patrons' enjoyment
- Complainant noted retaliation because of her gender (pregnancy).
- Respondent noted Complainant was not discharged but was suspended
- Respondent made accommodations for the Complainant's pregnancy based on her medical needs.
- Respondent states complainant never expressed discrimination; therefore allowing for no inference of retaliation.

# THRC Cases – Employment Case 2



## What occurred:

- Complainant alleged failure to properly accommodate her and ultimately discharged her because she was pregnant.
- Complainant argued that per doctor's orders asked for regular 15-minute breaks to hydrate, and "get off her feet"/ never given breaks
- Complainant was terminated four month after the pregnancy notification.
- Respondent argued that the Complainant was fired following an internal investigation that revealed she had mishandled a customer credit card
- Respondent stated that the Complainant did not ask for special accommodations for falling ill
- Respondent argued that the Complainant never told anyone about the instances of discrimination.

# THRC Cases – Housing Case 1



## **What occurred:**

- The Salvation Army Turning Pointe Center maintains a policy stating that “there are to be no additions to a resident’s family while she is enrolled in the Turning Point Program.
- Pregnancy regardless of outcome will be grounds of dismissal from the program”.
- As a result when four women became pregnant while participating in the program, the Center evicted them.

# THRC Cases- Housing Case 2



## **What occurred:**

- Six (6) families from across the nation filed a complaint against Wells Fargo Home Mortgage.
- They alleged that Wells Fargo's underwriting policy for its FHA insured home mortgage loans violated the Fair Housing Act by discriminating against women on maternity leave.
- The Complainants included allegations that Wells Fargo discriminated by making loans unavailable based on sex and familial status; or by forcing women applicants to sacrifice their maternity leave.

# Legal Framework of EEOC

- Title VII of the Civil Rights Act of 1964, as amended
- Pregnancy Discrimination Act of 1978
- Americans with Disabilities Act Amendments Act of 2008



# Other Laws

- 2010 FLSA Nursing Breaks Amendment
  - FLSA amended by 2010 Affordable Care Act
- Family and Medical Leave Act of 1993

# Title VII of the Civil Rights Act of 1964, as amended

- Title VII prohibits discrimination on the basis of sex/female (pregnancy)
- **Pregnancy Discrimination Act of 1978**  
amended Title VII. Discrimination prohibited based on:
  - Pregnancy
  - Childbirth, or
  - Related medical conditions



# ADA Amendments Act of 2008

- Broadened protections for individuals with a temporary impairment that is not transitory or minor
- Extended coverage to include impairments that substantially limit an individual's ability to lift, stand, or bend.
- A pregnancy-related impairment that substantially limits a major life activity is a disability. 29 C.F.R. § 1630.2(h).
  - E.g., gestational diabetes, pregnancy-related sciatica

# **The Affordable Care Act of 2010**

## **FLSA Amendment for Nursing Breaks**

- Employers must provide “reasonable break time for an employee to express breast milk for her nursing child for one year after the child’s birth each time such employee has need to express the milk.”
- Employers are required to provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”

**\*Enforced by Dept. of Labor – Wage & Hour**

# The Family and Medical Leave Act of 1993

- Twelve weeks of job-protected, unpaid leave per year for a covered workers:
  - to care for her own serious health condition
  - to care for a newborn child
- In the case of a medical necessity, FMLA leave may be taken intermittently or on a reduced leave schedule.

**\*Enforced by Dept. of Labor – Wage & Hour**

# Charges of Pregnancy Discrimination

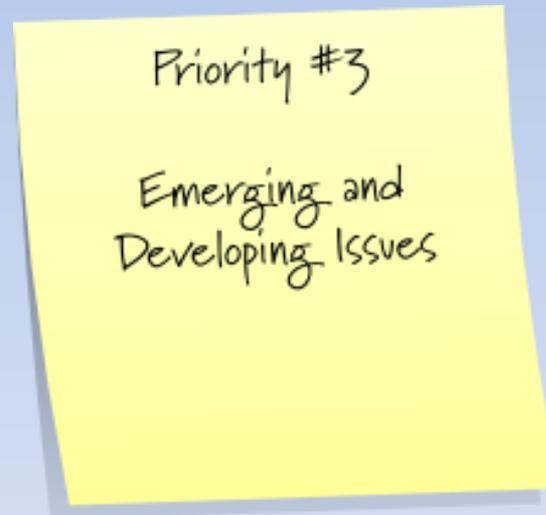
**\$14.4** million  
obtained in FY14 for  
Pregnancy discrimination victims  
- not including litigation

