



WOMEN RISING

A GUIDE TO YOUR RIGHTS AT WORK

NATIONAL EDUCATION ASSOCIATION

The National Education Association (NEA), the nation's largest professional employee organization, is committed to advancing the cause of public education. NEA's 3 million members work at every level of education from pre-school to university graduate programs. NEA has affiliate organizations in every state and in more than 14,000 communities across the United States.

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I. INTRODUCTION

This guidance provides an overview of the federal and state law protections that apply to women in the workplace. The goal of this guidance is to provide a starting place for both members and advocates to recognize, confront, and remedy unlawful and discriminatory conduct in the workplace. The topics covered in this guidance are broad, systemic issues, but which often have very specific implications depending on individual circumstances and the application of particular legal protections provided in federal or state law, school district policies, or collective bargaining agreements.

As employment laws alone often fall short of providing the support that educators¹ need in the workplace to care for their families, collectively bargained protections are particularly important. Union contracts are often the best starting place for identifying existing rights and potentially negotiating for better benefits. For that reason, in addition to providing brief summaries of the law and links to further legal information, this guidance highlights other resources that can help educators and their allies advocate for better policies.

¹ Note that the term “educators” is intended to refer to all teachers and education support professionals; where “teachers” is used, the intent is to reference a particular data set or specific issues that impact salaried classroom teachers.

This guidance provides a broad overview of employment-related issues that disproportionately impact women in the workplace. The legal information contained in this guide is meant to provide a starting point for recognizing potential employment law claims. Members who believe they have been subject to discrimination or harassment should contact their union representative for assistance, including potential referral to an attorney.

WHY IT MATTERS

Although the K-12 education sector is predominately made up of women in their childbearing years, labor and employment laws provide distressingly few protections to educators when it comes to caring for their own family members. The problems that may arise in the context of pregnancy and family caregiving are related to and entangled with broader forms of bias and discrimination against women within so-called “pink collar” professions, meaning work predominantly performed by women but historically exploited and [underpaid](#).

While this guidance focuses on issues that disproportionately impact women, sex discrimination and biases based on family caregiving responsibilities impact all workers. Furthermore, while this guidance uses the terms “women” and “female”, and the female pronoun, this is meant only as a shorthand. The guidance itself is intended to apply to all individuals who identify as female or who may otherwise face sex discrimination or harassment in the workplace. While the critical and interrelated issue of discrimination against individuals based on gender identity or expression is beyond the scope of this guidance, NEA opposes all such forms of discrimination and harassment, and is committed to supporting all educators in advocating for dignity and respect in the workplace.

FEMALE EDUCATORS FACE CHALLENGES ON MULTIPLE FRONTS



#MeToo

1 in 4 female educators report having been sexually harassed or assaulted on the job.



Forced to return to work immediately after giving birth

"I'm frustrated because I know I'm going to have to leave a newborn. ... It's too soon to be separated. I don't want to not teach anymore, but I also want to be a mother and have my family as well."

~ Maggie Perkins, 6th grade teacher, Smyrna, GA



Lack of Breastfeeding Accommodations

"Including teachers, 27.6 million women of childbearing age in this country do not have the basic legal protections needed by all breastfeeding workers – a clear right to receive break time, space, and other reasonable accommodations."

Educators end up huddled in closets and toilet stalls trying to find some vestige of privacy to pump breastmilk.



Pay Gap in Education Leadership

"Two-thirds of school superintendents – and most state education chiefs – are men, and they out-earn their female counterparts by an average of \$20,000 to \$30,000 per year, according to the [Council of the Great City Schools](#)."

About 77 percent of teachers are women. And many are in their prime childbearing years (the average age of teachers is 42). Among the teachers who leave the profession voluntarily, nearly a quarter say they do so for personal reasons, which include pregnancy and child care.²

2 Education Week, "With No Paid Parental Leave, Many Teachers Return to Class Before They're Ready," available at <https://www.edweek.org/ew/articles/2019/04/01/with-no-paid-parental-leave-many-teachers.html>.



SEX PLUS RACE

Mothers of color are even more likely to face workplace bias, and may be particularly vulnerable to backlash when they request pregnancy, breastfeeding, or family care accommodations.³

3 See e.g., Stephen Benard, In Paik, and Shelley J. Correll, "Cognitive Bias and the Motherhood Penalty," 59 HASTINGS L.J.1359 (2008).

II. SEX DISCRIMINATION

Despite the fact that three quarters of the nation’s K-12 teachers are women, and the majority of education support professionals are women as well, less than a quarter of school superintendent posts are held by women. As with many “pink collar” professions, the lack of representation of women in the highest leadership positions can undermine effective efforts to identify and address discrimination and harassment against women in heavily majority-female workplaces.

NEA RESOURCES

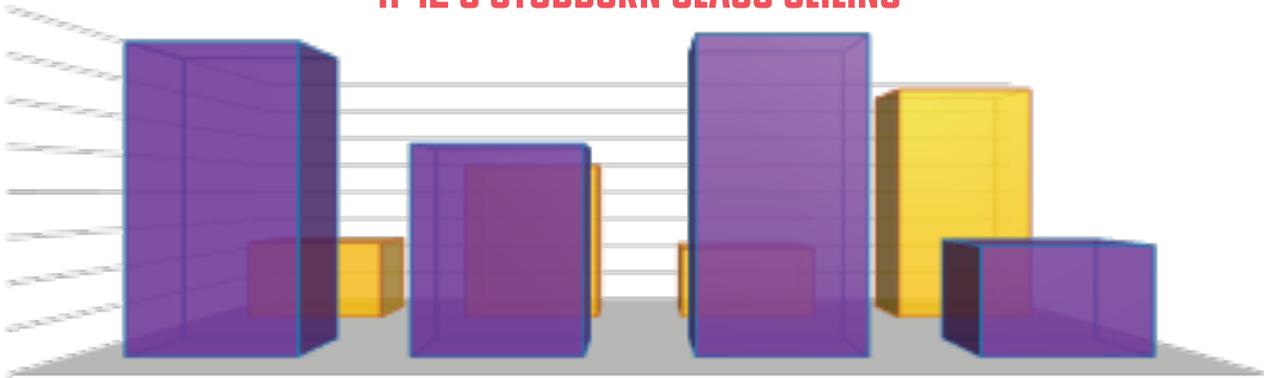
This [NEA Today article](#) summarizes the history of discrimination against women in the teaching profession, much of which can be traced back to the “outdated belief system that women are better suited for service labor because of feminine, domestic, and nurturing roles they performed in the home for centuries without any compensation. When performed in the paid labor force, they’re devalued.”

In industries across the country, employers still too often discriminate against women, particularly women of color and mothers by, for example, paying them less, forcing them out of jobs, and passing women over for advancement or promotion opportunities.

Sex discrimination can also take the form of treating employees differently because they do not conform to gender-role expectations or because of their **sexual orientation**.⁴ Sex discrimination may also include harassment, such as comments about women’s abilities or appearances or harassment based on a failure to conform to gender stereotypes.

⁴ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In October 2019, the Supreme Court heard arguments on the question of whether employment discrimination based on sexual orientation violates Title VII. A decision in these three consolidated cases (*Bostock v. Clayton County, Ga.*, *Altitude Express v. Zarda* and *R.G. & G.R. Harris Funeral Homes v. EEOC*) is expected in 2020. The interrelated and critical issues around discrimination and harassment because of sexual orientation and gender identity and expression are beyond the scope of this guidance, but are addressed elsewhere, including this comprehensive NEA [guidance on transgender students’ rights](#). Title VII also prohibits sexual harassment, as discussed in Part III, Sexual Harassment.

K-12’S STUBBORN GLASS CEILING



	Public Elementary and Secondary School Teachers in the 2011-12 School Year	Public Elementary and Secondary School Principals in the 2011-12 School Year	Central-Office Staff	Superintendents
Female	76%	52%	78%	27%
Male	24%	48%	22%	73%

Education Week, “Stubborn Gender Gap in the Top Job”

<https://www.edweek.org/ew/articles/2016/11/16/few-women-run-the-nations-school-districts.html>

As a general matter, it is illegal for an employer to discriminate on the basis of sex when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, raises, layoff, training, fringe benefits, and any other term or condition of employment.

