Breastfeeding in the Workplace

Background

The American Academy of Pediatrics recommends breastfeeding exclusively for the first six months of infancy, followed by continued breastfeeding, as other foods are introduced, for at least one year.\(^1\) Approximately 70% of mothers with children younger than three years old work full time.\(^2\) Women who return to work face barriers to breastfeeding. Studies show that a woman’s career plans are the most significant factor in determining the duration of breastfeeding and whether she breastfeeds at all.\(^3\)

In 2013, the participation of mothers with infants under a year old in the workforce was 57.3%,\(^4\) and of those women, only 25% breastfed for one month or longer while working.\(^5\) Nationally, only 10% of mothers employed full-time who initiated breastfeeding were still breastfeeding at six months.\(^6\) A multilevel analysis in one recent study indicated that mothers living in states without breastfeeding promotion legislation had 63% higher odds of discontinuing breastfeeding after birth and 45% higher odds of stopping after at least 6 months.\(^7\) Legal standards – and courts’ interpretation of these standards – can significantly impact the degree to which the American Academy's breastfeeding recommendations are met.

Accommodating breastfeeding in the workplace benefits employers and the U.S. health care system. A detailed pediatric cost analysis concluded: “If 90% of U.S. mothers [comply] with the recommendation to breastfeed exclusively for 6 months, there would be a savings of $13 billion per year.”\(^8\) Breastfeeding reduces rates of illness in mothers and infants, and could thus decrease annual national healthcare costs by $3.6 billion.\(^9\) Employers reduce health care costs, lost productivity, and absenteeism by enabling workplace lactation because breastfeeding reduces the incidence of short- and long-term health problems.\(^10\) Moreover, women who may otherwise prolong maternity leave to breastfeed may return to work earlier because they can express milk in the workplace.\(^11\)

This brief covers federal and state laws pertaining to breastfeeding in the workplace and the barriers faced by breastfeeding employees.

Federal Breastfeeding in the Workplace Legislation

Title VII – Pregnancy Discrimination Act

The Pregnancy Discrimination Act of 1978 (PDA) amendment to Title VII of the Civil Rights Act of 1964 governs pregnancy discrimination and related issues in the workplace. The goal of Title VII is to “[achieve] equality of employment opportunities and [remove] barriers that have operated in the past to favor an identifiable group of ... employees over other employees.”\(^12\) The Act covers “all aspects of pregnancy and all aspects of employment.” Arguably, this includes
lactation because “a practice that singles out lactation or breastfeeding for less favorable treatment “[...] is facially sex-based [because only women lactate].”\textsuperscript{13} Taking this approach, perhaps Congress actually intended for Title VII to secure lactation rights and some courts have so ruled. However, many other courts have found the statute’s permissive language to be inconsistent with extending broad lactation protections to the workplace.\textsuperscript{14}

**Affordable Care Act – ‘Break Time for Nursing Mothers’**

More recently, the Patient Protection and Affordable Care Act (ACA) amendment to the Fair Labor Standards Act requires employers to provide “reasonable break time for nursing mothers.”\textsuperscript{15} Under the amendment, employers must provide a reasonable break time, as needed, for mothers to express milk until the child turns one year old.\textsuperscript{16} Additionally, employers must provide a private place, other than a toilet stall, for mothers to express milk.\textsuperscript{17} There are several limitations to this law. First, employers are not required to pay for break time used to express milk (other than regular paid time).\textsuperscript{18} Second, employers with less than 50 employees may be eligible for an ‘undue hardship’ exemption\textsuperscript{19} Last, the law applies only to employees not exempt from the FLSA’s overtime pay requirements (generally hourly, not salary, employees).\textsuperscript{20}

**State Breastfeeding in the Workplace Legislation**

**Common Themes and Unique Elements in State Legislation**

Workplace accommodation for breastfeeding employees, and the level of protection afforded, varies dramatically between states. Currently, 25 states and D.C. have workplace breastfeeding legislation.\textsuperscript{21} Though the reach of each states’ legislation varies, there are several common themes. Most states use the same language as the ACA; requiring ‘reasonable’ break time to express breast milk in the workplace. No state requires the break be paid, but some states explicitly say that employers may provide a paid break. Most states require an employer to make a ‘reasonable effort’ to provide a private, secure and sanitary place (other than a toilet stall) where the mother may express milk. Additionally, some states (e.g. D.C.\textsuperscript{22}) elaborate that the location may be a childcare facility in ‘close proximity’ to the employee’s workplace.