## Charges Filed with EEOC



# Strategic Enforcement Plan

- Identifies six national enforcement and litigation priorities.



*Includes accommodating pregnancy-related limitations under the ADAAA and the PDA.*

# EEOC Enforcement Guidance on Pregnancy Discrimination & Related Issues

- Issued July 14, 2014
- Guidance
  - Addresses legal development from past 30 years
  - Includes discussion of:
    - Actions that constitute unlawful discrimination based on pregnancy, childbirth or related medical conditions
    - Obligation of employer under PDA to provide pregnant workers equal access to benefits (leave, light duty and health benefits, etc.), and
    - How Title I of the ADA applies to individuals with pregnancy related impairments
- [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm)

# General Prohibitions and Requirements under the PDA

- Requires that women affected by pregnancy, childbirth, or related medical conditions are treated in the same manner as others in their ability or inability to work.
- Covers all aspects of employment.
- Protects workers based on current pregnancy, past pregnancy, and potential pregnancy.

# Medical Condition Related to Pregnancy or Childbirth

- May not discriminate against an employee because of a medical condition related to pregnancy or childbirth and must treat the employee the same as other who are similar in their ability or inability to work but are not affected by pregnancy, childbirth or related medical conditions.
  - For example, since lactation is a medical condition related to pregnancy, an employer **may not discriminate against an employee because of her breastfeeding schedule**

# Benefits of Employment

- Must provide same benefits of employment to women affected by pregnancy, childbirth or related medical conditions that are provided to others who are **similar in their ability or inability to work.**
  - Light Duty Policies
  - Leave

# Benefits of Employment Related to Leave

- No special medical clearance procedures
- Must be permitted to work as long as they are able to perform their jobs
- May not be prohibited from returning to work for a predetermined length of time after childbirth
- Equal access to leave, including disability leave
- Job-protection after a pregnancy-related absence
- Parental leave to bond with and care for a child must be provided to men and women on equal terms

# Benefits of Employment

- *Medical Benefits* – employers who offer health insurance to include coverage of pregnancy, childbirth and related medical conditions.
  - *Must provide same terms and conditions for pregnancy related benefits as provided for benefits relating to other medical conditions.*

A Venn diagram with three overlapping circles. The top circle is light blue and contains the text 'PREGNANCY, CHILDBIRTH or RELATED MEDICAL CONDITION'. The bottom-left circle is light orange and contains the text 'ADA'. The bottom-right circle is light green and contains the text 'Title VII/PDA'. The intersection of all three circles is highlighted with a red gear icon.

PREGNANCY,  
CHILDBIRTH or  
RELATED MEDICAL  
CONDITION

ADA

Title VII/PDA



# Title I of The ADA

- May require employer **to go beyond** that which it usually allows its employees to take, as a reasonable accommodation for an employee with a pregnancy-related impairment that is a disability.
- While pregnancy itself is not a disability, pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA.
- Some pregnancy related impairments are likely to be disabilities, **even though they are temporary**, such as pregnancy related carpal tunnel syndrome, gestational diabetes, sciatica and preeclampsia.

# EXAMPLES OF REASONABLE ACCOMMODATION FOR PREGNANCY- RELATED DISABILITY

- Redistributing marginal or nonessential functions or altering how an essential or marginal function is performed;
- Modifying workplace policies;
- Modifying a work schedule;
- Allowing telework where feasible;
- Granting leave in addition to what would normally be provided under a sick leave policy;
- Purchasing or modifying equipment; and
- Temporarily reassigning to a light duty position.