The following is an overview of federal and state laws that address sex discrimination. Broadly, Title VII of the Civil Rights Act of 1964 (Title VII) is the primary federal law prohibiting sex discrimination (as well as discrimination based on other characteristics). Other federal laws may apply as well, including the Pregnancy Discrimination Act, Title IX, and the Equal Pay Act. Many states and municipalities have their own anti-discrimination laws, which may provide greater protections and additional avenues to remedy sex discrimination.

TITLE VII

- ➔ Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et. seq.* is the major federal law prohibiting employment discrimination based on race, color, religion, sex, or national origin
- ➔ Covers all private employers, state and local governments, and educational institutions that employ 15 or more individuals; also covers private and public employment agencies, labor organizations, and the federal government
- ➔ Prohibits sex discrimination: treating someone (an applicant or an employee) unfavorably because of that person's sex (also referred to as "**disparate treatment**")
- ➔ Prohibits retaliation against employees for opposing employment actions that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII
- ➔ Pregnancy Discrimination Act of 1978 – Amendment to Title VII, which made clear that "because of sex" or "on the basis of sex" includes discrimination based on pregnancy, childbirth and/or a medical condition related to pregnancy or childbirth
- ➔ See below, [Section V. Pregnancy Discrimination](#)

NEA RESOURCES

NEA's [Ed Justice](#) has numerous resources for educators on how to promote educational equity for women and girls.

WHERE TO FILE A COMPLAINT

Title VII discrimination charges can be filed with the Equal Employment Opportunity Commission (EEOC), the agency tasked with enforcing most employment-related federal civil rights laws. Many states and local jurisdictions have their own anti-discrimination laws and agencies responsible for enforcing those laws (Fair Employment Practices Agencies, or FEPAs). If you file a charge with a FEPA, it will automatically be "dual-filed" with the EEOC if federal laws apply. You do not need to file with both agencies.

You must file a charge with the EEOC first before bringing a lawsuit.

There are **strict timelines for filing**, usually 180 or 300 days from the discriminatory incident, depending on the state, but some state and local laws may have shorter or longer deadlines for filing.



TITLE IX

- ➔ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et. seq.* is a federal law prohibiting sex discrimination in any educational institution that receives federal funding
- ➔ Applies to state and local educational agencies, including approximately 16,500 local school districts and 7,000 post-secondary institutions, as well as charter schools, for-profit schools, libraries, and museums
- ➔ Also includes vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories and possessions of the United States
- ➔ Typically thought of as protecting **student rights**, but also prohibits sex discrimination against employees⁵
- ➔ Requires schools to operate in a non-discriminatory manner in areas of recruitment, admissions, and counseling; financial assistance; athletics; treatment of pregnant and parenting students; discipline; and employment⁶
- ➔ Prohibits retaliation against employees (and other individuals) for complaining, testifying, assisting, or participating in any manner in a Title IX investigation or hearing⁷

5 34 C.F.R. Part 106, Subpart E; 34 C.F.R. § 106.38.

6 Where a plaintiff could bring employment discrimination claims under both Title VII and Title IX, the question of whether they can only be brought under Title VII (that is, whether Title VII preempts Title IX) depends on the federal circuit where the case is filed. The 1st, 3rd, 4th, 6th, and 8th Circuit Courts of Appeals have held that there is no preemption, meaning that plaintiffs can bring a Title IX employment discrimination lawsuit, even where there is also a remedy under Title VII. *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1st Cir. 1988); *Doe v. Mercy Catholic Medical Ctr.*, 850 F.3d 545 (3d Cir. 2017); *Preston v. Virginia*, 31 F.3d 203 (4th Cir. 1994); *Price* 92 F.3d 1185 (6th Cir. 1996); *Brine v. Univ. of Iowa*, 90 F.3d 271 (8th Cir. 1996). The 5th and 7th Circuits and some district courts have held that Title VII preempts Title IX, meaning that an employee who potentially has claims under both Title VII and Title IX may only seek a remedy under Title VII. *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857 (7th Cir. 1996); *Storey v. Bd. of Regents of Univ. of Wis. Sys.*, 604 F.Supp. 1200 (W.D. Wis. 1985); *Morris v. Wallace Community College*, 125 F.Supp.2d 1315 (S.D. Ala. 2001).

7 The burden of proof in a Title IX retaliation case is likely to be lower than in a Title VII case. Following the Supreme Court's decision in *University of Texas Southwestern Medical Ctr. V. Nassar*, 570 U.S. 338 (2013), applying a "but for" standard in Title VII cases, as opposed to the lower "motivating factor" standard, most courts that have considered the issue have concluded that *Nassar* does not extend to Title IX cases. Rather, Title IX plaintiffs need only show that the covered institution took the adverse action "because of" the plaintiff's protected activity.

- ➔ Also prohibits discrimination against applicants or employees based on pregnancy, marital status, and parenting status
- ➔ See below, **Section V. Pregnancy and Breastfeeding**, and **Section VII. Family Caregiver Discrimination**

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Title IX of the Education Amendments of 1972,
20 U.S.C. § 1681(a)

WHERE TO FILE A COMPLAINT

Title IX complaints can be filed with the Department of Education's Office of Civil Rights (OCR), which is responsible for administrative enforcement of Title IX.⁸ All federal-funded K-12 schools and postsecondary institutions are required to designate at least one employee to act as their "Title IX Coordinator." The Title IX coordinator is responsible for providing information about Title IX rights and receiving reports about potential violations.⁹

Title IX also creates a private right of action for individuals against educational institutions in court. Unlike Title VII, which requires filing with the EEOC before going to court, there is no obligation to file first with OCR.¹⁰ However, claims of "disparate impact" (a facially gender-neutral policy or practice that has a disproportionately negative effect on members of one sex) can only be brought through the OCR process.¹¹

However, this question of the appropriate standard remains unsettled in some jurisdictions. As always, you should research the current law in your jurisdiction.

8 When an institution fails to comply with Title IX or to take action to remedy its non-compliance, it can be subject to a range of enforcement actions, including the loss of federal financial assistance.

9 The American Association of University Women (AAUW) provides an **interactive tool for locating contact information for Title IX coordinators**.

10 *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 247 (2009) ("Title IX has no administrative exhaustion requirement and no notice provisions. Plaintiffs can file directly in court under its implied private right of action and can obtain the full range of remedies.")

11 See *Alexander v. Sandoval*, 532 U.S. 275 (2001) (noting that Title VI "prohibits only intentional discrimination" and that Title IX "was

SECTION 1983 OF THE CIVIL RIGHTS ACT

- ➔ Civil Rights Act of 1871, 42 U.S.C. § 1983 is a federal law that allows people to sue the government for civil rights violations
- ➔ Applies when an official acting “under color of” state or local law deprives a person of their rights under the U.S. Constitution or federal statutes
- ➔ State and municipal government employees, including public school employees, can sue under both Title VII and Section 1983¹²
- ➔ Section 1983 has some advantages over Title VII:
 - ✓ No requirement to exhaust administrative remedies (i.e., no need to file first with the EEOC)
 - ✓ Longer statute of limitations (state law limits on time to bring general personal injury claims typically apply)

EQUAL PAY ACT

- ➔ Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d) is a federal law that is part of the Fair Labor Standards Act (FLSA), which prohibits pay discrimination on the basis of sex
- ➔ Requires employers to pay similarly situated employees the same wage, regardless of sex, if they perform jobs that require substantially equal skill, effort, and responsibility, under similar working conditions
- ➔ Includes all types of payments: salary, overtime pay, bonuses, vacation and holiday pay, expenses, and benefits
- ➔ No requirement to prove that employer intentionally paid employees differently because of sex (i.e., there is “strict liability” regardless of whether the employer intended to engage in wage discrimination)¹³

patterned after Title VI”). However, OCR regulations prohibit facially-neutral employment criteria which have a disparate impact based on sex: “A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless: (a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and (b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.” 34 C.F.R. § 106.52.

