University of California, Hastings College of the Law
UC Hastings Scholarship Repository

Center for WorkLife Law | Departments, Centers & Programs

1-2019

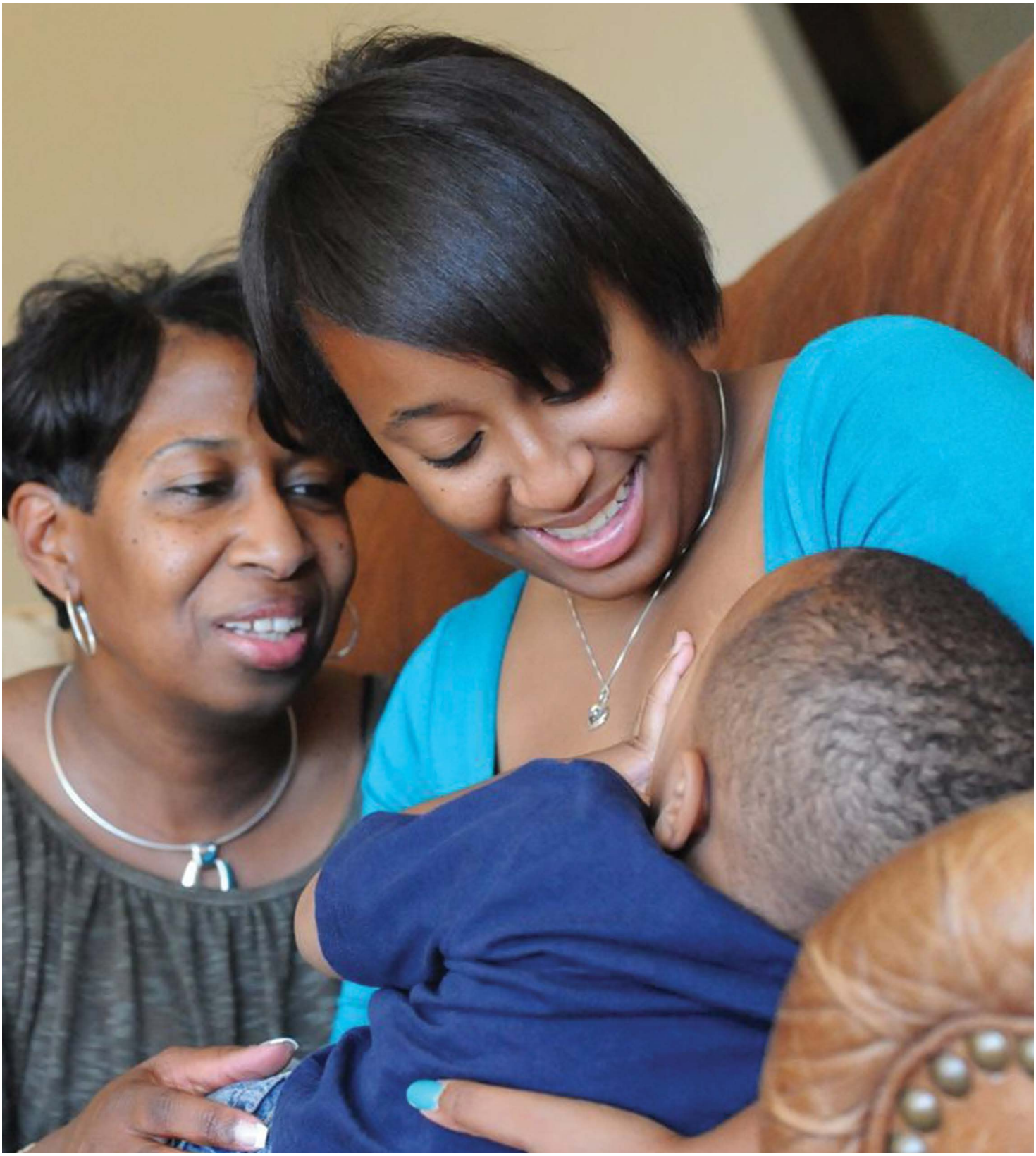
Exposed: Discrimination Against Breastfeeding Workers

Liz Morris

Jessica Lee

Joan C. Williams

Follow this and additional works at: https://repository.uchastings.edu/wll



EXPOSED:

DISCRIMINATION AGAINST BREASTFEEDING WORKERS

Liz Morris, Deputy Director
Jessica Lee, Staff Attorney
Joan C. Williams, Distinguished Professor of Law

CENTER FOR WORKLIFE LAW
University of California, Hastings College of the Law

CONTENTS

ACKNOWLEDGMENTS 3

EXECUTIVE SUMMARY 4

INTRODUCTION 7

PART I: BREASTFEEDING PARENTS FACE DISCRIMINATION AT WORK 8

- **What Are a Nursing Employee's Physical Needs?** 8
  - Break Time 8
  - Private, Clean Space 9
  - Other Accommodations 9
- **Breastfeeding Mothers Face Threats to Their Health and Economic Security** 11
  - Infections, Illness, & Early Weaning 11
  - Financial Harm and Job Loss 13
- **Part of a Larger Pattern of Discrimination** 14
  - Bias Against Mothers 14
  - Discrimination Most Acute in Predominantly Male Industries 17
  - Sexual Harassment 18

PART II: CURRENT LAWS LEAVE BREASTFEEDING WORKERS EXPOSED 19

- **Break Time for Nursing Mothers Law** 22
  - Unintentional Coverage Gaps Exclude Millions of Workers In a Wide Range of Industries 25
  - Limited Protections: Pumping Break Time and Space for Baby's Health, But Nothing More 29
  - Technicalities Make It Nearly Impossible to Enforce the Law 32
- **Title VII of the Civil Rights Act of 1964** 34
  - Federal Law Prohibiting Employment Discrimination Now Protects Breastfeeding Workers 34
  - A Law with Teeth That Prohibits Breastfeeding Discrimination 35
  - Accommodation Rights May Not Exist When Workers Need Them Most 36
- **States Step In Where the Federal Government Has Failed to Act** 39
  - Stand-Alone Break Time and Space Laws 41
  - Broader Reasonable Accommodation Laws 43
  - Less Robust State-Level Protections 45

PART III: SEVEN COMPONENTS OF A MODEL LACTATION POLICY 46

ACKNOWLEDGMENTS

The authors wish to express their sincere gratitude to all of the people who supported this report.

Thank you Barbara, Catherine, Kate Frederick, Leah, Sarah, Sarah Spriesch, Simone Teagle, Stephanie Hicks, and Susan for speaking out and sharing your personal experiences so that other nursing moms will have it easier than you did.

Thank you Heidi Shierholz and Janelle Jones from the Economic Policy Institute for your impressive economic modeling and unparalleled generosity of time and expertise.

Thank you to our colleagues at sister organizations whose brilliance and key insights left their mark on this report: Amelia Psmythe and Cheryl Lebedevitch (United States Breastfeeding Committee), Galen Sherwin and Gillian Thomas (ACLU Women's Rights Project), Dina Bakst, Elizabeth Gedmark, and Sarah Brafman (A Better Balance), Amy Smolinski (Mom2Mom Global), Stephanie Pitcher (Utah Women's Coalition), and Kimberly Seals Allers (Maternal and Child Health Communication Collective).

Thank you to WorkLife Law research assistants Kayla Bowen and Margot Brooks for your superb legal research and meticulous cite checking; Hilary Hardcastle and Holly Herndon, legal research gurus at the UC Hastings Law Library; and LJ Fletcher Pelham and the team of researchers that has worked over the last ten years to collect and code the breastfeeding cases studied for this report, including Thomas Avery, Maribeth T. Charvet, Nicole S. Dinis, Marguerite M. Dorn, Jessica Dummer, Juliana Franco, Danielle Fuschetti, Denison Goodrigh-Schlenker, Claudia Grajeda, Hillary Hansen, Brittany Harmssen, Maha Ibrahim, Mira Karageorge, Marianne Lewis, Cindy Liou, Michelle Morales, Lindsey Pace, Patricija Petrac, Prathima Reddy, and Laura R. Seegal.

For contributing beautiful photographs to this report, we thank United States Breastfeeding Committee, Kris Haro and Johnathan Wenske, Kate Frederick, Peggy Young, Sharon Gustafson, Simone Teagle, and Stephanie Hicks.

As always, thank you to our treasured WorkLife Law colleagues: Cynthia Calvert for meticulously building the FRD case database that served as a main dataset for this report and for providing an inspiring model in the FRD litigation update; Rachel Korn for your quantitative savvy; Anna Garfink for your excellent research contributions; Sky Mihaylo for your impressive research and project management skills; and Jamie Dolkas, Chelsey Crowley, and Nour Elgezawi for all you do to make the Center's work possible.

Many thanks to the Novo Foundation for its generous financial support of this report and the foundation's progressive model of philanthropy that empowers advocates to improve the world for women and girls.

Many thanks to the W.K. Kellogg Foundation for making this report possible and for your unparalleled leadership in the first food field to eliminate racial disparities in breastfeeding.

EXECUTIVE SUMMARY

Despite the medical consensus that breastfeeding reduces major health risks to both babies and mothers, discrimination against breastfeeding workers often forces them to stop breastfeeding or lose their jobs. Lactation discrimination cases from the last decade expose:

Discrimination is widespread, and has devastating consequences.

Breastfeeding discrimination takes many forms, including:

- denying pumping break requests from employees who are in pain and leaking milk;
- firing them just for asking;
- refusing to provide privacy, leaving workers to pump milk with their breasts exposed to coworkers, clients, and the public in physically unsafe conditions;
- commenting on their "tits," comparing breastfeeding workers to animals, and mooing at them.