## **Example - Pregnancy-Related Impairment Constitutes ADA Disability Because It Substantially Limits a Major Life Activity**

- In Amy's fifth month of pregnancy, she developed high blood pressure, severe headaches, abdominal pain, nausea, and dizziness. Her doctor diagnosed her as having preeclampsia and ordered her to remain on bed rest through the remainder of her pregnancy.
  - This evidence indicates that Amy had a disability within the meaning of the ADA, since she had a physiological disorder that substantially limited her ability to perform major life activities such as standing, sitting, and walking, as well as major bodily functions such as functions of the cardiovascular and circulatory systems. The effects that bed rest may have had on alleviating the symptoms of Amy's preeclampsia may not be considered, since the ADA Amendments Act requires that the determination of whether someone has a disability be made without regard to mitigating measures.

# Example - Discrimination Against a Job Applicant Because of Her Record of a Disability

- A county police department offers an applicant a job as a police officer. It then asks her to complete a post-offer medical questionnaire and take a medical examination. On the questionnaire, the applicant indicates that she had gestational diabetes during her pregnancy three years ago, but the condition resolved itself following the birth of her child.
  - The police department will violate the ADA if it withdraws the job offer based on this past history of gestational diabetes when the applicant has no current impairment that would affect her ability to perform the job safely.

# Example - Pregnant Employee Regarded as Having a Disability

- An employer reassigns a welder who is pregnant to a job in its factory's tool room, a job that requires her to keep track of tools that are checked out for use and returned at the end of the day, and to complete paperwork for any equipment or tools that need to be repaired. The job pays considerably less than the welding job and is considered by most employees to be "make work." The manager who made the reassignment did so because he believed the employee was experiencing pregnancy-related "complications" that "could very possibly result in a miscarriage" if the employee was allowed to continue working in her job as a welder. The employee was not experiencing pregnancy-related complications, and her doctor said she could have continued to work as a welder.

# Example - Pregnant Employee Regarded as Having a Disability

- The employer has regarded the employee as having a disability, because it took a prohibited action (reassigning her to a less desirable job at less pay) based on its belief that she had an impairment that was not both transitory and minor. The employer also is liable for discrimination because there is no evidence that the employee was unable to do the essential functions of her welder position or that she would have posed a direct threat to her own or others' safety in that job. Since the evidence indicated that the employee was able to perform her job, the employer is also liable under the PDA.

# Best Practices for Employers

- Develop, disseminate and enforce a strong policy on the requirements of PDA & ADA.
- Train managers and employees about their rights and responsibilities related to pregnancy, childbirth and pregnancy related medical conditions.
- Conduct employee surveys and review policies and practices to identify and correct any policies or practices that may disadvantage women affected by pregnancy, childbirth or related medical conditions.
- Respond to pregnancy discrimination complaints promptly, efficiently and effectively.
- Protect employees from Retaliation.

# EEOC Guidance and Technical Assistance on Pregnancy Discrimination

- Enforcement Guidance: Pregnancy Discrimination and Related Issues
- Questions and Answers about the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues
- Fact Sheet for Small Businesses: Pregnancy Discrimination
- The Family and Medical Leave Act, the ADA, and Title VII of the Civil Rights Act of 1964
- Employer Best Practices for Workers with Caregiving Responsibilities

All available on [www.eeoc.gov](http://www.eeoc.gov)

# EEOC Cases – Case 1

- A female hotel employee informed her manager of her pregnancy on her first day of work. That evening he terminated her and replaced her with a non-pregnant employee.
- Lawsuit filed by EEOC and settled for
  - \$20,000
  - 2 year consent decree
  - Required training for all employees
  - Maintain records and report to EEOC
  - Post a notice to employees about lawsuit and provide EEOC's contact information