Several states have unique and noteworthy elements to their legislation. Although the ACA limits lactation accommodation to one year, generally, state regulations do not impose such timeline restrictions. But, some states provide a maximum up to three years (e.g. Maine).\textsuperscript{23} D.C. and Arkansas specify that break time is necessary “in order to maintain milk supply and comfort.”\textsuperscript{24} Eight states (e.g. California\textsuperscript{25} & Hawai’i\textsuperscript{26}) have anti-discrimination and/or unlawful retaliation provisions.\textsuperscript{27} Six states (e.g. Hawai’i)\textsuperscript{28} include requirements for access to information and education about the legislation.\textsuperscript{29} Furthermore, some of those states publicly disclose instances of workplace breastfeeding discrimination, or provide yearly “report cards” (e.g. Hawai’i).\textsuperscript{30} Finally, only two states include provisions regarding breast milk storage: Montana requires employers to provide facilities for storage, whereas Indiana requires it if possible.\textsuperscript{31}

Conversely, states with legislation using only permissive, not mandatory language provide little protection. For instance, in Rhode Island, employers may provide the reasonable unpaid break time.\textsuperscript{32} Accordingly, the employer is under no obligation to accommodate lactation or to provide any workplace supports.\textsuperscript{33} Similarly, North Dakota, Texas, and Washington do not mandate lactation breaks, though they encourage it.\textsuperscript{34} These states do allow certain designations regarding employer’s support for mothers on company promotional literature, which may incentivize employers to afford accommodations.\textsuperscript{35} Despite these incentives, without mandatory enforcement, there are no legal measures for assisting mothers with complaints about barriers to expressing milk as a working mother.

**California as a Model State Legislation**

Under California law, employers must accommodate breastfeeding employees by providing break time and a private place to express milk.\textsuperscript{36} California is among the states that do not limit how long employees may lactate at work.\textsuperscript{37} While California provides exceptions to lactation accommodation requirements, the exceptions are limited to circumstances when accommodation would “seriously disrupt” operations.\textsuperscript{38} Additionally, the state requires the Department of Public Health to promote breastfeeding in public service campaigns.\textsuperscript{39}
California has anti-discrimination laws prohibiting discriminatory practices in employment related to breastfeeding. Under these laws, the definition of "sex" explicitly includes breastfeeding or "related medical condition" for the purposes of workplace discrimination. Similarly, the Fair Employment and Housing Commission (FEHC) of California has promulgated a set of regulations that specifically note that lactation is "a condition related to pregnancy, childbirth, or a related medical condition." This definition provides women access to a cause of action that has "largely been read out of Federal law." California is one of the only states to enforce penalties against employers who violate a worker's right to express milk — a critical element of legislation for effective enforcement.

Breastfeeding in the Workplace in the Courts

To date, courts have reached inconsistent holdings regarding breastfeeding in the workplace. On the federal level, courts have not always adopted uniform readings of the PDA. Additionally, since this federal statute does not apply to all employers, courts may also be presented with various state law claims. As noted above, there are wide differences on breastfeeding protections at the state level and these differences naturally lead to varying results in state courts.

The Supreme Court has yet to hear a lactation in the workplace discrimination case. As state legislatures and courts continue to address workplace accommodations issues, we may see higher court rulings on the issue. If a workplace-lactation case reaches the Supreme Court, jurisdictional uniformity and protection of lactation under Title VII (as per Congress' intention) may be achieved, and thus lead to improved protections for breastfeeding in the workplace.

In 1983, the Supreme Court held that Congress "made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." Latcation would therefore appear to be an impermissible sex-based distinction under the PDA. However, the broad framing of the PDA has led courts to reach conflicting holdings. As noted below, these historical trends may be changing in light of recent changes in state and federal law.

Several district and federal courts have refused to find workplace-lactation as protected under Title VII despite the broad purpose of Title VII to provide protection to women. For instance, in 1988, the 4th Circuit held in an early breastfeeding in the workplace discrimination case that the plaintiff-employee's discharge was lawful, believing that no Title VII claim was viable and that this case was inappropriate for disparate impact analysis. In this regard, the court noted that under the PDA, "One can draw no valid comparison between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies." This interpretation restricts lactation from Title VII's reach, thus preventing employed-mothers from bringing many workplace lactation claims. In 1999, a district court similarly refused to find that an employee's request to take breaks to express milk at work was protected by the PDA. The court dismissed the plaintiff-employee's claim, stating "[T]o the extent that Jacobson bases her discrimination claim on her assertion that [her employer] would not allow her to pump her breast milk, she fails to state a claim. Title VII and the PDA do not cover breast feeding or childrearing concerns because they are not "medical conditions related to pregnancy, childbirth or related medical conditions."

