

# Welcome!

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## Pregnancy in the Workplace... Hot Off the Press!

*The Young v. UPS Decision*

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# Overview

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Federal Statutes

*Young v. UPS*

EEOC Guidance

What to do Now

# Pregnancy Charges

	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
<b>Receipts</b>	4,029	3,983	3,745	3,541	3,400
<b>Resolutions</b>	4,130	4,590	4,225	3,580	3,221
<b>Merit Resolutions</b>	955	1,059	907	848	737
<b>Monetary Benefits (Millions)*</b>	\$14.7	\$13.9	\$14.3	\$17.0	\$14.4

Source:

[http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy\\_new.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy_new.cfm)

# Young v. UPS

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“... the difficulties pregnant women face in the workplace are and do remain an issue of national importance.”

Justice Kennedy's Dissent

# Title VII/PDA

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- Title VII of the Civil Rights Act of 1964, as amended
  - Prohibits sex discrimination

# Title VII/PDA

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- Pregnancy Discrimination Act of 1978 – no discrimination based on
  - Pregnancy
  - Childbirth
  - Related medical conditions

# *Young v. UPS* Background

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- Part-time pregnant driver for UPS
- Drivers have to lift 70 lbs.
- Medical Restriction: Not lift > than 20 lbs.
- UPS: Not qualify for temporary alternative job; could not return to work
- LOA, most of her pregnancy without pay; lost medical coverage



# “Facts”

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- Employees willing to help her lift
- Shop steward: “The only light duty requested [due to physical] restrictions that became an issue... were with women who were pregnant.”
- Manager told Young “too much of a liability” and could “not come back” until “was no longer pregnant.”

# Intentional Discrimination Case

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- Title VII, under PDA
- “Women affected by pregnancy... shall be treated the **same for all employment-related purposes... as other persons not so affected but similar in their ability or inability to work....**”
- Claim prior to ADA amendments

# Plaintiff Comparators

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- Employees accommodated – disabled on the job
- Employees with inside job accommodation – lost DOT certification
- Employees accommodated - disability occurring off the job

# “Polar Opposite” Views

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- *Young* argued
  - Entitled to same accommodation would get if work limitation due to different reason
  - Intentional discrimination shown by comparing lack of light duty work for Young yet light duty for some other employees
  - Pregnant and non-pregnant employees treated differently
  - Intentional discrimination

# “Polar Opposite” Views

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- UPS
  - PDA means only that sex discrimination includes pregnancy
  - Pregnancy blind policies are okay; legitimate non-discriminatory reasons
  - Any employee, pregnant or not, who had non-work related injury would be treated the same
  - Not intentional discrimination

# Supreme Court

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- Rejects Both Plaintiff's and Defendant's Views
  - Not “most favored nation”
  - Not simple definition

# Prima Facie Case

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- Genuine dispute as to whether UPS “provided more favorable treatment to some employees whose situation cannot be **reasonably distinguished** from Young’s.”

# Pretext ?

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- “Sufficient evidence” that:
  - Policy imposes “significant burden” on pregnant workers
    - Employer accommodates large % of non-pregnant workers, but fails to accommodate a large % of pregnant workers
  - Employer’s reason is not “sufficiently strong” to justify the burden
    - Multiple UPS policies accommodating non-pregnant employees undercuts UPS’ reasons for not accommodating pregnant employees
  - Inference of intentional discrimination



# Case goes back to 4<sup>th</sup> Circuit

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- To consider UPS' "legitimate" reasons for the policies
- To consider whether Young can show "pretext"
- "Why, when the employer accommodated so many, could it not accommodate pregnant women as well?"

# Impact of Young

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- New analysis required to determine “pretext”
- Easier for employees to get to a jury
- Employers could be liable for compensatory and punitive damages based on facially neutral policy that has a significant burden on pregnant workers

# EEOC Guidance on Pregnancy Discrimination

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- Key issues:
  - What constitutes unlawful discrimination
  - Equal access to benefits
  - How ADA applies to pregnancy

# EEOC Guidance on Pregnancy Discrimination

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- PDA applies to past, current and potential pregnancy
  - Employee says she plans to have children
  - Employee starts in vitro treatments
  - Employee had problem pregnancy before and missed work
  - Manager says “I think Kim is going to have children so I am not sure we should give her this assignment”

# EEOC Guidance on Pregnancy Discrimination July 2014

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- PDA requires same treatment as others who are similar in their ability or inability to work
  - This was the issue in Young
  - E.g. lactation is a medical condition related to pregnancy so can't discriminate because of breastfeeding schedule

# EEOC Guidance

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- PDA requires same benefits of employment
  - Light duty policies – EEOC’s view
    - can’t “deny light duty to a pregnant employee based on policy that limits light duty to employees with on the job injuries.”
      - this was issue in Young
  - If other employees are offered light duty, pregnant employees are entitled - even if does not rise to level of a “disability”

# EEOC Guidance

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- PDA requires same benefits of employment
  - No special medical clearance procedures
  - Cannot force leave
  - Employer's concern about risks to the employee or her fetus will rarely, if ever, justify sex-specific job restrictions for a woman with childbearing capacity
  - Cannot reassign
    - E.g., employer cannot involuntarily reassign a pregnant employee to a lower paying job involving fewer deadlines based on an assumption that the stress and fast-paced work required in her current job would increase risks associated with her pregnancy.

