



Oklahoma Attorney General Scott Pruitt's  
Office of Civil Rights Enforcement Presents

## TITLE VII 50<sup>TH</sup> ANNIVERSARY OCRE EDUCATIONAL OUTREACH

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*50<sup>th</sup> Anniversary of the Civil Rights Act of 1964*

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7.24.2014

Emphasizing Practical, Best Practices for Complying  
With Oklahoma's Anti-Discrimination Act

**[GENDER & PREGNANCY]**

Kathy Neal/McAfee & Taft

## **Kathy Neal**

Kathy Neal's practice focuses on the representation of employers with respect to all aspects of their relationships with employees. She has broad experience in both state and federal courts, before administrative and regulatory agencies, and in arbitration and mediation. Kathy's litigation expertise includes defense of claims of discrimination, wrongful and retaliatory discharge, breach of contract, enforcement of non-competition and confidentiality agreements, wage and hour disputes, and disputes over the payment of commissions.

A significant portion of her employment practice is also dedicated to educating, training and counseling clients on litigation avoidance strategies and compliance with state and federal laws and regulations affecting the workplace. In addition to being a frequent trainer, lecturer and writer on employment-related issues, Kathy routinely counsels clients in connection with employee discipline and terminations, wage and hour issues, employee handbooks and policies, drug and alcohol testing, employee leave and disability, and employment and post-employment agreements.

Kathy has assisted national and regional employers with the implementation of reductions-in-force and group severance programs requiring compliance with the federal Worker Adjustment Retraining and Notification (WARN) Act and Older Workers Benefit Protection Act (OWBPA).

She has also defended organizations against claims of disability and race discrimination under the Fair Housing Act.

Kathy has particularly unique experience counseling employers that are federal contractors on equal employment opportunity compliance-related matters overseen by the Office of Federal Contract Compliance Programs (OFCCP), representing employers in OFCCP audit proceedings, and defending employers undergoing investigation by the OFCCP for discrimination. If any violations are found, her representation includes negotiating reduced fines and penalties as part of the conciliation process.

In addition to her employment practice, Kathy has successfully litigated commercial claims involving such issues as breach of contract, fraudulent conveyances, bulk sales and manufacturers' products liability.

Kathy currently serves as an administrative law judge for the Oklahoma Department of Labor and as an adjunct settlement judge for the United States District Court for the Northern District of Oklahoma.

Kathy's achievements have earned her inclusion in Chambers USA Guide to America's Leading Lawyers for Business, where she was described as "enormously intelligent and well thought of..." Researchers at Chambers & Partners also quoted market observers who praised her as "a great problem solver and a skilled writer." She has also been recognized by Oklahoma Super Lawyers, which also named her to its lists of "Top 50 Oklahoma Super Lawyers" and "Top 25 Women Oklahoma Super Lawyers," and The Best Lawyers in America (commercial litigation; employment law–management; labor law–management; labor and employment litigation). She was selected by Best Lawyers as the "Tulsa Employment Law (Management) Lawyer of the Year" for 2013, an honor only given to a single lawyer in each legal specialty in each community.

In 2013, Kathy was honored with the Neil E. Bogan Award for Professionalism by the Tulsa County Bar Association. In 2011, she was named to the inaugural list of Power Attorneys and Legal Professionals by the Tulsa Business Journal. In 2005, she was awarded the Fern Holland Award by The University of Tulsa College of Law Women's Law Caucus for her work with Springboard — Educating the Future, a non-profit organization responsible for building 200 schools for young girls in rural Egypt.

**Pregnancy and Gender  
in the Workplace**

Kathy R. Neal | MCAFEE&TAFT

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**Pregnancy Discrimination –  
Refresher**

- Title VII as originally enacted prohibited discrimination on basis of:
  - Race, color, religion sex, and national origin
- *General Electric Co v. Gilbert*, 429 U.S. 725 (1976)
  - Held an employee disability benefits plan that excluded coverage for employees temporarily disabled because of pregnancy did NOT constitute gender-based discrimination

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**Pregnancy Discrimination  
Act of 1978**

- Amended Title VII to prohibit employers from discriminating female employees or job applicants based on pregnancy, childbirth, or related medical conditions
- PDA prohibits an employer with more than 15 employees from:
  - Refusing to hire a woman because she is pregnant; and
  - Firing or forcing a woman to leave because she is pregnant