Almost **three-fourths** of breastfeeding discrimination cases studied involved economic loss, and nearly **two-thirds** ended in job loss.

Nursing mothers facing discrimination suffer serious health consequences, including:

- illness and painful infections;
- diminished milk supply;
- weaning earlier than doctors recommend.

Because pumping breast milk in the workplace draws attention to a woman's breasts and female body, it can expose her to sexual harassment in the form of offensive remarks and hostility. One worker's supervisor mimed grabbing and squeezing her breasts during a company meeting.

Breastfeeding discrimination is found in many industries but is most acute in male-dominated sectors. First responders, law enforcement, and other women in predominantly-male industries make up only 16% of women workers[1] but account for nearly half (43%) of breastfeeding discrimination claims.

Lactation discrimination impacts women at all socio-economic levels but has particularly harsh effects for low-wage workers, who are more likely to be women of color.[2] Often it is part of a larger pattern of discrimination based on motherhood that begins in pregnancy. Some employers take advantage of a worker's lactation-related needs to push new mothers out of the workplace.

Breastfeeding workers have legal rights.

- The Break Time for Nursing Mothers law gives many employees a right to break time and private space to express breast milk for their nursing child during the first year of life.
- Rights under the federal employment discrimination statute, Title VII, have expanded over the last decade. Discrimination based on breastfeeding and lactation is now prohibited.
- Just over half of all states have enacted legislation to provide additional rights. These range from limited laws requiring public school boards to maintain lactation policies to sweeping laws giving robust accommodation rights to every employee across the state.

Despite the patchwork of laws, millions of breastfeeding women are still exposed, without the legal protections they need.

- Due to an unintended legal technicality, nearly one quarter of women workers of childbearing age—over 9 million women—is not covered by the federal Break Time for Nursing Mothers law.[3] Excluded workers range from kindergarten teachers to registered nurses to farmworkers.
- Even for employees who are covered, technicalities make the Break Time for Nursing Mothers law practically unenforceable. Widespread noncompliance exists.
- Title VII of the Civil Rights Act cannot be reliably counted on to provide accommodation rights when workers need them most.
- Even taking state laws into account, **27.6 million women workers of childbearing age nationwide are left without the basic protections needed by all breastfeeding workers** - break time, space, and a clear right to receive other reasonable accommodations as needed to stay healthy and continue breastfeeding.

Lactation Laws Work

Lactation accommodation laws have passed at the state level with bipartisan support and are proven to work. Model legislation has seven key components, outlined in this report, to meet the diverse health needs of all breastfeeding workers. The most critical component for ensuring widespread compliance is a strong enforcement mechanism that holds employers financially responsible for the harm they cause.

Workplace lactation laws increase breastfeeding rates,[4] allow nursing women to earn a living for their families, and send the message that workplaces must take women's needs, as well as men's, into account. Passing state-level legislation would fill the gaps left by federal law and help breastfeeding workers be less exposed.

Breastfeeding Discrimination Exposed

A POLICE OFFICER FACED A SERIOUS INFECTION, INSULTS, POSSIBLE ASSAULT, AND A "FILTHY, MOLDY" BREAK ROOM

"We're not asking for anything huge, just privacy and time to express milk for our children while we're working long hours." (PAGE 12)

KINDERGARTEN TEACHER: "MY BOOBS WERE SO FULL THAT I JUST BEGAN LEAKING EVERYWHERE"

"I started thinking, I'm here teaching these babies basic life skills and I don't even have the time to provide my own baby with food for survival." (PAGE 27)

U.S. AIR FORCE AIRMAN IN NEED OF PUMPING BREAKS TOLD SHE SHOULDN'T GET TIME TO "PLAY WITH HERSELF"

"A lot of people, maybe not a majority, but a noisy minority, think women should have to get out if they want children, but no one suggests men don't become fathers while they are in the military." (PAGE 16)

FIRE DEPARTMENT EMT FACED RETALIATION FOR ASKING TO PUMP: "I BECAME THE BLACK SHEEP"

"There were days I was afraid I'd get fired, or get messed with on the job. Some days I felt super strong, thinking 'I can do this and they shouldn't be treating women like this.'" (PAGE 33)

PRISON NURSE FORCED TO SMUGGLE IN BREAST PUMP, PIECE-BY-PIECE, AS "CONTRABAND"

"It was just such a struggle. Being a nurse and in a prison just felt like a double whammy." (PAGE 18)

COWORKERS COULD GO TO DUNKIN' DONUTS, BUT SHE COULDN'T GO ACROSS THE STREET TO NURSE HER NEWBORN SON

"They didn't seem to care about any of the health risks to me or my son." (PAGE 30)

EMERGENCY ROOM NURSE LEAVES JOB OF SIX YEARS AFTER "BULLYING" JEOPARDIZES HER ABILITY TO BREASTFEED

"I knew breastfeeding my child was important to me. That was a sacrifice I was willing to make for my child." (PAGE 15)

HUMAN RESOURCES PROFESSIONAL FORCED TO PUMP ON THE TOILET

After she quit and took a more supportive job: "I felt human. I felt respected and honored." (PAGE 41)

POLICE OFFICER FORCED TO CHOOSE BETWEEN BREASTFEEDING AND HER BULLET PROOF VEST RESIGNS AND MAKES LEGAL HISTORY.

"All I ever wanted when I took a stand was to protect the next working mother who chooses to breastfeed." (PAGE 38)

INTRODUCTION

In 2018, women's rights were front and center, with women across the country sharing their stories of workplace sexual harassment, unequal pay, and gender discrimination. But one essential right—the right to breastfeed—has received less public attention despite its considerable impact on women's health[5] and economic security.

In the United States, the vast majority of mothers start out breastfeeding their infants. In fact, 3.3 million mothers breastfed following childbirth in 2015, representing over 83% of the mothers who gave birth that year, the most recent for which data are available.[6] In light of overwhelming evidence of health benefits for babies and mothers, breast milk as a child's first food is universally recommended by all relevant major American medical associations. They urge exclusive breastfeeding for the first six months of a baby's life and continued breastfeeding with other foods until at least one year of age, or for as long as mutually desired.[7]

Infants who are not breastfed face higher rates of infection and disease, diabetes, obesity, and childhood leukemia and lymphoma.[8] One study found that more than 900 infant deaths could be avoided in the United States every year if 90% of mothers exclusively breastfed for 6 months.[9] Less well-known is that not breastfeeding heightens health risks for mothers including breast and ovarian cancers, heart disease, postpartum depression, diabetes, and rheumatoid arthritis.[10]

But despite these health impacts and the high breastfeeding initiation rate, a large majority of American mothers do not meet the breastfeeding goals set by themselves[11] or the medical community. Only 25% of infants are exclusively breastfed at 6 months, and just 36% continue to be breastfed at 12 months.[12] Black infants are substantially less likely than white infants to breastfeed,[13] reflecting patterns underlying other race-based health disparities.[14]

When a large majority of American women, and particularly women of color, are not meeting well-established breastfeeding milestones, we must ask, why not? **One major factor is that many mothers have to choose between breastfeeding their babies and keeping their jobs.**[15]

Half of all women in one national survey reported that their employment impacted their breastfeeding-related decisions, and a third said that their employment posed a challenge to breastfeeding.[16] Breastfeeding rates tell the same story. Workplace accommodations for breastfeeding significantly predict both breastfeeding outcomes and breastfeeding duration.[17] Women who receive appropriate break time and private space for pumping breast milk are over twice as likely to be breastfeeding at six months, even after controlling for sociodemographic factors.[18]

Supportive work environments are critical. Yet three out of every five mothers work for employers who do not provide reasonable break time and private space for pumping breast milk.[19] Low-income workers face the greatest barriers. They are only half as likely as middle-income workers and one-third as likely as high-income workers to be provided sufficient break time and private space. Married women are four times more likely to receive break time and private space than single mothers.[20] Perhaps not surprisingly, low-income and single mothers are less likely to initiate breastfeeding and to breastfeed for as long as medically recommended.[21]

Part I of this report documents patterns of discrimination against breastfeeding workers, including the serious health and economic threats they face. Breastfeeding workers are exposed to infections, illness, early weaning, sexual harassment, and job loss – all for trying to feed their babies and take care of their own health needs. Part II of this report reviews laws currently on the books that protect breastfeeding workers, revealing that they are an incomplete patchwork that leave millions of breastfeeding workers exposed to discrimination.

Part III of this report presents solutions. If we are to move toward a society where employers do not prevent women from breastfeeding their babies, where job obligations do not negatively impact women's health, and where women are on equal footing with men at work, we must update existing laws or enact new ones. This report concludes with a discussion of policy solutions that hold the promise of removing workplace barriers to breastfeeding. Enacting these policies would be a critical step toward achieving a reality where new parents have a meaningful choice to continue breastfeeding regardless of class, race, or geography.

PART I: BREASTFEEDING PARENTS FACE DISCRIMINATION AT WORK

> *When women say breastfeeding is hard, do they mean the act of breastfeeding—the literal process of placing a baby on your breast and your nipple into its mouth—or are they mostly referring to the experience of breastfeeding, that it feels impossible with so many structural and social barriers?*
>
> – KIMBERLY SEALS ALLERS, *The Big Letdown*

Most women who were employed during pregnancy (59%) return to work within only 3 months of giving birth, and four out of five (79%) return by their baby's first birthday.[22] Under standard medical guidelines, these women should continue breastfeeding. Whether they are able to do so depends in large part on their workplace.