Historically, this 4th Circuit decision was not an anomaly. Courts generally did not interpret the PDA as offering protection for breastfeeding mothers in the workplace. Federal courts often read the language "on the basis of pregnancy- or childbirth-related medical conditions" narrowly. Under this reading of the statute, breastfeeding was not a medical condition related to pregnancy, but instead a matter of personal choice. For instance, one court concluded that breastfeeding is not a medical condition because it was not sufficiently "incapacitating" or requiring "medical care and treatment." Similarly, another court ruled that discrimination against breastfeeding women is not "severe enough" to warrant action in unlawful retaliation cases. Thus courts rejected employees' requests to "attend to their bodies' lactation" by expressing milk at work. On some occasions, courts refused to consider whether workplace lactation is within the scope of pregnancy discrimination altogether. For example, the Ohio Supreme Court avoided the issue by holding that the plaintiff was fired, not because of breastfeeding, but because she took additional, unauthorized breaks.

The Ohio court's controversial decision gained national attention and may have propelled lobbying efforts just as Congress was considering the health care reform bill. As stated above, the ACA requires employers to provide "reasonable break time for nursing mothers." Consistent with this new federal standard, the FEHC of California held that
an employer's termination of a breastfeeding mother that insisted on her right to breastfeed constituted impermissible sex discrimination.\textsuperscript{58}

Other courts are also beginning to expand breastfeeding protections in the workplace. \textsuperscript{59} Last year, in two cases, the 5th Circuit held that the PDA explicitly recognizes lactation as a ‘related medical condition’ of pregnancy, thus terminating a female employee because she is expressing milk is unlawful sex discrimination. \textsuperscript{60} In 2014, a woman brought a case claiming that her employer ought to provide additional, \textit{compensated}, break time to express milk. \textsuperscript{61} Though the court rejected her claim, this case serves as an example of an attempt to break down barriers to workplace breastfeeding.

\section*{Breastfeeding in the Workplace Laws in Action}

\subsection*{Continued Barriers for Breastfeeding Employees}

Gaps remain in the law as a means to reduce discrimination against breastfeeding mothers in most states. In the past ten years, pregnancy discrimination claims filed with the EEOC\textsuperscript{62} and fair employment practice agencies increased over 48\% from 4,160 in 2000 to 6,196 in 2009 -- a trend that "reflects the resistance of employers to the needs of a female workforce."\textsuperscript{63} Because the ACA does not have an anti-discrimination provision, state law limits an employee’s ability to enforce her rights against adverse action by her employer. Thus, there is great disparity in protection against such discrimination as evidenced by the fact that only eight states provide full protections.

Women working for employers exempted from breastfeeding legislation face insurmountable barriers. And, employees exercising their rights under the law may face continued barriers to breastfeeding due to logistics. Enforcement issues inherently remain -- the term “reasonable” is vague and employers, mothers, and the government may have different conceptions of what constitute a reasonable effort and a reasonable amount of break time. The majority of current state laws do not resolve breast pump and milk storage cost-bearing issues, the reality of the feasibility of taking break time when needed, and logistics of creating a private place. Moreover, existing legislation does not address many implications related to socio-economic disparities. For instance, for health reasons, a woman must express milk roughly every three hours, and this may not be feasible for all employers because of staffing issues. \textsuperscript{64} Low-income mothers are more likely than their higher-income counterparts to return to work earlier. \textsuperscript{65} Moreover, they are more likely to have jobs that are less flexible with break time, and because of their socio-economic position, these mothers may not be able to justify unpaid break time. \textsuperscript{66} Finally, there remain wide disparities in access to skilled breastfeeding support and care across socio-economic, socio-cultural, and racial groupings because there are no universal requirements for third party payers to cover lactation support or breast pumps. \textsuperscript{67}

\subsection*{How Breastfeeding Opportunities Might Be Expanded}

Though no definitive data exists showing that state-level legislation affects overall breastfeeding rates, research indicates worksite lactation programs help encourage mothers to continue breastfeeding once back at work. This, in turn, increases the duration of breastfeeding. \textsuperscript{68} For instance, the U.S. Health Resources and Services Administration Maternal and Child Health Bureau launched a national workplace initiative that includes developing a resource kit for employers. \textsuperscript{69} Some states also have such programs. In California, the Network for a Healthy California – Worksit Program, assists employers in creating ‘breastfeeding-friendly workplaces’ to facilitate employees’ continued breastfeeding of their infants upon returning to work. \textsuperscript{70} Such facilities recognize and support breastfeeding mothers’ need for time at work to express milk in a clean, comfortable, and private space.\textsuperscript{71} If more states and individual workplaces develop programs like these, women may have even less barriers to lactation in the workplace.