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### Pregnancy Discrimination Nuances

- A pregnant employee must be allowed to keep her job as long as she is able to perform her duties
  - An employer cannot regulate how much time a pregnant employee must take off work either before or after childbirth if she is able to perform her job
  - If an employee is absent for a pregnancy-related condition and recovers, employer can't force her to remain on leave until the baby's birth
  - Cannot have rule prohibiting a return to work for a predetermined length of time after childbirth

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### Pregnancy Discrimination Nuances

- What if an employee's pregnancy prevents her from performing all of her job duties?
  - If employer offers other workers easier duties for a limited time when they cannot do their regular jobs, the employer must offer the same accommodation to pregnant workers
    - Modified tasks
    - Alternating assignments
    - Offering disability leave
    - Offering leave without pay

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### Pregnancy Discrimination Nuances

- An employer cannot treat a female employee who has recently had a baby differently than employees dealing with other types of medical conditions
- An employer cannot take away credit for previous years worked, accrued retirement benefits, or seniority because of maternity leave
  - Must make vacation calculations, PTO accrual, accrual of seniority in the same manner as other temporarily disabled employees.

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**Pregnancy Discrimination Nuances**

- An employer cannot fire or refuse to hire a woman because she has had an abortion.
- An employer must treat an employee who has recently given birth at least as well as it treats other workers who cannot do their jobs for a short period of time.
  - Ex: Employee goes on paid or unpaid leave because of a heart attack
  - Employer must offer that arrangement to an employee who needs time off for childbirth or pregnancy

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**Pregnancy Discrimination Nuances**

- Ex: Employee goes on paid or unpaid leave because of heart attack and job is held for him until he is able to return to work (up to a maximum of 10 weeks)
- Employer must offer that arrangement to an employee who is out because of pregnancy related conditions or childbirth
- Pregnant employees are not entitled to preferential treatment
- Maternity leave is not required on a federal level (many states require it)

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**Pregnancy Discrimination Nuances**

- PDA applies regardless of length of service
- Any health insurance provided to employees must cover expenses for pregnancy-related conditions on the same basis as they cover costs for other medical conditions.
  - Pregnancy-related expenses must be reimbursed in the same manner as those incurred for other medical conditions (whether payment is on fixed basis of a percentage of reasonable and customary charges)

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### Pregnancy Discrimination Nuances

- Employers must provide the same level of health benefits for male employees' spouses as they do for female employees' spouses
- A policy that denies pregnancy leave during the first year of employment but provides leave for other medical conditions is discriminatory
- A neutral policy that prohibits an employee from taking sick leave or short-term disability leave during the first year of employment could have a disparate impact on women

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### Nursing Employees

- Section 4207 of the Patient Protection and Affordable Care Act amends the FLSA to require "reasonable" break time for nursing mothers
  - Exception: Employers with fewer than 50 employees that would experience undue hardship from "significant difficulty or expense" by complying with the requirement

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### Nursing Employees

- Nursing mothers are eligible for the break time for up to one year after her child's birth
  - May take advantage of the breaks anytime she has the need to do so
- Employers must provide a private place, other than a bathroom, for the employee to use to express breast milk

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### Family and Medical Leave Rights

- Employer must employ at least 50 workers within a 75-mile radius
- Not applicable to state and local government employers
- Provides 12 weeks of unpaid leave per year

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### Family and Medical Leave Rights

- Applies to eligible new mothers and fathers
  - Must have worked at least 12 months (not necessarily consecutively)
  - Must have worked at least 1,250 hours over the past 12 months; and

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### FMLA Rights

- If employer is subject to FMLA, it must:
  - 1) Provide FMLA benefits during pregnancy (e.g., bed rest before giving birth)
    - Time taken off for pregnancy complication can be counted against the 12 weeks of FMLA leave for childbirth
  - 2) Provide up to 12 weeks unpaid leave per year to a father or mother to care for a newborn baby, adopted child, or foster child

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### FMLA Rights

- NOTE: Employers can require that an employee must use up all vacation, sick leave, and PTO first, and personal leave time can be deducted from the 12 weeks of FMLA leave.
- NOTE: If father and mother work for the same employer, they are entitled to a combined total of 12 weeks of FMLA leave for childbirth.