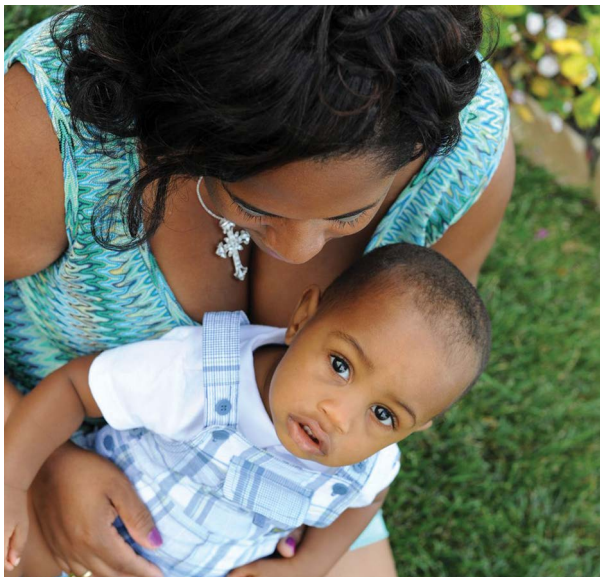
What are a nursing employee's physical needs?

Nursing parents are constantly producing milk. When a new mother is away from her child, she has to express the milk she is producing on roughly the same schedule as her child nurses.[23] If her employment situation prevents her from regularly expressing milk, serious health consequences may follow.

Once milk fills the breast, it must be removed (either through nursing, pumping, or by hand) to avoid excessive build up and painful pressure. Breast engorgement can lead to mastitis, an inflammation of the breast tissue that may involve an infection, abscess, pain, fever, and illness.[24] The condition may require hospitalization and, in some cases, surgical intervention. Mastitis can make it difficult for a mother to work or care for her child and may cause her to stop breastfeeding before she intends.[25]

Inability to express milk can also negatively impact future milk production. The body produces breast milk in response to sucking (or pumping) on a demand and supply basis. A nursing parent who isn't able to pump could suffer a drop in her milk supply, leaving her unable to supply enough milk for her infant, and ultimately unable to breastfeed.[26]

Break Time: Breastfeeding parents need time during the workday when they can pump or otherwise express breast milk. For many workers, this means they need permission from their bosses to take a break from their normal job duties. Typically, during an 8-hour shift, a nursing parent requires 2-3 breaks of 15-20 minutes of pumping time, plus the additional time it takes to takes to travel to/from the pumping space, to set up the pump, and to clean up and store her milk.[27] What constitutes a sufficient amount of time depends on a woman's body, the proximity of her workstation to the pumping space and facilities (e.g., sink, refrigerator), and the effectiveness of her pump. The frequency with which a nursing mother needs to take breaks depends on her child's age, whether the child is eating solid food, and other factors that determine a child's normal nursing schedule. Typically, the younger the child, the more frequently the mother will need to express breast milk.[28]



Source: Kris Haro and Johnathan Wenske, When Nurture Calls Campaign

Private, Clean Space: Breastfeeding parents also need private, clean space near their work area where they can pump. For many workers who do not have a private office, this means they require the employer to identify, create, or simply give permission to use a suitable pumping location. The private space should, at minimum, have a seat and a flat surface where the breastfeeding employee can place her breast pump.[29] Electricity to operate the pump, running water to clean hands and pump parts, and a refrigerator to store milk should be provided whenever possible. These basic provisions will reduce the amount of time the worker needs to pump, clean up, and store her milk. In situations where they cannot be made available, batteries, sanitizing gels, and personal coolers can substitute. Because breast milk is food, pumping inside or near a toilet stall, or other dirty place, is unsafe.[30]

Other Accommodations: Some nursing parents, either because of the nature of their job or their unique physical needs, may require support beyond break time and space. For example, workers whose job duties normally expose them to chemicals, radiation, smoke, or other toxins may need to avoid exposure while breastfeeding.[31] Others with medical complications stemming from breastfeeding, like mastitis, may require a brief time off from work or a change in work duties while they recover. And in the rare instance that a job is simply incompatible with breastfeeding, a temporary reassignment or transfer to another position may be necessary.[32]

MAKING IT WORK

Small businesses and companies in every industry can provide basic lactation accommodations by adopting creative but simple solutions. Employers that support breastfeeding employees with these affordable solutions realize cost savings from increased loyalty and retention, reduced sick time, and decreased health care and insurance costs.[33]

Don't assume that accommodations are impossible. Creative accommodations include:

- Arranging with public entities like libraries, city halls, or universities to allow traveling employees to stop in and use available lactation space.
- Using pop-up tents or employer vehicles to allow outdoor workers in agriculture or construction to pump in privacy.
- Temporarily assigning clean supply closets, changing rooms, manager offices, or conference rooms to serve as pumping space.
- Repurposing an unused "port-a-potty" structure into a lactation space with a seat and counter, to be placed along driving routes for nursing bus drivers or other transportation workers.
- Providing hands-free, battery-operated breast pumps for use by pilots and flight attendants, assuming their own body is compatible with such devices.
- Assigning floater employees or managers to cover a nursing employee's duties during pumping breaks, for example in restaurants or schools.

For more industry-specific solutions, visit the U.S. Department of Health and Human Services Office on Women's Health's breastfeeding resource: https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries.

Breastfeeding Mothers Face Threats to Their Health and Economic Security

Breastfeeding workers whose employers refuse to support their basic physical needs face severe consequences. Many lose their jobs, are forced to stop breastfeeding, or jeopardize their health or the health of their child. These outcomes are documented by the breastfeeding discrimination legal cases filed by workers over the last decade, which were collected by the Center for WorkLife Law in its family responsibilities discrimination case database.[34]

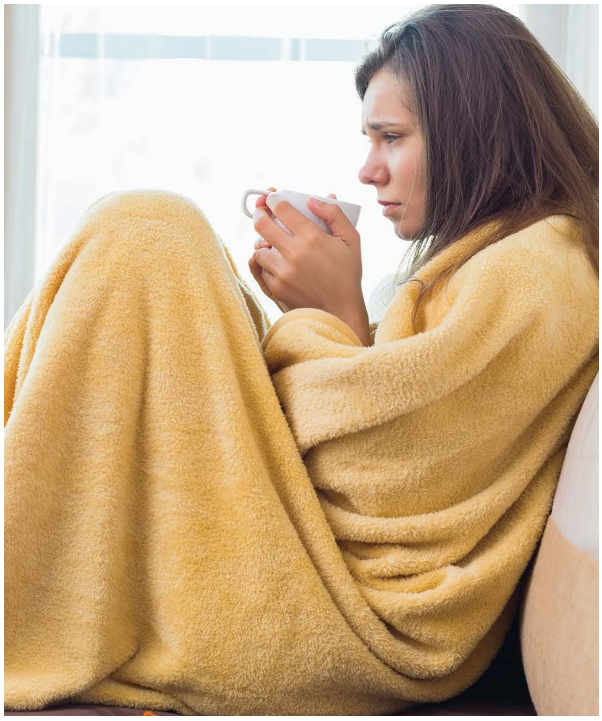
Although women working in male-dominated fields and low-wage and hourly workers face unique challenges, the cases in the WorkLife Law database show that breastfeeding discrimination does not discriminate: it impacts women across a wide range of industries, at all socio-economic levels, and nationwide. The absence of workplace support for breastfeeding can lead to physical and financial harms that negatively impact women and their children for years to come.

Infections, Illness, & Early Weaning

One construction worker in New York was forced to pump milk in improvised locations like a "make-shift bathroom" and inside an air-conditioning unit with her coworker serving as a "look-out" after her employer refused to provide private pumping space. She said the situation was so stressful, she stopped breastfeeding her child earlier than she had planned.[35] Her choice makes sense, as breastfeeding women experiencing stress are more likely to suffer from breastfeeding-related diseases like mastitis and give up breastfeeding earlier.[36] This and other cases dramatize the ways employers leave women with no choice but to stop nursing, even when they want to continue.

Another breastfeeding mother, a state trooper from Connecticut, said her breast milk production diminished after she was denied appropriate pumping facilities, ultimately causing her to stop breastfeeding before she was ready.[37] Similarly, Allison was unable to produce breast milk after being denied adequate pumping breaks and space during her shifts as an EMT. Allison believed that switching her baby to formula-feeding caused medical problems.[38] Another public safety worker, a 911 dispatcher named Katie, says she had to work in a soiled bra and suffered three breast infections after her supervisors refused to provide adequate accommodations. When she told her sergeant, he "laughed, made a 'moo' noise, and walked away."[39]

A Home Depot cashier says she suffered similar health consequences when her request for break time and a private space to pump was denied. When the cashier complained to management about her supervisor's failure to provide the necessary accommodations, her supervisor accused her of "gossiping" and retaliated against her by changing her work schedule and assigning her to an isolated position. Due to the lack of accommodations and related stress, her breast milk supply diminished. Eventually, she was fired.[40]



A POLICE OFFICER FACED A SERIOUS INFECTION, INSULTS, POSSIBLE ASSAULT, AND A "FILTHY, MOLDY" BREAK ROOM

Simone Teagle was an officer with the New York City Police Department for 12 years when she returned to work three months after her son was born, committed to continuing breastfeeding. She found "I was an outcast for deciding to give my child milk that was made for him."

Often she had to work her entire 9-hour shift without pumping. This threatened both her health and her milk supply. "I had blood in my milk from waiting so long," "a fever, aches and pains, and other flu-like symptoms." It was "super-painful" mastitis, "but I had to keep working."

"Breastfeeding has been important to me because I see the health benefits in my son. He's hardly ever sick. I don't have to worry about any side effects from formula." But the difficulties she faced meant, "I lost a lot of my milk supply."