# EEOC Cases – Case 2

- Female employee of manufacturer and distributor of medical scrubs informed her supervisor she was pregnant. After this, she was subjected to frequent reprimands, a negative performance evaluation and termination.
- Lawsuit filed by EEOC and settled for:
  - \$80,000 monetary relief
  - 1 year consent decree
  - Required training
  - Maintain records and report to EEOC
  - Post a notice to all employees about lawsuit and provide EEOC's contact information

# EEOC Cases – Case 3

- A female employee of a nationwide provider of support services to health care institutions was fired from her housekeeping position at a hospital after employer discovered she was pregnant.
- Lawsuit filed by EEOC and settled for:
  - \$88,000 monetary relief
  - Reinstatement of employee
  - 2 year consent decree
  - Amend anti-discrimination and EEO policy to include specific reference to pregnancy, childbirth or related medical condition
  - Required training for all managers and supervisors
  - Semi-annual reporting to EEOC



# UPCOMING WEBINAR

Retaliation

March 18, 2015

10:00 a.m. (cst)

Presenters:

Katharine W. Kores

Beverly Watts



## Pregnancy Webinar Questions

**QUESTION:** Can an employer terminate an employee for exhausting her intermittent FMLA leave and maternity leave prior to the employee giving birth?

**ANSWER:** It depends on the circumstances, including how an employer handles situations of exhausting FMLA leave for non-pregnant employees. Pregnancy must not be a factor in any decision to terminate an employee.

**QUESTION:** Could you expand on requirements to accommodate bonding time for male employees?

**ANSWER:** There are no set requirements, but if an employer offers bonding time to a female employee, then it should be offered for a male employee. Employees should be treated the same despite gender.

**QUESTION:** For THRC retaliation claims, what is the scope of the "protected acts?" Is it limited to the protected classes of discrimination? Does a claim for retaliation under the THRC include a general claim for retaliation for "other illegal acts" such as a civil code violation?

**ANSWER:** For EEOC and THRC retaliation claims, the employee must be involved in a protected activity. This means the employee opposed an employment practice based on a protected class or the employee participated in an EEO process (such as filing an EEOC/THRC complaint or an internal discrimination complaint, or testified or assisted in a co-worker's discrimination complaint.)

**QUESTION:** If an employer is worried about a pregnant employee lifting, when a lot of lifting is done on the job, can they require the employee to get a doctor's note clearing them to work?

**ANSWER:** Pregnant employees must be permitted to work as long as they are able to perform their jobs. Pregnancy must not be a factor in any decision with regard to an employee even if you believe it's "for her own good."

**QUESTION:** Is it correct that the 4 months of Tennessee parental leave applies only to employers with 100 or more employees at a single site?

**ANSWER:** Yes. See T.C.A. Section 4-21-408(d)(2).

**QUESTION:** Are state and federal maternity leave periods consecutive (12 weeks plus 4 months) or concurrent (4 months maximum)?

**ANSWER:** FMLA and TN maternity leaves generally run concurrently. However, there are some instances where the leaves can run consecutively because Tennessee law applies only to adoption, pregnancy, nursing an infant, and childbirth. If an employee doesn't qualify for leave under one of the 4 state law categories, the employee can take FMLA on top of TN maternity leave. An employer should also be aware of any circumstances that may necessitate the ADA regulation to be applied.

**QUESTION:** If an employee tells me that she is pregnant, and she works in an environment that could be harmful to her unborn child, can I lay her off until after she has had the baby?

ANSWER: An employee may not be laid off if her pregnancy is the reason for the employer's decision regardless if the employer has a safety concern.

**QUESTION:** Do I have to allow my employee, who is seeking fertility treatments, time off to go to these treatments?

ANSWER: This may be covered under other leaves (FMLA, annual, sick), but it is not covered under Tennessee's state parental leave laws (only covers adoption, pregnancy, childbirth and nursing your infant). Keep in mind also that depending on the circumstances, gender (pregnancy) discrimination and disability discrimination could be issues if leave is denied.

**This information is provided for general informational purposes only and is not intended in any way to constitute legal advice. If you require legal advice, please consult an attorney.**