12 See e.g., *Vega v. Hempstead Union Free School Dist.*, 801 F.3d 72 (2d Cir. 2015) (holding high school math teacher’s claim of retaliation for complaining about national origin discrimination is actionable under Section 1983).

13 E.g., *Bauer v. Curators of Univ. of Missouri*, 680 F.3d 1043, 1045 (8th Cir. 2012) (“The EPA, a strict liability statute, does not require

NEA RESOURCES

NEA recently published an article on how the educators of #RedforEd are working to close the pay-gap.

WHERE TO FILE A COMPLAINT

Equal Pay Act complaints can be filed with the EEOC, but filing with the EEOC is not required; a lawsuit may be filed directly in court.

The deadline for filing is within two years of the violation, unless it can be proven that it was a willful violation, in which case, the statute of limitations is three years.

It often makes sense to file a Title VII discrimination claim along with an Equal Pay Act claim; but keep in mind that a Title VII claim must first be filed with the EEOC before bringing a lawsuit.



plaintiffs to prove that an employer acted with discriminatory intent; plaintiffs need show only that an employer pays males more than females.”); *Belfi v. Prendergast*, 191 F.3d 129 (2d Cir. 1999); *Fallon v. State of Ill.*, 882 F.2d 1206 (7th Cir. 1989); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518 (11th Cir. 1992).

STATE AND LOCAL LAWS

- ➔ Many states and even some counties and cities provide additional and more robust sex discrimination protections than federal law guarantees
- ➔ State anti-discrimination laws vary from state to state

MEMBER TIP

Always check to see if there is a state or local law that may apply to your situation. **State laws may...**

- ✓ include more protections (e.g., prohibit discrimination on bases not covered by Title VII, such as family responsibilities or marital status)
- ✓ apply to more employers, such as those with fewer than the 15 employees required for Title VII to apply
- ✓ allow for more types of damages

STATE LAW RESOURCES

The following organizations provide good starting places for identifying state law protections: [National Conference of State Legislatures](#), the [Center for American Progress](#), and [Equal Rights Advocates](#)



COLLECTIVE BARGAINING AGREEMENTS

- ➔ Collective bargaining agreements that include specific anti-discrimination language or even a general "just cause" provision are an important source of rights

MEMBER TIP

Many union contracts contain clauses specifying that the employer will not discriminate on the basis of sex (as well as other personal characteristics). If you believe you have been discriminated against, ask your union for assistance. You may be able to file a grievance challenging discriminatory actions as a violation of your contract.

In addition, if you are disciplined or terminated and know or suspect it is for discriminatory reasons, you may be able to file a grievance challenging this action as being without "just cause," and present evidence of discrimination as the real reason for the discipline or termination.

Pursuing rights under the collective bargaining agreement will almost always yield quicker results than any other legal process, and you can usually also still pursue your rights under federal and state anti-discrimination laws (unless, for example, you agree to waive these rights as part of settling the grievance).

SEX DISCRIMINATION - OTHER RESOURCES

- ★ [EEOC guidance](#) on retaliation
- ★ [AAUW factsheet](#) about Title VII rights
- ★ [ACLU factsheet](#) with helpful guidance
- ★ [Legal Aid at Work factsheet](#)
- ★ Economic Policy Institute [reports and blogs on teacher shortages](#), and report, "[What is the gender pay gap and is it real?](#)"

III. SEXUAL HARASSMENT

Sexual harassment is a particular type of prohibited sex discrimination. Sexual harassment can include sexual assault, unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature, or gender-based harassment, when this conduct affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

In addition to unwelcome behavior of a sexually explicit nature, sexual harassment also includes gender-based harassment that is not necessarily sexual but would not have occurred but for the victim's sex, such as calling women derogatory names, making offensive comments about women in general, or applying negative stereotypes.

The applicable laws are summarized below. Generally, sexual harassment is prohibited under Title VII as a form of sex discrimination, and is also prohibited under Title IX. School districts, like most employers, have reporting policies and procedures for addressing allegations of sexual harassment, which employees are usually required to utilize in order for the school to bear responsibility for remedying the harassment. Union contracts can also be an important source of protections against sexual harassment, and union representation itself can be a powerful force for addressing problematic behaviors in the workplace.

SEX PLUS RACE

A National Women's Law Center analysis of the EEOC sexual harassment reporting data indicates that many women experience racialized sexual harassment. Women of color may face the "double jeopardy" of being more vulnerable to harassment than white women because of their race, and more vulnerable to harassment than men of color because of their gender.¹⁴

¹⁴ Report by the National Women's Law Center, "Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women," 2018.

TITLE VII

- ➔ Prohibits workplace sexual harassment just as it bars any other type of sex discrimination
- ➔ Prohibits retaliation for complaining about sexual harassment
- ➔ Harassing conduct must be unwelcome in order to be actionable
- ➔ Victim and harasser can be a man or a woman; victim does not have to be the opposite sex
- ➔ Harasser may be a supervisor, agent of the employer, supervisor in another area, a co-worker, or even a non-employee, such as a parent or student
- ➔ Victim does not have to be the person who is being harassed – harassment in the workplace can create a hostile work environment even for those who are not directly subjected to the harassing conduct
- ➔ As with other discrimination charges under Title VII, charges alleging sexual harassment can be **filed** with the EEOC (See "Where to File a Complaint" above)

MEMBER TIP

If your employer has a sexual harassment reporting procedure, use it!

In most circumstances, you have an obligation to tell management about the harassment and use the employer's established anti-harassment reporting procedures in order to later assert your legal rights.

You should also consult with your union about filing a grievance. Just keep in mind that even if you file a grievance, you will still need to file a charge with the EEOC within the required deadline (either 180 or 300 days, depending on the state) prior to filing any lawsuit under Title VII.

#METOO ACTIVISTS RAISE AWARENESS ABOUT SEXUAL HARASSMENT AND ASSAULT

The #MeToo movement, which was originally started a decade ago by [Tarana Burke](#), an artist, fashion blogger, and agent for social change, found a dramatic reawakening in the age of social media and public attention to stories of abuse and harassment by celebrities and other high-profile men.

[#MeToo](#) ignited a national conversation about sexual violence in the forms of assault and harassment. In addition to highlighting the pervasiveness of these problems and providing an outlet for survivors, the movement has empowered many people to speak out against workplace and school-based harassment and assault. For example, the Trump Administration's proposed Title IX sexual harassment rule, which would weaken protections for survivors in the education sector, [received over 100,000 comments](#), the great majority of which were in opposition to the rule. And complaints about workplace sexual harassment filed with the EEOC were [up more than 13% from 2017 to 2018](#).

In addition to Burke, who continues to raise awareness about the intersectionality between race and sexual violence, activists like [Trace Lysette](#) bring much-needed attention to the ways in which sexual violence disproportionately impacts trans individuals and other marginalized peoples.¹⁵



15 A 2015 survey highlights the extremely high rates of harassment, discrimination, and sexual abuse and assault of trans people: <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>; Burke calls out the ways in which the voices of “women of color, trans women, queer people” and indigenous women continue to go unheard: <https://time.com/5574163/tarana-burke-metoo-time-100-summit/>

TITLE IX

- ➔ Educators and students are also protected from sexual harassment by Title IX
- ➔ Under current case law, what constitutes “sexual harassment” is similar under Title VII and Title IX, but the standard of proof is higher for plaintiffs in Title IX cases, compared to the standard in Title VII cases¹⁶
- ➔ See [Section II. Sex Discrimination](#) above for more information about Title IX employment complaints

ASPIRING EDUCATORS - KNOW YOUR RIGHTS UNDER TITLE IX

A student-teacher may file a complaint under Title IX when she is subjected to sexual harassment, sexual assault, or sex discrimination on a college campus or in connection with any university program (or any other federally funded education program or activity).¹⁷ In an unpaid internship, a student-teacher may not be protected under Title VII, the federal anti-discrimination laws that protect employees,¹⁸ but she would still be protected under Title IX. She would have a potential cause of action against both the school where she was placed, as well as the university at which she is a student, if the internship was for credit or otherwise a requirement of her program and she reported the harassment to the university. In a recent case involving a graduate student in social work who was subjected to pregnancy discrimination and harassment in an off-campus internship placement, the student won an \$850,000 judgment against her university for its failure to address her complaints of harassment in her internship.¹⁹

16 *Compare Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (school liable for damages in private litigation under Title IX for teacher/student sex harassment only if school had actual knowledge of misconduct and was deliberately indifferent) with 29 C.F.R. § 1604.11(d) (in claims of harassment between employees, an employer is responsible if it “knew or should have known” of the conduct, unless it can show it took immediate and appropriate corrective action).