Simone's requests for a clean, private place to pump were denied by numerous supervisors, the department, and the employee relations unit. She had to pump in a "filthy, moldy" break room in front of female colleagues. One colleague told her she looked like a cow and her nipples like udders.

"There were days when I just didn't want to deal with the comments, and so I would pump in my car. [But] I was still wearing my NYPD uniform, so having my breasts out in public made me a possible target for assault."

"This is not 1950. There are female police officers, and we need to be able to pump. We are officers, but we are mothers too. We're not asking for anything huge, just privacy and time to express milk for our children while we're working long hours to do our duties. I don't think it is that hard."

"I was made to feel like a small, horrible person over something that my body was supposed to do."

"It has been a lot, a heavy burden to carry," but Simone has persevered and recently hired a lawyer. "Police officers are supposed to represent justice. But I was not given my rights." "I hope to get a proper facility for women that have children after me, so no one else will have to go through what I have gone through."

Interview of Simone Teagle, October 25, 2018.

Financial Harm and Job Loss

Breastfeeding disputes at work can have direct and dire economic consequences. Seventy-four percent (74%) of the breastfeeding cases from the last decade involved claims of economic harm resulting from the employer's failure to accommodate or related discriminatory action. Sixty-three percent (63%) of all cases ended in job loss, either because the employee was fired (43% of cases) or forced to resign (20% of cases). This can have devastating consequences for poverty-wage workers, who are more likely to be women of color.[41]

Workers who experience job loss may be more likely to pursue legal claims, so these numbers are not necessarily representative of all employees who face discrimination, but these data confirm that breastfeeding accommodations are not only a health issue, but an economic one as well.

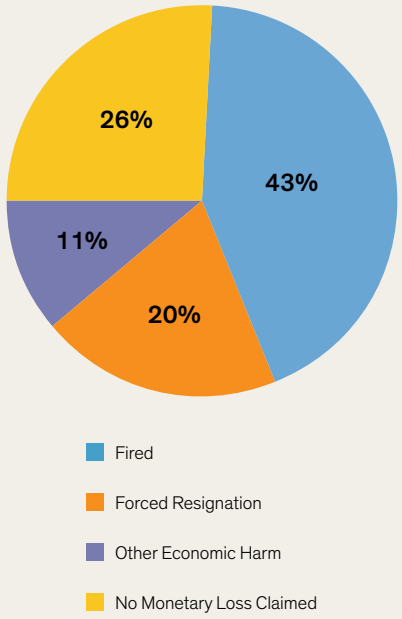
Marina, a taqueria cashier in California, worked from 5 p.m. to 2 a.m. for $7.55 per hour. After giving birth, Marina returned to work when her baby was one month old. On her first day back, she breastfed her newborn inside her car during her break. On her second day back, the taqueria owner confronted Marina about nursing during her shift, forbidding her from returning to work until she'd weaned her baby. When Marina explained to the owner that she needed to work, he fired her. The mother of four struggled financially to support her family. She diligently looked for other jobs but was unsuccessful, in part because Marina had to work a night shift to share childcare responsibilities. With no steady income, Marina and her partner were forced to take loans and rely on family donations and food boxes from her church.[42]

Low-wage women, like Marina, have a particularly difficult time juggling breastfeeding with work. Such women lack control over their working conditions, often faced with limited break time, a lack of facilities for pumping and storing milk, work requiring constant customer contact, and limited support from co-workers.[43] Low-wage hourly workers may also find it difficult to pump at work because their pay may be reduced when they take breaks.[44]

But at the other end of the economic spectrum, highly compensated professionals also face discrimination. A pediatrician in Georgia said the medical practice where she treated children failed to provide adequate break time and suitable space for pumping milk. When she told her boss, also a pediatrician, that she would be taking pumping breaks for an extra two weeks, he became angry, complaining that her pumping breaks were impacting her productivity. He soon fired her.[45]

A lawyer in New York similarly faced discrimination after having a baby and seeking accommodation for breastfeeding, she said. Following her return from maternity leave, she was expected to work 60-70 hours per week and faced harsh treatment for pumping breast milk in the office. Her supervisor, a partner at the law firm, referred to women who breastfeed as "cows." After complaining about discrimination and long work hours that interfered with breastfeeding and child care, she too was fired.[46]

Financial Consequences of Breastfeeding Discrimination*



* *As alleged in breastfeeding discrimination cases from the last decade*

Part of a Larger Pattern of Discrimination

Lactation discrimination is intimately related to, and entangled with, bias against mothers and women. While some women are fired outright and seemingly out of nowhere when they request accommodations, other breastfeeding mothers face a pattern of unfair treatment that begins with pregnancy, maternity leave, or simply the first day on the job in a male-dominated workplace.

Bias Against Mothers

A textbook pattern of "maternal wall" bias, or bias against mothers at work, involves an employee who appears to be on the right track—receiving positive feedback and increased responsibilities—until she announces her pregnancy. Suddenly, her competency is called into question and her contributions are no longer valued. She may be subjected to negative comments about the exaggerated impact her pregnancy has on her employer. She may be pressured not to take a full maternity leave, or retaliated against when she does, demoted or reassigned to a less desirable position upon her return to work. A request for a breastfeeding accommodation is a lightning rod in the hand of an employee who has already been devalued, portrayed as a company burden, or written off.

The experience of Angela, an insurance company employee in Iowa, followed this pattern. Angela's supervisor made negative comments during her pregnancy and expressed annoyance when she requested an accommodation for pregnancy complications, she says. The supervisor "teased" the employee about taking only one week of maternity leave because they were "too busy for her to take off that much work." After the baby was born, Angela's supervisor told her to come back earlier than previously agreed. On her first day back, Angela's manager told her that "none of her work had been completed while she was on maternity leave, that she had two weeks to complete the work, and that she would have to work overtime to accomplish this, and that if she failed to catch up, she would be disciplined."[47]

The final strike against Angela came when, after repeatedly asking for a private space to pump, the nursing employee went to her supervisor in tears pleading for help. While her two-month old son was nursing every three hours, it had been five hours since she last pumped, and she was in considerable physical pain. Instead of helping her find a private space, her supervisor responded, "You know, I think it's best that you go home to be with your babies." Angela's supervisor gave her a paper and pen, and dictated a resignation letter.[48] Angela's pumping needs were used against her to push her out of her job.[49]

The experience of an elementary school teacher in Colorado similarly followed a pattern of unfair treatment beginning in pregnancy. After Lisa announced her pregnancy, she says she became subject to strict scrutiny by her supervisor, who began making frequent unannounced visits to observe her teaching. She was required to reschedule prenatal care appointments and denied permission to take more frequent bathroom breaks necessitated by pregnancy. When she was out on maternity leave, the new mother was frequently contacted to come into work to assist her substitute teacher. When Lisa returned full-time as a breastfeeding mother, she was denied adequate breast pumping breaks and subjected to continuing criticisms. She was terminated at the end of the year, with the explanation that she was "not a good fit."[50]

Breastfeeding draws attention—via noisy pumps, bags of milk in the company fridge, and time away from work duties—to an employee's motherhood role. As a result, breastfeeding makes employees vulnerable to the strong negative assumptions mothers face that they are less committed to their jobs and less competent to perform them, along with all the hiring, pay, and promotional consequences that flow from those assumptions.[51] Mothers of color are even more likely to face workplace bias,[52] and so may be particularly vulnerable to backlash when they request accommodations, breastfeed, or pump milk at work.

EMERGENCY ROOM NURSE LEAVES JOB OF SIX YEARS AFTER "BULLYING" JEOPARDIZES HER ABILITY TO BREASTFEED

"My reason to go into nursing was to help people, so I would never leave a patient in need," said Barbara, but she needed coverage from her coworkers to take regular pumping breaks. Instead she was told, "just give your kid formula."

A lot of her coworkers took dinner or smoking breaks just an hour or two after starting work. "That shouldn't take priority over me pumping when I'd been there for 6 hours and I'd feel like my breasts are bursting—but it did." When Barbara did find time, she had to scramble to find space. "I pumped in the CAT scan area, the ultrasound room. Any free room—next to bedside trays that had dried blood I had to clean up before I could get out my equipment."

When Barbara asked her manager for help, he ordered her to drop a pumping break and to spend no more than 10 minutes pumping. She explained that this would jeopardize her health and milk supply, but her manager didn't seem to care. Barbara sought assistance from human resources, which clarified that she should be allowed to take breaks as needed. But her manager responded by "bullying" Barbara and writing her up for infractions like "failure to socialize."

"It just became too much. It affected my home life. It affected my baby. My milk supply dropped. It was spiraling downhill."

Just under three months after she returned from maternity leave, Barbara quit her job. "I knew breastfeeding my child was important to me. That was a sacrifice I was willing to make for my child."

Interview with Barbara, October 18, 2018.

U.S. AIR FORCE AIRMAN IN NEED OF PUMPING BREAKS TOLD SHE SHOULDN'T GET TIME TO "PLAY WITH HERSELF"

Sarah faced hostility from the moment she returned to work after having her baby when she was an active service airman. "They didn't think anyone deserved to have 6 weeks off for having a baby." She was "bullied" for breastfeeding, and although she had rights under the Air Force Instruction on Breastfeeding, Sarah found her supervisors and coworkers "don't know it, don't care to learn, and also think it is a waste of resources to have an airman pumping or nursing."

Sarah was told to feed her baby formula instead, given assignments that couldn't be completed while pumping, and prohibited from storing her breast milk in the freezer. "The room that I pumped in didn't have a lock, no privacy, it was an equipment room and people were walking in almost daily on me." One supervisor told Sarah she was out of uniform and had to pump with her shirt on. Another said, "I shouldn't get time to play with myself."