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### FMLA Rights

- Time off for prenatal care pregnancy complications, or to care for a sick child is not subject to the combined limit for maternity/paternity leave.
- 3) Reinstatement a parent returning from leave to the same or an equivalent position.
- EXCEPTION: If employee is the highest 10 percent of wage earners and his/her absence would cause significant financial harm to the employer.
- 4) Maintain employees existing level of coverage (including family or dependent coverage) under a group health plan during FMLA leave, provided employee pays his/her share of the premium.

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### FMLA Rights

- NOTE: Cannot discriminate against an employee for taking FMLA leave.
- Must provide same benefits (e.g. life or disability insurance) normally provided to an employee with the same level status.

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### State Leave Rights

- Oklahoma public teachers may be absent because of pregnancy with loss of salary for no more than ten days for contracts of less than 11 months.
  - 11 days for teachers on an 11 month contract;
  - 12 days for teachers on a 12 month contract.

OKLA. STAT. tit. 70 § 6-104

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### No-No's During Application Process

- Do you plan to become pregnant in the future?
- Are you married? Are you single?
- Do you have children?
- Are you using birth control?
- What are your childcare responsibilities?

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### Discrimination Against Workers with Caregiving Responsibilities

- Men and women juggle work and caregiving responsibilities
  - Responsibilities extend to:
    - Spouses and children
    - Parents and older family members
    - Relatives with disabilities
- Women (particularly women of color) remain likely to exercise these duties.

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### Caregiving Stereotypes or Biases

- Assuming:
  - Female workers' caretaking responsibilities will interfere with ability to succeed;
  - Female workers who work part-time or flex-time are less committed to their jobs;
  - Male workers do not, or should not, have caregiving responsibilities;
  - Female workers prefer, or should prefer to spend time with families rather than work;

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### Caregiving Stereotypes or Biases

- Female workers who are caregivers are less capable;
- Pregnant workers are less reliable than others.

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### No-no's Re Caregivers

- Don't:
  - Make stereotypical comments about pregnant workers or female caregivers;
  - Treat female workers without caregiving responsibilities more favorable than female caregivers;
  - Steer women with caregiving responsibilities to less prestigious or lower-paid positions; or
  - Treat male workers with caregiving responsibilities more, or less, favorably than female workers with caregiving responsibilities.

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## Other Gender Discrimination

- Title VII does not explicitly include sexual orientation or gender identity.
  - See: *Glenn v. City of Tulsa*, Case No. 12-CV-18-GKF-PJC (“While both federal and state laws protect employment applicants from gender-based discrimination, neither protects employment applicants from sexual preference based discrimination.”)

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## Gender Discrimination

- EEOC and Courts have said that sex discrimination includes discrimination because an applicant or employee does not conform to traditional gender stereotypes.
  - A woman does not dress or talk in a feminine manner
  - A man dresses in an effeminate manner or enjoys a pastime (like crocheting) that is associated with women
  - A female employee dates women
  - A male employee plans to marry a man
  - An employee transitions from female to male or male to female

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## EO 11478, Section 1 as amended by ED’s 13087 and 13152

- “It is the policy of the government of the United States to provide equal opportunity in federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin [disability], age, **sexual orientation or status as a parent**, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency.”

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### Sexual Orientation / Gender Identity

- As of May 15, 2014:
  - 18 states and D.C. prohibit discrimination based on sexual orientation and gender identity
  - 3 states prohibit discrimination based on sexual orientation only
  - 9 states have an EO, administrative order, or personnel regulation prohibiting discrimination in public employment
  - 3 states prohibit discrimination against public employees based on sexual orientation only

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### Sexual Orientation / Gender Identity

- 1 state prohibits discrimination against executive branch employees based on sexual orientation
- 23 states and D.C. provide state employees with domestic partner benefits
- 3 states provide state employees with benefits based only on marriage, and same-sex spouses are eligible for benefits

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### Equal Pay Act

- Prohibits pay discrimination because of an employee's gender
- Prohibits discrimination against men and women
- Part of the FLSA

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## Lilly Ledbetter Fair Pay Act

- Changes when the statute of limitations begins for workers' claims of pay discrimination under Title VII and the ADEA
  - An unlawful employment practice occurs not only when a discriminatory pay decision or practice is adopted but also when the employee becomes subject to the decision or practice, as well as each additional application of that decision or practice (each time compensation is paid)
  - Directly addressed *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)

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