17 See 20 U.S.C. § 1681(a).

18 See e.g., [EEOC Informal Discussion Letter](#) dated Dec. 8, 2001; HR Dive, [“Unpaid intern not an ‘employee’ protected by anti-bias laws”](#)

19 *Varlesi v. Wayne State Univ.*, 643 F. App’x 507 (6th Cir. 2016); see also, [The Pregnant Scholar: Title IX Case Update](#)



NEA OPPOSES PROPOSED CHANGES TO TITLE IX SEXUAL HARASSMENT RULES

The Education Department under Besty DeVos proposed new rules that would drastically scale back schools’ ability to address sexual harassment while also introducing inflexible procedural requirements for investigating complaints. The new rules have not yet taken effect as of the date of this guidance. NEA [opposed](#) these changes, along with many other [advocates](#).

STATE AND LOCAL LAWS

- ➔ As with other discrimination laws, some state laws prohibiting sexual harassment may provide additional protections separate from federal laws and regulations

STATE LAW RESOURCES

[Strengthening Workplace Sexual Harassment Protections and Accountability](#)

(Report from the National Women’s Law Center, includes a summary of sexual harassment laws by state)

COLLECTIVE BARGAINING AGREEMENTS

- ➔ Union representation can provide additional protections against harassment, including more avenues for awareness and reporting, as well as protections from retaliation and firing
- ➔ Unions can negotiate for contract language that goes beyond the protections afforded by federal and state law and that takes into account the unique challenges of particular work environments²⁰

MEMBER TIP

Grievance procedures can provide for a much quicker resolution than filing with the EEOC or state agency. Even if you use the grievance procedure, you still have a right to file with the EEOC, but the deadlines and other requirements (such as filing with EEOC and receiving a “right to sue” letter prior to filing a lawsuit) still apply. Consult with your union about the best way to remedy the harassment.

ADVOCATE TIP

It is important to make sure that any non-discrimination and anti-harassment provisions in collective bargaining agreements do not waive or limit members’ ability to enforce their rights under federal or state law. You should consult with legal counsel before proposing or agreeing to any contract language related to rights that are also protected under the U.S. Constitution or federal or state statutes.

²⁰ As noted in the “Advocate Tip” on this page, any such contract language should be carefully drafted so as to ensure that members retain their right to bring any statutory claims they may have. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009).

COLLECTIVE BARGAINING AGREEMENTS CAN...²¹

Take a variety of approaches to sexual harassment reporting and responses, for example:

- ★ Require the employer to take affirmative steps to create a harassment-free environment, but require employees to use employer’s complaint procedures outside of the CBA; or
- ★ Grant the union the right to participate in an external complaint procedure on the victim’s behalf; or
- ★ Allow employees to use the regular grievance procedure to pursue sexual harassment complaints.

Address specific concerns identified by the membership, for example:

- ★ Oppose harassment by non-employees, such as parents and students; and/or
- ★ Provide avenues for addressing offensive or bullying behavior before it reaches the point of legally actionable sexual harassment.

SEXUAL HARASSMENT - OTHER RESOURCES

- ★ [EEOC guidance](#)
- ★ [Equal Rights Advocates Know Your Rights](#) guide
- ★ [Legal Aid at Work](#) factsheet
- ★ April 2018, collaboration between the National Women’s Law Center and the AFL-CIO on ways unions can help prevent and address sexual harassment in the workplace: [Fact Sheet](#) here
- ★ AFL-CIO comprehensive [toolkit](#) for union members to address sexual harassment in the workplace

²¹ See NWLC and AFL-CIO toolkits in “[Sexual Harassment - Other Resources](#).”





WHAT TO DO IF YOU HAVE BEEN DISCRIMINATED AGAINST OR HARASSED

If you believe you have been discriminated against or harassed, there are basic steps you can take to better understand, preserve, and enforce your rights.

TIPS AND OPTIONS IF FACING WORKPLACE SEXUAL HARASSMENT OR DISCRIMINATION:

1. OBJECT TO HARASSMENT

In the case of harassment, if you feel comfortable doing so, clearly state to the harasser that their behavior offends you. If the conduct continues, ask them to stop. Put it in writing. If you don't feel comfortable saying this directly to the harasser, make sure to tell a supervisor or someone in HR and document it with, for example, an email. (Being able to demonstrate that you reported the harassment to management may be important if you later need to pursue legal action.)

2. KEEP RECORDS!

For example, make notes of any incidents, including time, location, details, and witnesses; record (and document in emails) when you report problems; and make note of any ways in which the discriminatory or harassing behavior impacts your work or other aspects of your life.

- ✓ If you have co-workers who have witnessed the conduct or experienced harassment themselves, ask them to keep notes.
- ✓ Keep copies of everything you send to your employer and everything you receive back.
- ✓ Keep notes and copies of documents in a secure place, preferably at home rather than at work.

3. LOOK AT YOUR COLLECTIVE BARGAINING AGREEMENT to see what protections it provides.

4. FIND OUT THE PROPER REPORTING PROCEDURES

Check for any school, university, or district policies for reporting discrimination or harassment. If you end up

needing to bring a legal claim, you may have to show that you used the employer's established anti-harassment reporting procedures.

5. CONTACT YOUR UNION REPRESENTATIVES

They can help you map out a course of action, including filing a grievance under your collective bargaining agreement and/or consulting with an attorney about whether or not to file a complaint with a state or federal government agency.

6. BE AWARE OF DEADLINES!

Laws have statutes of limitations, which means your rights can only be enforced for a certain window of time after the conduct has occurred. It is very important that you do not miss the deadlines for filing with the EEOC or state agency that enforces employment discrimination laws, as you usually will not be able to later bring a lawsuit if you have not first filed with the administrative agency. Grievance procedures in union contracts also have time limitations, which are usually much shorter than for enforcing rights under federal and state laws.

7. WHERE THE LAWS COME UP SHORT...

Work with your union to advocate for stronger protections in your collective bargaining agreement or in school board policy (if you work in a non-bargaining jurisdiction), and for stronger local and state laws and [policies](#).

V. PREGNANCY AND BREASTFEEDING

Discrimination and harassment based on pregnancy or breastfeeding are illegal. In addition, employers may be required to provide accommodations for breastfeeding and some pregnancy-related medical conditions. There are many laws, summarized below, that may apply to pregnant, postpartum, or breastfeeding employees. However, which laws will apply depends on the individual circumstances. For example, discrimination may be addressed through the Pregnancy Discrimination Act (PDA), and issues having to do with leave may be addressed by the Family Medical Leave Act (FMLA) and possibly the Americans with Disabilities Act (ADA).

As a legal and practical matter, breastfeeding accommodations may present a unique challenge for educators, most of whom are not covered by the applicable federal law, the "Break Time for Nursing Mothers Act," and therefore need to rely on other federal or state laws, or more likely, school district policies or collectively bargained protections.