"A lot of people, maybe not a majority, but a noisy minority, think women should have to get out if they want children, but no one suggests men don't become fathers while they are in the military." In part because of the discrimination she faced, Sarah left the Air Force.

Interview with Sarah, October 9, 2018

EXPOSED: MOTHERS IN THE MILITARY

All five branches of the military now have supportive breastfeeding policies that apply to uniformed service members.[53] However parents with limited postpartum leave or on deployment or assignment away from their babies continue to face challenges. Even with supportive policies, a lack of education and awareness means that some nursing mothers in uniform continue to face significant pushback.[54]

Discrimination Most Acute in Predominantly-Male Industries

Women in male-dominated industries are more likely to face hostility and retaliation for breastfeeding. Nearly two-thirds (64%) of the breastfeeding discrimination cases in the WorkLife Law database come from industries where there are more men than women, even though less than a third of women (30%) nationwide work in such industries.[55] First responders and public safety workers like police, firefighters, EMTs, and emergency dispatchers filed a disproportionately high number of the discrimination claims, as did women working in law enforcement occupations more generally. Although only a small percentage (16%) of women work in predominantly-male industries[56] in this country, close to half (43%) of all breastfeeding discrimination cases were brought by women working in such industries.

Breastfeeding women working in male-dominated industries like public safety and construction face an uphill battle. As in other industries, their bosses and coworkers fail to understand their breastfeeding-related needs. But for women in predominantly-male workplaces, a request for breastfeeding accommodation can serve as tangible "proof" that they don't belong. As noted by one witness to a case of breastfeeding discrimination at a construction and engineering firm, "[T]here is an 'old boys club' mentality at [the company], and some of the men resent females being in what they believe to be a 'man's job.'"[57]

In that case, Sara, a welding apprentice in Tennessee and the only female welder to ever work for her company, says she was on track to complete her apprenticeship until she disclosed her pregnancy. After returning from maternity leave, Sara's instructor was sporadic in his teaching, dismissive, hypercritical, and exhibited anger toward her. Sara was told that if she did not stop breastfeeding, she could not weld and might have to go back out on leave, because of potential risks to her newborn baby.

Only after Sara lodged a complaint with the company's ethics hotline did they determine that she could in fact weld while breastfeeding her child. Even after she was technically allowed to resume welding, Sara wasn't given adequate training and was held to unreasonably high performance standards. An experienced welder who also worked for the company said he believed Sara was "set up to be terminated." He explained, "many men do not feel women should be working in certain trades, such as welding."[58]

In Pennsylvania, a police officer was subjected to sex-based discrimination and harassment from the beginning of her time on the police force. Traci says she faced threats of physical violence from fellow officers, interference with doing her job, and sexually derogatory remarks for years. The police chief told Traci she would be fired if she ever had a baby. When she did have a baby, Traci was harassed and denied accommodations.

After returning from leave Traci pumped milk during her lunch breaks at her mother's house in a neighboring community. When the police chief found out, he forbid Traci from leaving the geographic boundaries of the town during her shift, even though other male officers were allowed to leave to eat lunch at their homes. The breastfeeding officer was told she could instead pump in a public place that had "constant incoming and outgoing traffic." After trying to use that space on two occasions, she felt too uncomfortable and stopped.[59]

PRISON NURSE FORCED TO SMUGGLE IN BREAST PUMP, PIECE-BY-PIECE, AS "CONTRABAND"

Susan knew that the prison where she worked as a nurse didn't have a strong track record of accommodating breastfeeding employees. Her coworkers were mostly men, and the one woman who needed accommodations in the past was forced to pump in the bathroom.

Security protocols required that Susan receive permission to bring her breast pump through the security check point. Susan initially secured permission to bring in an electric-powered pump. But when she learned the only place she would be allowed to plug it in was the bathroom or a busy break room, she asked for permission to bring in a manual pump instead. Her request was ignored for months. "It was just such a struggle. Being a nurse and in a prison just felt like a double whammy."

As a result, Susan had to go outside in freezing weather and pump in her vehicle. She was often interrupted by prison security personnel who thought this was suspicious behavior, and always had to pass through security to regain entry. "From start to finish this was a 40-minute ordeal."

Because Susan was sometimes the only nurse for over a thousand inmates, spending so much time outside made it difficult to care for her patients. When it became too much, Susan weighed her options and decided to smuggle her manual pump into the prison—piece by piece—so she could pump inside the medical unit.

Although the pump was considered contraband, she felt pumping on site was necessary, but it caused stress and close calls: "I cannot tell you how many times I had to put my boobs away in a hurry, get my bra straight, and respond to an emergency."

Interview with Susan, October 18, 2018.

Sexual Harassment

Women in male-dominated industries also are more likely to experience sexual harassment,[60] which can include derogatory remarks or threats made because of breastfeeding that cause a hostile work environment. Because pumping milk necessarily draws attention to a worker's breasts and female body, it can expose her to offensive comments, or other hostilities. A Rhode Island mother who lost her ability to breastfeed because of her unsupportive work environment says that she was forced, while pumping, to listen through paper-thin walls as her male coworkers made comments about her "tits" or "boobs."[61]

When Eva, a storage facility clerk in California, disclosed her pregnancy to her supervisor, he responded by yelling and throwing papers at her. "You're four, five months pregnant now? In a few weeks, with your belly, you're not going to be able to do your work, and then you're going to be breastfeeding, and it's going to cause even more problems." Eva was soon fired.[62]

Rebecca, a breastfeeding television network coordinator, says she suffered panic attacks and sleeplessness when her supervisor harassed her because of breastfeeding. Her boss commented during a meeting that "breastfed babies were obsessed with women's breasts." When Rebecca felt uncomfortable and tried to leave the room, her supervisor said, "wait, wait! I'm going to demonstrate on you." The supervisor placed her hands an inch away from Rebecca's breasts, simulated grabbing and squeezing, and then attempted to lay her head on the employee's chest.[63]

Monica, a federal employee in Colorado who worked with cattle ranchers, says she was regularly subjected to derogatory comments about breastfeeding from her male supervisors, sometimes comparing breastfeeding women to animals. When Monica told her boss that another office provided lactation facilities for nursing mothers, he responded that the lactating employees "would be lined up like cows [...] at pumping stations." In reference to her maternity leave, Monica's boss explained to a group of livestock owners that she had been away from work "calving," to which they chuckled. Monica said her boss's comments made her feel "disrespected, humiliated, and belittled."[64]

PART II: CURRENT LAWS LEAVE BREASTFEEDING WORKERS EXPOSED

> *Before the nineteen-nineties, electric breast pumps, sophisticated pieces of medical equipment, were generally available only in hospitals, where they are used to express milk from women with inverted nipples and from mothers of infants too weak and tiny to suck. Today, breast pumps are such a ubiquitous personal accessory that they're more like cell phones than like catheters.*
>
> – JILL LEPORE, *The New Yorker* [65]

The right to pump breast milk at work, widely demanded by women in today's workforce, was unheard of by their mothers' generation. Today, breastfeeding discrimination and failure to accommodate lactation are increasingly recognized as obstacles to women's equality.[66]

Although workplace breastfeeding discrimination cases were not unheard of in the nineteen-nineties and early two-thousands, there has been an explosion of them in recent years. A 2016 WorkLife Law report found lactation cases jumped 800% in the preceding ten years, although the overall number remains relatively small compared to cases alleging other forms of employment discrimination.[67]

This period has seen remarkable progress in legal rights for nursing workers. The federal Break Time for Nursing Mothers law passed in 2010 to require employers to provide break time and private space for expressing breast milk during the workday. Three years later, a federal appellate court issued a groundbreaking legal opinion that Title VII of the Civil Rights Act of 1964 makes it illegal to fire an employee because she is breastfeeding or asks to pump breast milk.[68] Also during this time, states enacted their own laws to give increased rights to breastfeeding workers by filling in some of the gaps left by federal law. This substantial progress on an accelerated timeline was possible because of the tireless work of committed advocates nationwide.

Despite these advances, protections for breastfeeding workers remain an incomplete patchwork of laws, leaving both breastfeeding mothers and their employers confused.

Due to major gaps in coverage, limited protections, confusing legal standards, and enforcement challenges, millions of breastfeeding workers nationwide still do not have an unequivocal right to necessary workplace accommodations and fair treatment.

Part II of this report reviews the major federal and state workplace breastfeeding laws to measure their strength and examine their shortcomings. Based on this analysis, Part III will outline concrete policy solutions to fill in the gaps left by current law.

Breastfeeding Rights Over Time

1964
Congress passes Title VII of the Civil Rights Act to prohibit discrimination in employment.

1960s-2000s
Title VII did not prohibit employers from firing someone because they were breastfeeding.

1980s-2000s
Courts around the country are split on whether the PDA requires employers to make work modifications.

1964 →

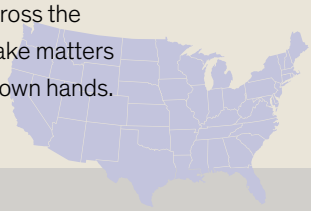
1976
The U.S. Supreme Court rules that pregnancy discrimination is not illegal sex discrimination.