Innovative workplace lactation support programs are also effective. A study revealed that roughly 75\% of mothers in lactation programs continued breastfeeding upon returning to work for at least six months.\textsuperscript{72} Moreover, measures of participant satisfaction and perceptions revealed the program’s positive impact of on the mothers' work experience.\textsuperscript{73} A successful California program\textsuperscript{74} enlists agencies to provide employee support. A program hallmark is access to an experienced colleague known as a ‘Trained Lactation Coach’ who breastfed her own children after returning to work. The program’s evaluation revealed more than 99\% of employees returning to work after giving birth initiated breastfeeding.
and 69% of those employees breastfed for at least 12 months. Access to breast pumps and support groups were significantly associated with high breastfeeding duration rates.

**Conclusion**

Progress is being made both federally and at state-level, and in the court system, to accommodate breastfeeding mothers in the workplace. Mandatory statutory language, consistent interpretations of Title VII by the courts, and greater resources for women to appeal lactation discrimination, may help break down the continued barriers to effective accommodation. Employers and the government, not just breastfeeding employees, all have important opportunities to promote effective workplace breastfeeding accommodations.

**Supporters**

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This document was developed by Helen Stolte, Public Health Law Lab Student, Case Western Reserve University School of Law, with supervision from Jalayne Arias, J.D., M.A., Adjunct Professor, Case Western Reserve University School of Law, Jessica Berg, J.D., M.P.H., Interim Dean and Professor of Law, Case Western Reserve University School of Law, and Kim Weidenaar, J.D., Staff Attorney, Network for Public Health Law – Western Region. The Network for Public Health Law provides information and technical assistance on issues related to public health. The legal information and assistance provided in this document does not constitute legal advice or legal representation. For legal advice, please consult specific legal counsel.

**References**


3 National Business Group on Health, Center for Prevention and Health Services, Investing in Workplace Breastfeeding Programs and Policies [hereinafter, Investing in Workplace Breastfeeding].


5 Id.

6 CDC Guide, supra note 2 at 8.


8 AAP Policy Statement 2012, supra 1 at e822.

9 Am. Acad. of Pediatrics, POLICY STATEMENT: Breastfeeding and the Use of Human Milk, 115 PEDIATRICS 496, 497 (Feb. 2 2005), available at http://aappolicy.aappublications.org/cgi/content/full/pediatrics;115/2/496.
10 Investing in Workplace Breastfeeding, supra note 3 at 1.2.

11 Id.


13 Orozzo, Note: Pumping at Work: Protection from Lactation Discrimination in the Workplace, 71 Ohio St. L.J. 1281, 1286 (2010) [hereinafter Pumping at Work].

14 Id.

15 29 U.S.C. § 207.


22 2007 D.C. Stat., Chap. 17-58; B 133.


24 D.C.: (2007 D.C. Stat., Chap. 17-58; B 133) (employers must provide break time “as required by the employee […] to maintain milk supply and comfort.”); Arkansas: (2009 Ark. Acts, Act 621, HB 1552) (the employer shall provide the break time to an employee who “needs to express breast milk for her child in order to maintain milk supply and comfort”).


27 California, D.C., Hawaii, Maine, Mississippi, New York, Montana, New York, and Vermont. Supra note 18.


29 Colorado, Hawaii, North Dakota, Oklahoma, Rhode Island, Texas. Supra note 18.


33 Pumping 9 to 5, supra note 24.


35 Lactation Breaks, Supra note 23 at 146.

36 Cal. Labor Code § 1030 et seq. (2001). See also, Lactation Accommodation, supra note 20 (the minimum requirements of the state’s Lactation Accommodation Law recommends that the location should have the following items: a comfortable chair, small table, electrical outlet, a sink with a safe water source, disinfectant dish soap, and paper towels).

37 Compare 29 USC 207 to CA Labor Code 1030 – 1033.

38 Supra note 18.


40 Supra note 25.

41 Id.
Sarah Andrews, Practitioner’s Note: Lactation Breaks in the Workplace: What Employers Need to Know About the Nursing Mothers Amendment to the FLSA, 30 Hofstra Lab. & Emp. L.J. 121, 144 (2012) (hereinafter Lactation Breaks) (But, it is unclear whether a reasonable accommodation in a given situation might be to allow on-site nursing.”.