PREGNANCY DISCRIMINATION ACT (PDA)

- ➔ The Pregnancy Discrimination Act of 1978 (PDA), an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.*, codifies that discrimination in employment "on the basis of pregnancy, childbirth or related medical conditions" constitutes unlawful sex discrimination under Title VII
- ➔ Prohibits employers from discriminating against employees on the basis of pregnancy (including current, past, potential and intended pregnancy), childbirth, or a related medical condition
 - ✓ Examples of pregnancy-related medical conditions: severe morning sickness, doctor-ordered bedrest, and recovery from childbirth
 - ✓ Applies to employer decisions about hiring, firing, promotions, assignments, training and benefits
 - ✓ Employers cannot unilaterally change work assignments or require pregnant employees to take leave because of their pregnancy
- ➔ Provides for accommodations – Requires employers to make adjustments to allow workers with pregnancy-related limitations to perform their job duties on the same basis on

which they allow for other employees who have limitations due to disability, injury or illness

- ✓ Examples of possible accommodations: reassigning certain tasks; light duty; allowing for more breaks; providing a stool to sit on or other adjustments to a workstation
- ➔ Prohibits Harassment – harassment based on pregnancy violates Title VII
 - ✓ Harassment can include verbal acts, like name-calling; images and graphics; written statements; or other actions that may be physically threatening, harmful, or humiliating
 - ✓ Examples:
 - ★ Supervisor repeatedly makes statements about how pregnant women do not belong at work
 - ★ Co-worker repeatedly comments about sexual attractiveness or unattractiveness of pregnant women, and when reported, employer does nothing about it
- ➔ Prohibits Retaliation – It is illegal for an employer to retaliate against an employee for requesting a pregnancy accommodation or for reporting harassing or discriminatory behavior
- ➔ May also protect against breastfeeding discrimination and provide a basis for asserting a right to an accommodation to pump breastmilk, because lactation is a pregnancy-related medical condition²²

In 2015, the Chicago Board of Education paid out \$280,000 to 8 teachers to settle a lawsuit brought by the EEOC alleging that an elementary school principal discriminated against pregnant teachers by giving them lower performance evaluations and terminating or threatening to fire them.

22 See [EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues](#) ("To continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk, a nursing mother will typically need to breastfeed or express breast milk using a pump two or three times over the duration of an eight-hour workday. An employee must have the same freedom to address such lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions. For example, if an employer allows employees to change their schedules or use sick leave for routine doctor appointments and to address non-incapacitating medical conditions, then it must allow female employees to change their schedules or use sick leave for lactation-related needs under similar circumstances.").

YOUNG V. UPS

In 2015, the Supreme Court decided a pregnancy discrimination case in favor of Peggy Young, a UPS driver who had been forced onto extended unpaid leave and eventually lost her medical coverage because of a lifting restriction. UPS denied Young's request for light-duty, despite the fact that the company provided light-duty to three large groups of employees: those injured on the job; those eligible for accommodations under the ADA; and those who had lost their commercial driver's license due to a medical condition or drunk driving conviction. Young sued UPS under the PDA and ADA. The Court held that an employer's policy that treats pregnant workers differently than others with comparable physical limitations must be based on legitimate, non-discriminatory reasons. The Court made clear that while pregnant workers are not entitled to "most favored nation status" (that is, to be given any accommodation offered to any other employee), Young could win her case on remand by showing that UPS does not have a sufficiently strong reason for refusing accommodations for pregnant employees with lifting restrictions while accommodating non-pregnant employees with lifting restrictions. UPS actually changed its pregnancy accommodations policy prior to the oral argument before the Supreme Court, and settled Peggy Young's case after the Court's decision came down.

ADVOCATE TIP

No educator should be forced to choose between her job and the health of her pregnancy or ability to breastfeed her infant.

For many pregnant and nursing workers, being able to resolve their need for an accommodation at the time when they need it is crucial. Pursuing a grievance or legal action retroactively, after being denied an accommodation or being forced out of work, is often not the best resolution.

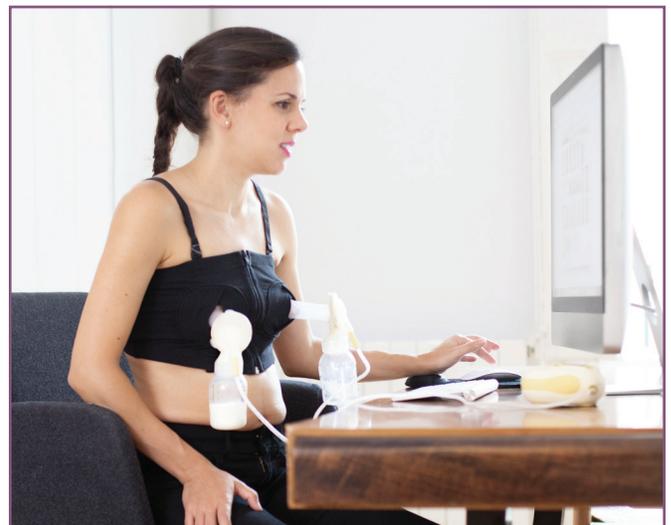
For a pregnant woman who just wants to be able to continue doing her job safely or a nursing mom who wants to be able to breastfeed her infant and keep her job, a union representative or other advocate can provide critical support at the time she needs an accommodation by helping her assert her legal rights and problem-solve with her employer to find a workable accommodation. This could mean anything from just helping facilitate productive discussion with a principal to aggressively pursuing a grievance as soon as an accommodation is denied.

MEMBER TIP

When and How to Tell Your Boss You're Pregnant

Telling your principal or other supervisor that you are pregnant can be stressful. When and how to discuss your pregnancy is a personal decision based on your circumstances, but here are some things to keep in mind...

- ✓ You are not required to tell an employer or prospective employer that you are pregnant prior to being hired or when applying for a new position or transfer.
- ✓ If you are planning to return to work after giving birth, state that clearly.
- ✓ You may want to provide as much notice as you can to allow for planning for coverage for you.
- ✓ If you have a pregnancy-related medical condition that may require you to take additional time off or may impact your ability to do certain job duties, you should advise your employer as soon as possible and ask that they work with you to find an accommodation.
- ✓ If you are going to take FMLA leave, you must give at least 30 days notice prior to when you expect to be out, or as soon as possible and practical in the case of an unexpected absence (such as premature labor or early leave for preeclampsia). It is best to give notice in writing, but oral notice is acceptable too.
- ✓ If you believe you are being treated differently from other employees because of your pregnancy or being retaliated against for requesting accommodations or leave, document what is going on and consider filing a grievance and a complaint with the appropriate agency.



FAMILY AND MEDICAL LEAVE ACT (FMLA)

- ➔ The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601, *et seq.* is a federal law that provides some employees with up to 12 weeks of job-protected, unpaid leave per year
- ➔ FMLA leave can be used for medical appointments, medically-required leave during pregnancy, to recover from childbirth, and to bond with a new baby
- ➔ Only applies to employers with 50 or more employees
- ➔ To qualify employees must have worked 1,250 hours in the previous 12-month period, and the employee must have been employed by the employer for at least 12 months (does not have to be consecutive)

MEMBER TIP

FMLA Leave Can Be Used for Prenatal Appointments and Time-Off Related to Pregnancy Symptom

If you are covered by the FMLA, you can take “intermittent” leave, even for just a couple of hours at a time, in order to attend prenatal appointments or if you have a diagnosed condition such as severe morning sickness. You do, however, have to seek employer approval to use intermittent leave and it is not guaranteed to be granted.

Also keep in mind that, depending on the employer’s policies or applicable collective bargaining agreement, any paid sick leave that is also FMLA-qualifying may be counted toward your allotted 12 weeks of FMLA leave. If this is the case in your job, it would not be beneficial to specifically ask that leave for doctor’s appointments be designated as “FMLA leave” unless you have been denied the time off and need to cite to your FMLA right in order to take that time off.