1978
Congress passes the Pregnancy Discrimination Act (PDA).

1991
The electric-powered, vacuum-operated breast pump, for use at home and work, comes onto the U.S. market.

1964	Congress passes Title VII of the Civil Rights Act to prohibit discrimination in employment. The law was initially drafted to protect African Americans from race discrimination, but a prohibition against discrimination on the basis of sex was added at the last minute.[69]
1960s - 2000s	Title VII did not prohibit employers from firing someone because they were breastfeeding. Judges dismissed the idea that breastfeeding discrimination was outlawed under the PDA as a "medical condition related to pregnancy," finding breastfeeding is simply a "childrearing concern."[71]
1976	The United States Supreme Court rules in Gilbert v. General Electric that employers are allowed to discriminate against pregnancy, finding discrimination based on "pregnancy" is not the same thing as discrimination based on "sex" outlawed by Title VII.
1978	Congress passes the Pregnancy Discrimination Act (PDA) to make clear that unlawful "sex" discrimination includes discrimination on the basis of "pregnancy, childbirth, and related medical conditions," and to require that employers do not treat pregnant women worse than other employees.
1980s - 2000s	Courts around the country are split on whether the PDA requires employers to make work modifications (accommodations) for pregnancy, childbirth, and related medical conditions. Some judges rule that accommodations must be provided to pregnant employees when they are given to other employees, to ensure equal treatment. But other judges disagree, saying that the PDA does not entitle pregnant workers to "special treatment."
1991	The electric-powered, vacuum-operated breast pump, for use at home and work, comes onto the U.S. market.[70]

1998-2018
States across the country take matters into their own hands.



2013
The first federal appellate court in the country decides that firing an employee because she is lactating is illegal sex discrimination.

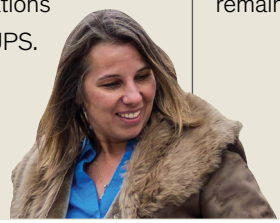
2017
The first appellate court in the nation rules that the PDA requires employers to treat breastfeeding accommodation requests the same as others.

2018

2010
President Barack Obama signs the Break Time for Nursing Mothers provision of the Affordable Care Act.

2014
The Equal Employment Opportunity Commission takes the position that the PDA prohibits breastfeeding discrimination.

2015
The U.S. Supreme Court rules in favor of pregnancy accommodations in Young v. UPS.



2018
Despite progress, legal protections remain incomplete.

1998 - 2018	States across the country take matters into their own hands and pass laws requiring employers to provide break time, private space, and other breastfeeding accommodations.
2010	President Barack Obama signs the Break Time for Nursing Mothers provision of the Affordable Care Act, mandating that employers provide reasonable break time and private, non-bathroom space for expressing breast milk during the workday.
2013	The first federal appellate court in the country decides in EEOC v. Houston Funding that firing an employee because she is lactating or expressing milk is illegal sex discrimination under Title VII.[72]
2014	The Equal Employment Opportunity Commission, the federal agency responsible for enforcing the PDA, takes the position that the PDA prohibits breastfeeding discrimination. Agency guidance says an employee "must have the same freedom to address lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions."[73]
2015	The U.S. Supreme Court rules in Young v. UPS that an employer's refusal to provide work accommodations for pregnant employees is illegal under the PDA if other employees receive accommodations and there's not a strong justification for treating pregnant women differently.[74]
2017	The first appellate court in the nation rules in Hicks v. Tuscaloosa that the PDA requires employers to treat requests for breastfeeding accommodations the same as other accommodation requests, and employers who fail to accommodate breastfeeding may be held liable in court if the employee quits as a result.[75]
2018	Despite the recent explosion of legal protections, breastfeeding rights remain incomplete, as documented in this report.

Break Time for Nursing Mothers Law

Signed into law by President Obama in 2010 as part of the Patient Protection and Affordable Care Act, the Break Time for Nursing Mothers provision is the most widely recognized law protecting breastfeeding workers. It requires employers to provide covered employees with reasonable break time as needed and a place for expressing breast milk during the workday.[76] The law makes clear that the break time should be provided "each time such employee has need to express milk" "for her nursing child for 1 year after the child's birth." The pumping place should not be a bathroom, and should be "shielded from view and free from intrusion from coworkers and the public."[77] It is illegal to retaliate against an employee who makes a complaint that her rights have been denied.

The Nursing Mothers law was a landmark step toward achieving equity for women and nursing parents around the country. Not only has the law secured pumping accommodations for countless women, but the legal mandate sends the message to employers that jobs should be designed also to meet the needs of women's bodies. It signals that continued breastfeeding is an important public health goal, and helps reshape work to be compatible with motherhood.

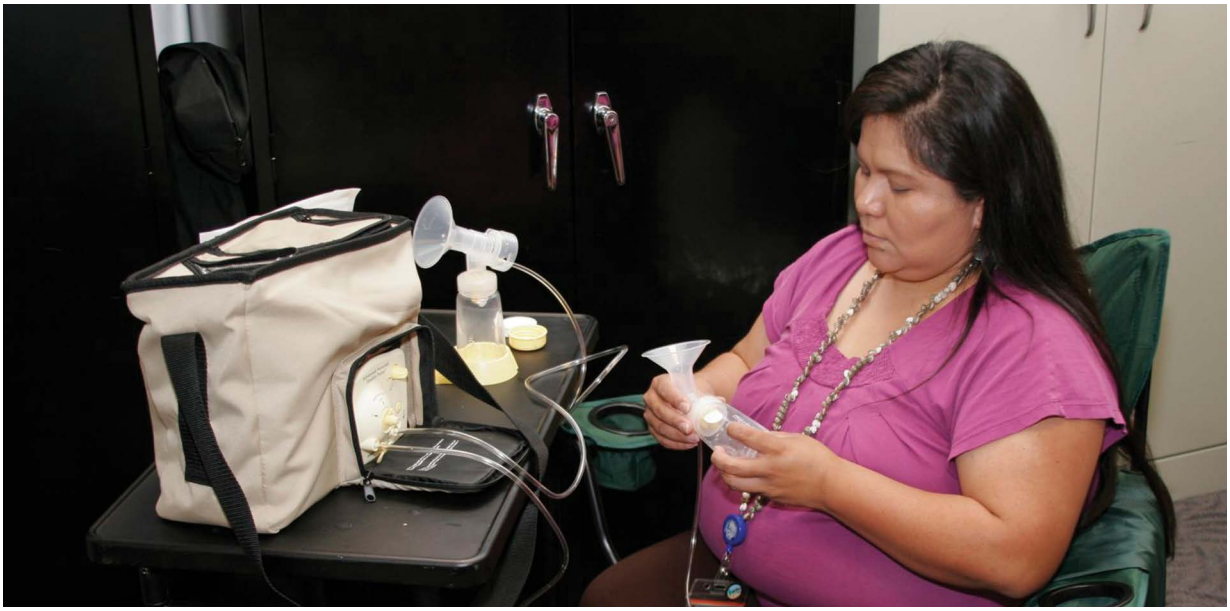
But despite these significant gains, the law is far from perfect. In some ways, it doesn't function as intended. This section examines the law's three serious shortcomings: (1) major gaps in coverage; (2) limited protections; and (3) a weak enforcement mechanism.

BREAK TIME FOR NURSING MOTHERS LAW – WHAT'S LEGALLY REQUIRED?

What kind of space must the employer provide? The law requires employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."[78] The U.S. Department of Labor, the federal agency tasked with enforcing the Nursing Mothers law, has provided its interpretation of what this requires.[79] Whenever practicable, employers must provide a room (either private or with partitions for use by multiple lactating employees) that is available whenever the nursing employee has a need to express milk. If impractical to provide a room, employers may provide another location, so long as it is shielded from view and free from intrusion. This can be accomplished, for example, by using partitions or curtains and taking steps to ensure privacy. The space should not be so far from the work area that accessing it during breaks is impractical. To be functional for the purpose of expressing milk, the space should have a place for the employee to sit and a flat surface to put her pump, other than the floor. It should not be in an unsanitary location. Providing support beyond these minimum requirements, like a refrigerator and electricity, allows the employee to pump and return to their work duties faster.[80]

How much do these spaces cost? Upfront costs are typically low, as lactation spaces can be created out of existing space. To meet the basic requirements of the law, employers may need to purchase a lock for the door, a popup tent, a temporary partition, or the like.[81] In the long run, providing lactation accommodations saves money. Employers that choose to invest in additional amenities can expect to see a return on their investment, as employees in comfortable conditions can pump and return to their work duties faster, and, lactation support increases employee loyalty and decreases health care costs and absenteeism due to illness.[82]

How frequently must breaks be given? Employers must provide breaks to a nursing employee "each time such employee has need to express milk." Frequency will vary based on the employee's unique physiological needs that depend on factors such as the age of the baby, the number of feedings in the baby's normal daily schedule, and whether the baby is eating solid food. Typically, mothers will need two to three breaks during an eight-hour shift.[83]



BREAK TIME FOR NURSING MOTHERS LAW – WHAT'S LEGALLY REQUIRED? *continued*

How much time must be provided during the break? The length of time necessary also varies from woman to woman. The act of expressing breast milk alone typically takes about 15 to 20 minutes, but there are other factors that will determine what is "reasonable." They include the proximity of the employee's work area to the lactation space, pumping equipment, and to amenities like sink and refrigerator; the efficiency of the breast pump; and the time needed to retrieve the pump, set it up, clean up, and store the milk.[84]

Must the breaks be paid? Milk expression breaks need not be paid. However, where an employer already provides paid breaks, an employee who uses that break to express milk must be paid in the same way that she and other employees would otherwise be paid for that time. Additionally, if the employee is not completely relieved from all work duties during the milk expression break, the time must be compensated as work time.[85]

Are small employers exempt? News articles and other sources describing the Nursing Mothers law frequently say that it applies only to employers with 50 or more employees. This is inaccurate. The law applies to employers of all sizes. Employers with fewer than 50 employees are excused from providing break time or space if to do so would cause an undue hardship.[86]

What is an "undue hardship"? A significant difficulty or expense on the employer with less than 50 employees when considered in relation to the size, financial resources, nature, or structure of the employer's business. The Department of Labor's non-binding interpretation is "that this is a stringent standard that will result in employers being able to avail themselves of the exemption only in limited circumstances."[87] Based on the longstanding and oft-interpreted use of "undue hardship" under the Americans with Disabilities Act, and the ease with which pumping accommodations can be provided, true undue hardship is likely extremely rare.