43 Id.
44 Jake Marcus, Pumping 9 to 5, Breastfeeding Law: Know Your Legal Rights (2014), http://breastfeedinglaw.com/articles/pumping-9-to-5/ (hereinafter Pumping 9 to 5). See also, e.g., Dept. Fair Employ. & Hous. v. Acosta Tacos (Chavez), No. 09-03-P [2009 WL 2595487 (Cal.F.E.H.C.)] filed 6/19/2009 (the FEHC ordered the employer to pay Chavez $21,645.00 in lost wages plus $20,000.00 to compensate her for her emotional suffering. The FEHC also ordered her to pay the state’s General Fund a $5,000.00 administrative fine; develop a written policy, printed in English and Spanish, prohibiting sex and pregnancy discrimination in the workplace; train all employees and supervisors on the policy; and post a notice stating that the FEHC found the company violated the FEHA and ordered it to pay damages).

45 Newport News Shipbuilding Co. v. EEOC, 462 U.S. 669, 684 (1983) (an employer health plan giving female employees extra benefits for pregnancy-related conditions was unlawful because it was less comprehensive for male employees).

46 Pumping at Work, supra note 13, at 1303.
47 Barrash v. Bowen, 846 F.2d 927, 931, 194 (4th Cir. 1988) (employee’s discharge for not returning to work was lawful). See also, e.g., Wallace v. Pyro Mining Co., 951 F.2d 351 (6th Cir. 1991) (denying personal leave for breastfeeding does not constitute sex-based discrimination).

48 Barrash, 846 F.2d at 194.
50 Id. at 29-30.
51 Pumping at Work, supra note 13, at 1307.
52 Id.
53 McNill v. N.Y. City Dep’t of Corr., 950 F. Supp. 564, 570 (S.D.N.Y. 1996) ("related medical conditions” interpreted as “limited to incapacitating conditions for which medical care or treatment is usual and normal,” and breastfeeding does not constitutes such conditions).

55 Pumping at Work, supra note 13, at 1305.
57 Pumping at Work, supra note 13 at 1283.
58 Acosta Tacos (Chavez), WL 2595487 (This precedential decision incited the California amendment to the term “sex” to include breastfeeding).

59 See, e.g., Falk v. City of Glendale, 2012 U.S. Dist. LEXIS 87278, 14 (D. Colo. June 25, 2012) (holding that breastfeeding is a medical condition, but denied the discrimination based on pregnancy claim because she did not allege, “that her non-lactating coworkers were treated more favorably”).
60 EEOC v. Houston Funding II LLC, 717 F.3d 425 (5th Cir. 2013) (court vacated a decision from the district court that granted summary judgment to the employers, finding that, as a matter of law, discharging a female employee because she was lactating or expressing milk was not sex discrimination); Affidavit in Support of EEOC Complaint, Bockoras v. Saint Gobain-Verallia North America, American Civil Liberties Union (November 6, 2003), https://www.aclu.org/reproductive-freedom-womens-rights/bockoras-v-saint-gobain-verallia-north-america. (a working mother asserted an EEOC charge because she needed to express milk at work. Court held that an adverse employment action motivated by lactation clearly imposes upon women a burden that male employees need not suffer).
61 Wilson v. Ont. County Sheriff’s Dept, 2014 U.S. Dist. LEXIS 110618 (W.D.N.Y.Aug. 8, 2014) (the court reasoned that because the plaintiff did not allege that the lack of compensation did not prevent her from expressing milk, she had no cause of action).
63 Pumping at Work, supra note 13 at 1291.
64 Id.
65 CDC Guide, supra note 2 at 7.
66 Id.
update-to-a-call-to-action-to-support-breastfeeding-a-fundamental-public-health-issue. (some suggested strategies to reduce such disparities include using performance measures and improvements in reimbursement for lactation care”).

68 Public Health Analysis, Supra note 7 at 4.


70 A GUIDE TO ESTABLISHING A BREASTFEEDING-FRIENDLY WORKPLACE, Network for a Healthy California – Worksite Program,  

71 Id.

72 CDC Guide, supra note 2 at 10.

73 Id.

74 A statewide initiative that focuses on workplace policies to build a culture to promote and support healthy habits as part of the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC)). Women, Infants, and Children (WIC), United States Department of Agriculture, Food and Nutrition Services (Last Modified: 10/08/2014), http://www.fns.usda.gov/wic/women-infants-and-children-wic.