AMERICANS WITH DISABILITIES ACT

[ADA]

- ➔ The Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101 is a federal law that requires covered employers to provide reasonable accommodations to employees and job applicants with disabilities, and prohibits discrimination on the basis of disability
 - ✓ Note: In some circumstances, leave may be considered a reasonable accommodation under the ADA
- ➔ Applies to employers with 15 or more employees, and to state and local governments
- ➔ Defines “disability” as a physical or mental impairment that substantially limits one or more major life activities
 - ✓ “Life activities” include, e.g., caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working
- ➔ ADA Amendment Act of 2008 expanded the ADA’s definition of disability to include, among other things, some “temporary impairments” related to pregnancy and childbirth
 - ✓ Examples of pregnancy related impairments that could fall under the ADA: gestational diabetes, anemia, edema, and severe morning sickness²³

Although pregnancy itself is not a disability, some pregnancy symptoms and complications may qualify as a disability if they substantially limit a major life activity.

23 Most courts have found that pregnancy alone does not meet the definition of a disability. But there is substantial caselaw finding that “where a medical condition arises out of a pregnancy and causes an impairment separate from the symptoms associated with a healthy pregnancy, or significantly intensifies the symptoms associated with a healthy pregnancy, such medical condition may fall within the ADA’s definition of a disability.” See *Love v. First Transit, Inc.*, 2017 WL 1022191 (N.D. Ill. 2017). As always, because courts in different jurisdictions have ruled differently on this issue, you need to research the protections available in your jurisdiction.

REHABILITATION ACT

- ➔ The Rehabilitation Act of 1973, 29 U.S.C. § 794 is a federal law prohibiting discrimination on the basis of disability in programs receiving federal financial assistance
- ➔ Section 504 of the Rehabilitation Act prohibits discrimination against individuals with disabilities in any program receiving federal financial assistance, including discrimination against employees and job applicants

NEA RESOURCES

See this recent NEA article describing [employee rights under Section 504 of the Rehabilitation Act](#).

WHERE TO FILE A COMPLAINT

Complaints under Section 504 of the Rehabilitation Act can be filed with either the Department of Education's Office of Civil Rights (OCR) or the EEOC.

Complaints about a violation of the ADA must be filed with the EEOC or equivalent state agency.

Although there is no requirement to file an administrative claim in order to bring a lawsuit under Section 504 of the Rehabilitation Act, there is such a requirement for an ADA lawsuit.

MEMBER TIP

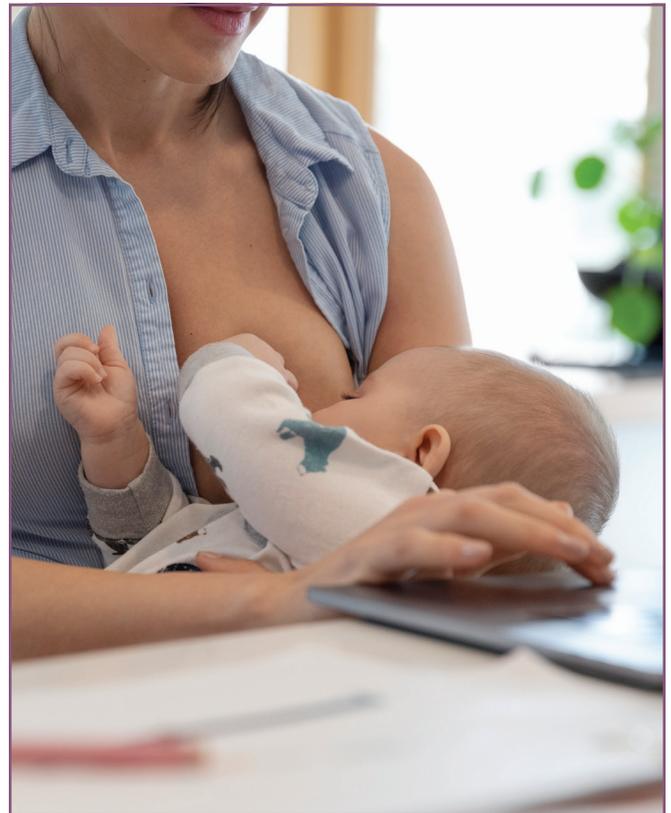
Childbirth and recovery are commonly considered to be disabling. You should always check to see if you have coverage under a temporary/short-term disability policy.

TITLE IX

- ➔ Educators and students are also protected from pregnancy discrimination under Title IX
- ➔ Title IX prohibits employment discrimination or failure to hire based on pregnancy or childbirth²⁴
- ➔ Pregnancy, "false pregnancy," childbirth, termination of pregnancy, and resulting disability or recovery must be treated the same as any temporary disability for all job-related purposes, including leave, seniority, reinstatement and benefits²⁵
- ➔ See [Section II](#) for more information about Title IX complaints

MEMBER TIP

Many of the same laws that apply to working while pregnant will also apply if you need time off or experience discrimination at work because of a miscarriage or an abortion.



24 34 C.F.R. § 106.57(b)

25 34 C.F.R. § 106.57(c)



MAKING THE CASE FOR CONSTITUTIONAL PROTECTION

The NEA has a long history of championing the rights of women to determine if, when, and how to parent, including the right to breastfeed. In the absence of other statutory protections (and often along with other legal claims), legal advocates may challenge laws or policies as violating fundamental rights under the U.S. Constitution, as the NEA did on behalf of member Janice Dike when she was barred from breastfeeding her baby on school grounds during her duty-free lunch period. NEA argued that the right to nurture and rear children is one of the rights encompassed in the right to privacy established by the Supreme Court in *Roe v. Wade*. The trial court dismissed the case, but the Fifth Circuit Court of Appeals reversed, emphasizing that breastfeeding is “the most elemental form of parental care” and like “individual decisions respecting marriage, procreation, contraception [and] abortion” is entitled to constitutional protection. *Dike v. School Bd. of Orange County, Fla.*, 650 F.2d 783 (5th Cir. 1981).²⁶

²⁶ On remand, the district court ruled in favor of the school board, finding that the school board had a compelling interest in maintaining a policy restricting teachers from having their children on school grounds, which could only be accomplished by the broad policy that was applied to prohibit Dike from having her breastfeeding infant on school grounds. The case was settled before the district court’s decision could be appealed. Danielle M. Shelton, *When Private Goes Public: Legal Protection for Women Who Breastfeed in Public and at Work*, 14 Law & Ineq. 179 (1996).

BREAK TIME FOR NURSING MOTHERS ACT

- ➔ Break Time for Nursing Mothers Act, Section 7(r) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207 is a 2010 amendment to the FLSA, added by the Patient Protection and Affordable Care Act
- ➔ For covered employees, requires that employers provide a reasonable amount of break time and a space for lactation (typically, pumping breast milk) for up to one year following the birth of a child
 - ✓ Space must be:
 - ✦ Shielded from view and free from intrusion by co-workers or the public
 - ✦ Available to nursing employees each time they need to express milk
 - ✦ Cannot be a bathroom
 - ✓ Break time does not have to be paid
- ➔ Exempts employers with fewer than 50 employees if providing such break time and space for lactation would cause “undue hardship”

Workers who are exempt from the FLSA (meaning, they are not entitled to overtime pay) – including teachers – are **not** covered by the *Break Time for Nursing Mothers Act*.