PART II: CURRENT LAWS LEAVE BREASTFEEDING WORKERS EXPOSED

Unintentional Coverage Gaps Exclude Millions of Workers in A Wide Range of Industries

To understand how millions of working women of childbearing age could be unintentionally left unprotected by the nation's "Nursing Mothers" law, it is necessary to understand the history of the law's passage. Congress passed the 2010 Break Time for Nursing Mothers provision as an amendment to an existing law that dates back to President Roosevelt's New Deal, the Fair Labor Standards Act (FLSA).

Congress added the new break time language to the FLSA in the section that requires employers to pay overtime compensation for long work hours, 29 U.S.C. § 207(r). Due to this placement, the Break Time for Nursing Mothers provision is subject to other sections of the FLSA that were originally designed to regulate employers with regard to payment of overtime—not the provision of pumping breaks.

One such section involves employee "exemptions." Under the FLSA there are numerous categories of workers who are not entitled to receive overtime compensation, regardless of the number of hours they work in a week.[88] These employees are said to be "exempt" from overtime. However because of the Nursing Mothers law's placement within the overtime section, they have also been made exempt from the breastfeeding protections, meaning they are not entitled to receive them.

When the Nursing Mothers law was passed, it was intended to cover all workers.[89] The exclusions are nothing more than an unintentional byproduct of the statutory placement. The resulting coverage gap is considerable and impacts employees in a wide range of occupations.

Who is Excluded?

Workers in a wide range of occupations were inadvertently left out, including those working in the top two pink-collar occupations, nursing and teaching.[90] Determining whether a worker is covered by the law is complicated in some cases. Generalizations often cannot be made because the determination can turn on nuanced, individualized details. With that caveat, categories of workers who are not covered by the Break Time provision include:

- **Teachers** at the elementary, secondary, and higher education level[91]
- **Registered Nurses and Nurse Practitioners** who are paid an annual salary of at least $23,660[92]
- **Transportation workers**, including airline and railway employees,[93] taxicab drivers,[94] certain local delivery drivers, and truckers (depending on weight of trucks in the fleet)[95]
- **Agricultural workers** like farmworkers, harvesters, and livestock handlers[96]
- **Computer programmers and software engineers** who are paid an annual salary of at least $23,660 or receive at least $27.63 per hour.[97]
- **Retail workers** who receive at least half of their earnings on commission and earn at least one and one-half times federal minimum wage[98]
- **Traveling salespeople**[99]
- **Managers** who regularly direct the work of at least two other employees and are paid an annual salary of at least $23,660[100]
- **Professionals like doctors, lawyers, journalists, photographers, and musicians**, depending on the specifics of their job duties and salary level.[101]
- **Other categories of workers.** For more information, visit https://www.dol.gov/whd/regs/compliance/hrg.htm#8, contact the Department of Labor's Wage and Hour Division (1-800-USA-WAGE), or speak with an attorney.

These categories of employees were carved out of the FLSA's overtime protections for a range of reasons, mostly political.[102] But there is no principled reason to deny these workers the right to receive basic breastfeeding accommodations, and indeed their exclusion was unintentional.[103]

Measuring the Coverage Gap

Nearly one out of every four working women of childbearing age is left out of the Break Time for Nursing Mothers law's protections. This translates to more than 9 million working women of childbearing age who do not have a clear right to break time and space for pumping breast milk under federal law.[104] This number does not include non-employee workers, like freelancers and independent contractors, who are generally not covered by worker-protective employment laws.

The number of women of childbearing age who are left out of the federal law broken down by industry, state, and race is available in Appendix A.

Industry 4.6 million of the uncovered women work in the Educational and Health Services industry, the sector with the highest number of uncovered workers. The industries with the largest proportion of uncovered women of childbearing age are Public Administration (40% unprotected) and Mining (39% unprotected).

Geography The states with the largest number of uncovered women are also the country's four most populous states: California (994,000 uncovered women), Texas (800,000 uncovered women), New York (712,000 uncovered women), and Florida (474,000 uncovered women). California and New York have state laws that provide a clear right to receive break time and space for all employees, but many other states don't, as shown in Appendix A. These include large states like Texas and Florida, neither of which provides a clear state-level right to pump breast milk at work.

Race Black and Hispanic women are more likely than White and Asian women to be protected by the Nursing Mothers law, as they are more likely to work in the hourly and low-wage jobs covered by the requirements. Still, over 1 million black women and nearly 1 million Hispanic women are uncovered.

EXPOSED: TEACHING WHILE PUMPING

Teaching at the primary and secondary levels is one of the most dramatically "pink-collar," or female-dominated, occupations in the U.S.[105] Teachers—who are excluded from the Nursing Mothers law—can have a difficult time meeting their lactation-related health needs in cramped, understaffed schools, where finding private, unused space and another adult to supervise their students is often a struggle.

KINDERGARTEN TEACHER: "MY BOOBS WERE SO FULL THAT I JUST BEGAN LEAKING EVERYWHERE"

Catherine "had eighteen 4-5 year olds and never got a break." "I had lunch every day with my class." It was hard to find private space and coverage for her classroom from the start, but "as soon as standardized testing began it got way worse." Because classrooms and staff were diverted to administer the tests, "the closet was no longer an option and coverage was non-existent." "I would be mid-pump, shirt off, bottles up, and the locked door would fly open with an 'I know you're pumping but I'm not looking.' I just felt violated and I'm not one for modesty."

"Finally I had my mommy-breakdown when one day I had no chance to leave and pump, as there was zero coverage to be had. By mid-day my boobs were so full that I just began leaking everywhere. Soaked through my shirt and sweater. I started thinking, I'm here teaching these babies basic life skills and I don't even have the time to provide my own baby with food for survival."

"I came home that day and told my husband I was not going back and we would figure it out. The stress and lack of availability to be able to pump sent me over the edge."

Interview with Catherine, October 11, 2018

FLSA Misclassification Threatens the Rights of Even More Women

In addition to the more than 9 million women who work in jobs that legally exempt them from coverage under the Nursing Mothers law, an additional 3.7 million women of childbearing age are vulnerable to being improperly classified as exempt, even though based on their job duties they should be covered.[106] Because of the fact-intensive and complicated legal standards used to determine whether employees are exempt, employers may misclassify them, whether due to confusion or disregard for the law.

It is well-established that such misclassification deprives workers of overtime wages owed.[107] No research has measured the impact of misclassification on employees with lactation-related health needs. However, it is likely such mislabeling hurts some breastfeeding workers who may believe, or are told, that they are not entitled to the FLSA's break time and space protections due to their "exempt" status.

Taken together, a total of 12.7 million working women of childbearing age are either exempt from the Nursing Mothers law or are vulnerable to being misclassified as exempt.

Limited Protections: Pumping Break Time and Space for Baby's Health, But Nothing More

The Break Time for Nursing Mothers law has several components of a model breastfeeding accommodation law. It imposes the critical requirement that the lactation space not be a bathroom, ensuring that parents are not preparing their babies' lunch inside a dirty toilet stall. It also requires that the space be "shielded from view and free from intrusion from coworkers and the public," recognizing that milk will not as easily release inside the breast (let-down) unless the lactating parent is relaxed and secure.[108] Finally, the FLSA requires that breaks be provided to the nursing parent "each time such employee has need to express the milk," recognizing that every breastfeeding worker is different and a one-size-fits-all approach cannot meet the needs of all people. Other features of the law, however, do not meet the unique needs of the full range of lactating employees.

Limited to milk "expression": The Break Time for Nursing Mothers provision requires accommodations for "expressing" milk, but does not require employers to allow workers to take breaks for direct breastfeeding under any circumstances. Although not possible in all circumstances due to workplace hazards or distance, in many situations direct breastfeeding can be reasonably accommodated without undue difficulty or expense. In these cases, a nursing parent may either need or want to directly breastfeed her child during her lactation breaks.

A growing field of research is examining the benefits of direct breastfeeding for mother and child, separate from the health benefits of the milk itself.[109]

Kate, a child support officer at the New Hampshire Department of Health, needed to directly breastfeed for her own health and for the health of her child, as described in more detail on the next page. When her employer refused to allow Kate to use her pumping breaks for this purpose, she brought suit. The judge in Kate's case summarized her FLSA claim:

"What [Kate] Frederick actually complaints about, understandably, is [her employer's] refusal to accommodate her desire to breastfeed her child, either in the lactation room at work or a short distance away from her workplace, during an extended lactation break period. This case does not present issues like those that might arise if breastfeeding were allowed in a dangerous workplace (e.g., a chemical plant or construction site), and it is difficult to discern any meaningful difference between a [Department of Health] employee pumping milk on the one hand, or breastfeeding a baby on the other, while on break in a room provided for the very purpose of privately expressing breast milk."[110]

Despite the judge's clear sympathies, he dismissed her claim, concluding that the Nursing Mother's law does not provide a right to breastfeed and so Kate's employer maintained a "legally valid breastfeeding policy."[111]

THEY COULD GO TO DUNKIN' DONUTS, BUT SHE COULDN'T GO ACROSS THE STREET TO NURSE HER NEWBORN SON

Kate Frederick went to great lengths to teach her son how to drink from a bottle before returning to her job at the Department of Health, but he wouldn't take milk from anything but her breast. "I tried to be tough, but it was a nightmare for all of us."