# EEOC Guidance

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- PDA requires same benefits of employment
  - Cannot prohibit from returning for a certain time period after birth
  - Must hold open job for pregnancy-related absence for the same length of time that jobs are held open for employees on sick or temporary disability leave.



# EEOC Guidance

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- PDA requires same benefits of employment
  - Parental leave to bond with and care for child must be provided to men and women equally
    - E.g., if employer extends leave to new mothers beyond the period of recuperation from childbirth, it cannot refuse to provide an equivalent amount of leave to new fathers for the same purpose

# EEOC Guidance

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- ADA Amendments Act 2008
  - Pregnancy itself still not a disability
  - Broadened to include temporary impairments
  - Covers impairments that substantially limit lifting, bending, standing
  - Pregnancy-related impairment that substantially limits a MLA is a disability (29 C.F.R. 1630.2(h)).

# EEOC Guidance

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- ADA Amendments 2008
  - Pregnancy-related temporary impairments include, for example, gestational diabetes, swollen feet, carpal tunnel syndrome, sciatica, depression, preeclampsia

# EEOC Guidance

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- EEOC's list of examples of accommodations for pregnant workers:
  - Redistributing marginal or nonessential functions (e.g. occasional lifting)
  - Altering how an essential or marginal function is performed
  - Modifying workplace policies (e.g. allow water bottle close to an area where no liquids are allowed)
  - Modifying a work schedule (e.g. later arrival/departure to accommodate morning sickness)

# EEOC Guidance

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- EEOC's list of examples of accommodations for pregnant workers:
  - Allowing telecommuting when feasible (e.g. to accommodate bed-rest)
  - Additional leave beyond the sick leave policy
  - Buying or modifying equipment (e.g. a stool)
  - Temporarily assigning to a light duty position
  - Assigning to an open vacant position

# EEOC Guidance

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## “Regarded as Disabled” or Association with a Disabled Person – examples

- Employer withdraws job offer based on learning that applicant had gestational diabetes 3 years ago when pregnant
- Employer refuses to hire the mother or father of a newborn with a disability because it is concerned about time off to care for the child or that the child's medical condition would impose high health care costs.

# Miscellaneous Questions

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- What do employers need to provide for lactating mothers?
  - Reasonable break times each time employee needs to express milk
    - Typically 2-3 times per 8 hours
    - For 1 year after birth
  - Space must be shielded from view, free from intrusion
    - Cannot be a bathroom
    - If < 50 employees, exempted if can show “undue hardship” – federal law only (ACA amending FLSA)

# Miscellaneous Questions

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## Documentation?

- FMLA provides for 12 weeks of leave for birth and to care for the newborn
  - Can use 6 weeks for birth and 6 weeks for care (certification required only for the first 6 weeks or other medically-based leave)
  - Includes pre-natal care
- “Light Duty” on doctor’s note
  - Require what you require for non-pregnant workers to go on light duty
- Pregnancy-related “disability” needing accommodation
  - Require same documentation as other disabled workers provide



# What To Do Now

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- Audit policies
- Update job description
- Review resources
- Train managers

# Audit Policies

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- Audit Policies
  - Consider in light of common pregnancy related concerns – morning sickness, back pain, high blood pressure, lifting or standing limits, bed rest etc.
  - Do policies impacting pregnancy related impairments satisfy ADA
  - Red flags – carve outs; no light duty; lifting restriction, adverse burden, etc.
  - Assess sufficiently strong justification
  - Consistency in application
  - Proactive and not reactive

# Update

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- Job descriptions
- Essential functions
- Consistent with and bolster employer work requirements

# EEOC Resources

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- 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 FMLA, Title VII and ADA
- Employer Best Practices for Workers with Caregiving responsibilities
- All available at [www.eeoc.gov](http://www.eeoc.gov)
- [www.dol.gov/wb/maps](http://www.dol.gov/wb/maps) (shows various states with pregnancy and breastfeeding laws)

# Train Managers: PDA, FMLA and ADA

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- Pregnancy discrimination not allowed
  - Pregnancy, childbirth, related medical condition
  - Current, past or potential pregnancy
- Retaliation not allowed
- Applicant not required to tell you she is pregnant

# Train Managers: PDA, FMLA and ADA

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- Not just about women
- Dads and FMLA
- How to respond to requests from employees with pregnancy related disabilities
- Nursing mom's rights

# Conclusion

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- Pregnancy is a fact of life
- Likely to see more claims given the *Young* decision and ADA Amendments
- Ounce of prevention worth a pound of cure