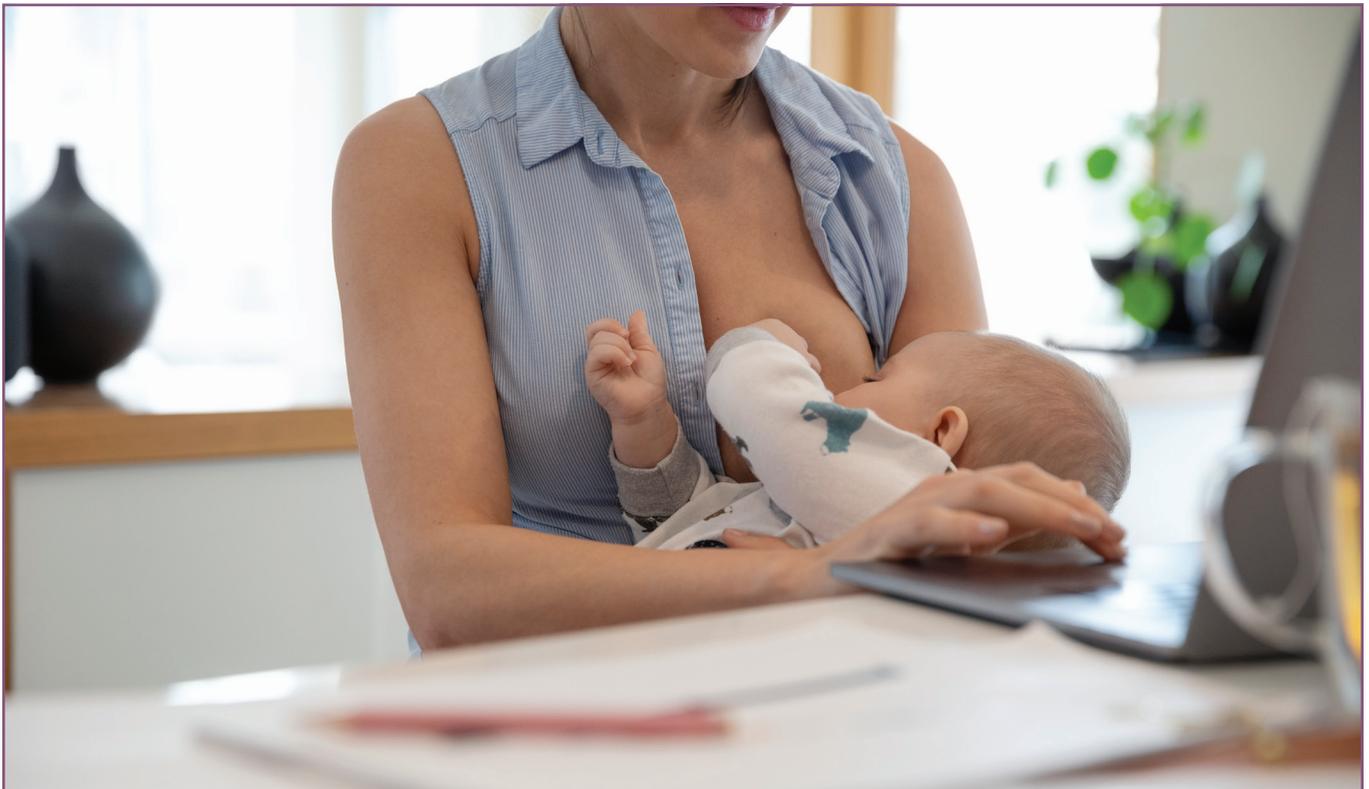
NEA RESOURCES

NEA highlighted the case for breastfeeding in schools in its [Rights Watch](#) column. This article includes tips for bargaining for breastfeeding protections and accommodations.

ADVOCATE TIP

Many employers may have only passing familiarity with this law providing for breaks for nursing mothers to express breastmilk, and some school districts may not be aware that teachers are exempt from coverage.

Nearly one quarter of female workers of childbearing age—over **9 million women**—are not covered by this provision.



Nearly a quarter of working women (over 9 million) of childbearing age are excluded from key FLSA protections for nursing mothers.
Source: EPI analysis of Current Population Survey Outgoing Rotation Group microdata, 2015-2017. *Economic Policy Institute*

STATE AND LOCAL LAWS

- ➔ Many states²⁷ and some cities have passed laws that give pregnant and postpartum workers additional protections, including, in some locations, the explicit right to reasonable workplace accommodations for breastfeeding or pumping

STATE LAW RESOURCES

- ★ Department of Labor – information on state employment law protections related to pregnancy discrimination, accommodations and breastfeeding: [DOL map](#)
- ★ Pregnant at Work’s [website](#) – summary of state laws protecting breastfeeding mothers
- ★ National Women’s Law Center [fact sheet](#)

For a current and thorough assessment of state and local laws, you should contact an attorney in your area.

27 Currently, twenty-two states and the District of Columbia and Puerto Rico have laws clearly requiring break time and space for nearly all workers, including teachers. Other states have added to the patchwork: Texas and Montana cover public employees, while Louisiana and Virginia have passed laws specifically to protect breastfeeding educators.

PREGNANCY & BREASTFEEDING - OTHER RESOURCES

- ★ Pregnancy Accommodations: Tools and educational materials from [Pregnant@Work](#) (Center for WorkLife Law)
- ★ List of common conditions and accommodations from the [Pregnant Scholar](#) (Center for WorkLife Law)
- ★ Department of Education – [Information for pregnant and parenting students](#)
- ★ [NWLC fact sheet](#)
- ★ [EEOC’s guidance](#) for pregnant women in the workplace

If your state or city has not enacted laws to protect pregnant and breastfeeding workers, including educators, consider advocating for better legislation or stronger collective bargaining agreement provisions in your local area. For more information, contact NEA Collective Bargaining and Member Advocacy at collectivebargaining@nea.org.



VI. FAMILY LEAVE

The United States is one of just a handful of countries that do not have a national parental paid leave policy and program. The federal and state laws summarized in this section may provide some protections against job loss as a result of needing time off for family caregiving. However, union contracts are often the most important source of leave rights.

As this [Education Week article](#) highlights, many teachers who want to have children have to cobble together sick days just to have some paid time off with their newborns, and then supplement with unpaid leave. The stress this puts on families and the difficulties it presents for retention in a female-dominated workforce has spurred efforts across the country to get paid leave through legislative efforts and collective action.

“Marianna Ruggerio said when she had her first child, it was only her second year working in the school district, so she had few sick days saved. In order to make ends meet during a largely unpaid maternity leave, she did online tutoring sessions to prepare students for the ACT college-admissions test. The day she brought her newborn son home from the hospital, she did a two-hour call with a student.”

FAMILY AND MEDICAL LEAVE ACT (FMLA)

- ➔ As noted in [Section V above](#), the FMLA provides eligible employees with up to 12 weeks per year of job-protected, unpaid leave
- ➔ Leave can be used both to recover from childbirth and to care for a newborn or newly adopted child or new foster child
 - ✓ Leave to recover from childbirth is limited only to a parent giving birth; bonding leave is available to any parent caring for a new child
- ➔ Employers are also required to continue benefits during this leave, including continuing to pay the employer’s share of health insurance premiums while the employee is on leave
- ➔ Applies only to employers with at least 50 employees
- ➔ To qualify, employees must have worked 1,250 hours in the previous 12-month period, and the employee must have been employed by the employer for at least 12 months (does not have to be consecutive)

AMERICANS WITH DISABILITIES ACT

[ADA]

- ➔ The ADA return-to-work provisions may cover pregnant and postpartum women who experience complications that qualify as “temporary impairments”²⁸
- ➔ Additional information about the ADA can be found in [Section V](#) above

TITLE IX

- ➔ Under Title IX, school employees must be provided with unpaid pregnancy and/or childbirth-related leave for a “reasonable” period of time²⁹
- ➔ Entitles employees to return to same status or a comparable position as held prior to taking leave, and forbids employers from penalizing employees for taking leave (such as by losing promotion opportunities or taking away benefits)³⁰
- ➔ Additional information about Title IX can be found in [Section II](#) and [Section V](#) above

PAID LEAVE

- ➔ Just a handful of states, including Washington state and New Jersey, as well as the District of Columbia, provide paid parental leave for teachers

ADVOCATE TIP

In addition to negotiating for collectively-bargaining paid leave, consider advocating for state and local laws that provide paid leave to all workers. Partner with your local affiliate and/or other advocacy groups. Paid family leave is increasingly on the radars of [policymakers](#) – this is a moment that can be seized!

28 The EEOC lists gestational diabetes and preeclampsia as [examples](#) of pregnancy-related temporary impairments, but other conditions may also qualify.

29 34 C.F.R. § 106.57(d)

30 *Id.*

COLLECTIVE BARGAINING AGREEMENTS

- ➔ Many unions attempt to address the limitations of the FMLA and the lack of paid leave in the workplace by bargaining for paid family leave

NEA RESOURCES

NEA provides sample contract language for paid family leave policies that affiliates can use during bargaining. For a copy of this model contract language, please contact NEA Collective Bargaining and Member Advocacy at collectivebargaining@nea.org.

CHECKLIST AND TIPS FOR DEVELOPING CONTRACT LANGUAGE:

1. **Know your rights!** – Rights under local, state, and federal law are a bare minimum and should be the starting place for negotiating contract language. Make sure you know what is provided by the applicable laws in your area. You can always negotiate for more than what is provided under the law.
2. Provisions for family leave should be non-gendered, and should include coverage for all types of families, for example, adoption, foster placements, and surrogacy.
3. Advocate for continuing wages, health coverage, and other benefits during leave, and make sure to spell out when pay and benefits do and do not continue during leave.
4. Push for language that allows employees to use up any available paid leave before their FMLA leave (and any additional unpaid leave guaranteed under state law) kicks in.
5. Make sure the procedures for requesting leave are clear and not more complicated than they need to be. There should also be grievance procedures in place to challenge the denial of a request for leave and to deal with other issues that may come up under the policy.

FAMILY LEAVE - OTHER RESOURCES

The National Partnership for Women and Families maintains a “[report-card](#)” for all state leave laws, as well as a full [report](#) summarizing each state’s laws.



VII. FAMILY CAREGIVER

DISCRIMINATION

While both men and women may struggle to balance work with family caregiving obligations, women frequently shoulder **more of the labor done in the home**. These responsibilities often include childcare, care for elderly parents or relatives, or care for a close family member with a serious health condition, disability, special needs, or illness.

On a national level, we lack the policies needed to support the realities of working families – policies like paid leave, workplace flexibility, scheduling predictability, and affordable childcare.³¹ This means that employees are often disciplined, and even terminated, because of conflicts between work and family obligations or simply because of negative assumptions made about caregivers. In most states, there is no one law that explicitly protects caregivers from workplace discrimination, but depending on the specific circumstances, one or more of the federal or state laws described below may apply.

FAMILY AND MEDICAL LEAVE ACT (FMLA)

- ➔ Protects the jobs of eligible employees who take up to 12 weeks of unpaid leave per year for serious personal illness, to care for a newborn or newly adopted baby or new foster child, or to care for a seriously ill parent, child or spouse
- ➔ Unfortunately, only applies to employers with 50 or more employees and, in order to qualify, employees must have worked 1,250 hours in the previous 12-month period and have been employed by the employer for at least 12 months total

MEMBER TIP

Under some circumstances, parents may be entitled to take intermittent FMLA leave in order to attend Individualized Education Program (IEP) meetings for their child, where the IEP meetings relate to the parent's role as a caregiver to a child with a qualifying "serious health condition."³²

31 The **Recognize, Assist, Include, Support and Engage (RAISE) Family Caregivers Act**, a law that directs the Secretary of Health and Human Services to develop and maintain a strategy to support caregivers, was signed into law in January 2018. However, implementation has been slow and has not resulted in any immediate benefits for the many working caregivers across the U.S.

32 See **DOL Opinion Letter, FMLA2019-2-A**, (Aug. 8, 2019).

STATE AND LOCAL LAWS

- ➔ Some states have laws or policies that provide additional protections in the form of:
 - ✓ paid family leave;
 - ✓ unpaid leave for workers in smaller businesses that are not subject to the FMLA;
 - ✓ unpaid leave for part-time workers not protected by the FMLA;
 - ✓ allowing unpaid leave for a broader range of caregiving responsibilities in terms of both family members and conditions;
 - ✓ allowing for paid or unpaid time off to attend to more routine health or care needs; and
 - ✓ making workers eligible for unemployment insurance when they temporarily leave the workforce to care for a seriously ill family member
- ➔ Alaska, Connecticut, New Jersey, Oregon, Maryland, and the District of Columbia are examples of states that have laws protecting caregivers that exceed the federal law protections

STATE LAW RESOURCES

For more in-depth summaries of state laws, see resources from the **American Society on Aging**, the **AARP**, and the **National Partnership for Women & Families**.

UNIONS

- ➔ Unions can provide valuable training on how to manage work/family conflicts and advocate for better policies to cover educators

ADVOCATE TIP

Resources for Union Representatives and Advocates

The Center for Work Life Law at the University of California Hastings College of the Law has put together helpful tools and resources for **Union Representatives**. They have also published a **model policy** for employers on preventing discrimination against employees with family responsibilities.

TITLE VII

- ➔ Disparate treatment or discrimination against caregivers in the workplace may be a violation of Title VII, which prohibits sex-based discrimination. Examples of such Title VII violations include:
 - ✓ Questions about caregiving responsibilities during the hiring process that lead to a refusal to hire or promote
 - ✓ Being passed over for promotions or raises because of caregiving responsibilities
 - ✓ Being denied promotions or raises based on stereotypes about how a caregiver is supposed to act or behave – such as “a woman with children should stay home”

TITLE IX

- ➔ Title IX prohibits discrimination based on parenting status, marital status, or whether an employee is or is not the primary wage-earner³³

AMERICANS WITH DISABILITIES ACT

[ADA]

- ➔ Prohibits discrimination based on an employee's need to provide care to a disabled family member
- ➔ Does **not** mandate that employers provide employees with disabled family members with time off or more workplace flexibility to accommodate caregiving responsibilities
 - ✓ May be a basis for relief if the employer gives other employees more flexibility or time off, while denying it to caregivers of disabled family members

SECTION 1983 OF THE CIVIL RIGHTS ACT

- ➔ Public employees may be able to challenge discrimination on the basis of status as a mother/caregiver as violating the Fourteenth Amendment of the Constitution³⁴

33 34 C.F.R. § 106.57(a)

34 See *Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107 (2d Cir. 2004) (holding that “sex-plus” or “gender-plus” discrimination is actionable in a Section 1983 case, as violating the Equal Protection Clause; also noting that individuals have a due process right to be free from undue interference with their procreation, sexuality, and family, citing e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

EMPLOYEE RETIREMENT INCOME

SECURITY ACT (ERISA)

- ➔ Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132, *et seq.* is a federal law that sets minimum standards for most private sector retirement and health plans in order to provide protections for individuals participating in these plans³⁵
- ➔ Can be used to challenge denial of pension credits due to policies that calculate maternity leave credit less generously than other types of leave
- ➔ Prohibits employers from taking adverse actions for the purpose of interfering with an employee/plan participant's right to benefits, for example:
 - ✓ Refusing to hire someone with a disabled child or terminating a woman with a high-risk pregnancy because of concerns about high health insurance costs
 - ✓ Terminating someone to prevent the use of maternity benefits

FAMILY CAREGIVER DISCRIMINATION - OTHER RESOURCES

- ★ Practical resources for navigating the realities of caregiving from the [AARP](#) and the [Center for Work Life Law](#)
- ★ EEOC [guidance](#) on caregiver protection

35 Government plans are not covered by ERISA. See 29 U.S.C. § 1002(32) (defining government plan to include any plan established or maintained by the federal government, state government or political subdivision, or by any government agency or instrumentality). If a plan is exclusively government funded, it is excluded from ERISA coverage. However, where funding includes private sources, such as in a public-private partnership, and possibly even payroll deductions, the plan may be covered by ERISA. See *Graham v. Hartford Life & Acc. Ins. Co.*, 589 F.3d 1345 (10th Cir. 2009) (long-term disability plan covered by ERISA where premiums were paid by employees through payroll deduction); *but see Montoya v. ING Life Ins. & Annuity Co.*, 653 F. Supp. 2d 344, 347 (S.D.N.Y. 2009) (holding that teachers' retirement savings plan was a “governmental plan” excluded from ERISA coverage, even though the plan was funded with payroll deductions).



National Education Association
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