Fortunately, Kate landed a spot at the childcare center across the street from her office. "I totally assumed that since it was Health and Human Services and all that it wouldn't be a problem to feed him at his daycare. I didn't anticipate any resistance." Kate's doctor wrote a letter saying she needed to directly breastfeed her son both for his sake, and also for her own health condition.

"I was shocked when they forbid me from 'leaving the premises,' especially because I had been allowed to do so before I had my baby, along with all my other coworkers." Department employees regularly took trips to Dunkin' Donuts up the road, but "I was being told I couldn't go across the street to feed my baby, who would go hungry without me."

Desperate, Kate proposed that she be allowed to feed her son in the on-site lactation room. The Department refused, saying she could access the room only if she was going to pump milk. Because her son refused to take a bottle, Kate's only option was to nurse him in a public area, but she was beyond uncomfortable with the idea of breastfeeding in front of her coworkers and clients. "Some of my clients were predators who had been physically and sexually abusive to children. I was normally allowed to meet with them only in a secured room with an alarm. And here I was being told to expose my breasts in front of them."

"It was infuriating. They're called the Department of Health and Human Services. Their mission is to serve families. It was hypocritical on so many levels. They didn't seem to care about any of the health risks to me or my son."

The Department fired Kate. "Since then, the woman who fired me got a promotion, and HHS got tens of thousands of dollars in grant money to promote breastfeeding. They even created a booklet that suggests allowing direct breastfeeding during work hours when possible."

"The Department has never offered a good explanation as to why they refused to let me nurse my 2-month old son." The judge in Kate's case characterized her employer's refusal as "an unfortunate (even deplorable) insensitivity and intransigence." But despite his sympathies, the judge concluded that the Nursing Mothers law does not cover breastfeeding and dismissed her claim.

Interview with Kate Frederick, Oct. 11, 2018.

Limited to one year: While many workers may not require accommodations after the one-year mark, many others need to express milk for longer. Nationwide, one in three babies is still breastfeeding at one year.[112] The World Health Organization recommends breastfeeding for up to the first two years of a child's life, or beyond.[113] And while toddlers may nurse less frequently than infants, allowing the nursing parent to go longer stretches without pumping, many employees continue to need to express milk, particularly those who work 12-hour or longer shifts, travel away from home for long stretches, or alternate between daytime and nighttime shifts.

Limited to only "for her nursing child": The FLSA provides rights only to a lactating employee who is expressing milk "for her nursing child." While this is typically the circumstance under which an employee will seek accommodation, this vague language may leave out those who wish to express milk for other purposes. It could be interpreted to exclude workers who want to express milk for their own health, due to gestational surrogacy, to donate breast milk following the loss of a child, or for other similar reasons.

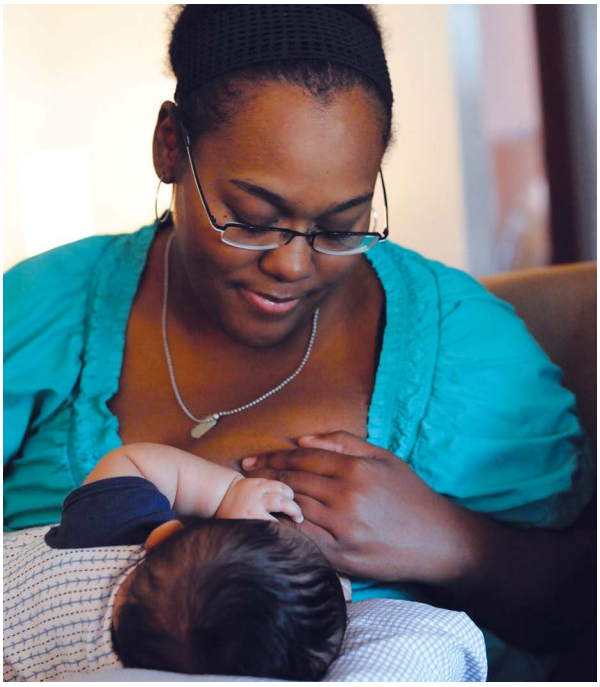
Mary, a hotel cashier and accountant, asked for permission to express breast milk at work after she gave birth to a baby as a gestational surrogate. Mary wanted to provide breast milk to the child's family, to receive the personal health benefits associated with lactation, and to donate milk to women who were unable to produce it for their own children. After a period of accommodating Mary, the hotel's human resources director refused to provide ongoing pumping breaks, with the explanation that Mary was "not disabled" or feeding "a child at home." Mary offered to bring a doctor's note certifying her need for accommodation, but the HR director told her not to bother. [114]

A law that places limits on the purpose for which milk may be expressed does not account for the full range of women's health needs, both physical and emotional.

Limited to break time and space: The Nursing Mothers law provides the most common form of accommodation required by nursing employees: time away from one's duties and a clean private place to pump breast milk. But whether due to personal health needs or the nature of their jobs, some lactating employees require other reasonable accommodations, like permission to carry a water bottle, to avoid exposure to toxic chemicals, or to take time off for medical appointments.

A police officer in Alabama, Stephanie Hicks, needed an assignment that did not require her to wear a bullet proof vest. Stephanie's physician advised that wearing the restrictive vest would put her at risk for breast infection and jeopardize her milk supply due to the pressure it would place on her breasts. Although her coworkers who had non-breastfeeding-related medical restrictions were regularly given temporary desk jobs, Stephanie was forced off of the police force.

Stephanie Hicks successfully sued her employer for discrimination under a different federal law, Title VII of the Civil Rights Act, and won. However as discussed later in this report, Title VII's prohibition on breastfeeding discrimination does not provide a clear right to accommodation when workers need it most.



Technicalities Make It Nearly Impossible to Enforce the Law

Only fifteen of the breastfeeding lawsuits in WorkLife Law's case database involve allegations that the employer violated the FLSA's 2010 Break Time for Nursing Mothers provision, despite the fact that it is the only federal law providing an explicit right to break time and space. This surprising statistic highlights the law's final shortcoming. Even when clear violations occur, the Break Time for Nursing Mothers provision cannot be counted on to deliver justice in a court of law.

This failing is another unfortunate consequence of the break time provision's placement within the FLSA's overtime section. The FLSA provides that employers who violate the overtime section are liable to harmed employees only "in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be."[115] This may make sense in the context of wage violations. But unpaid wages is a meaningless remedy for an employee who has suffered diminished milk supply, painful infection, embarrassment, emotional distress, poor health outcomes, extended unpaid leave, forced resignation, or termination. As one judge put it, "there does not appear to be a manner of enforcing the express breast milk provisions."[116]

Even when nursing mothers are treated poorly and the law has undoubtedly been broken, judges' hands are tied. As one judge expressed in the case of an EMT who was fired simply for asking that she be given break time and space: "While the Court is sympathetic to Plaintiff's argument that this renders [the Nursing Mothers law] ineffective, there is no support from the case law or DOL [Department of Labor]" to provide a remedy.[117]

Almost all legal claims in the database that an employer failed to provide FLSA-mandated break time and space have been thrown out of court.[118] Since the law was passed in 2010, only two such claims have survived legal challenges and were allowed to proceed on the theory that the lactating employees in those cases suffered lost wages (the only compensable harm) as a result of the break time violation.

One of these cases was brought by a bank teller in New York whose manager responded to her requests to take pumping breaks by giving her additional assignments. "The inability to take nursing breaks caused painful breast engorgement, and on several occasions, [her] breast milk leaked out through her clothing in front of customers and coworkers."[119] It got so bad that she started traveling home during the workday to nurse her child instead of expressing milk at the bank, causing her to miss 40.35 hours of work. Her lawsuit framed this missed work time as "lost wages," and the court allowed her case to proceed.[120]

Assuming the federal minimum wage of $7.25 per hour, someone who misses 40.35 hours of work suffers $292.54 in lost wages, and the court has discretion under the FLSA to award an additional $292.54 in liquidated damages. It currently costs $400 in court fees alone just to file a lawsuit in the court where the bank teller brought her case.[121] As bluntly stated by one court, the weak enforcement mechanism renders the law "virtually useless in almost all practical application."[122]

This is a failure of the law's protections for harmed individuals seeking justice, but it is also a failure of a larger magnitude. Because toothless laws can't bite, they don't have the same power to deter unlawful behavior as do laws with strong enforcement mechanisms. Perhaps not surprisingly, 60% of women still did not have access to both break time and space in the years following passage of the Nursing Mothers law.[123] When employers fear hefty financial penalties for violating a law, they are more likely to comply.

CAN THE DEPARTMENT OF LABOR ENFORCE THE NURSING MOTHERS LAW?

The U.S. Department of Labor's (DOL's) Wage and Hour Division is the federal agency charged with enforcing the Nursing Mothers law. The agency accepts complaints about employers that may be in violation of the law's requirements. It can launch an investigation to determine if a violation has occurred and to bring the employer into compliance, if necessary. DOL takes the position that it lacks the authority to assess civil penalties against employers that have violated the Nursing Mothers law.[124] However, employers under investigation may still face civil penalties for violations of other laws DOL may consider during an investigation, like those requiring payment of minimum wage and overtime.[125]

Retaliation for Complaints

The FLSA doesn't provide a remedy in even the most egregious cases where an employee is immediately fired in response to a request for break time and space, or for actually exercising her right to express milk. However, there is one limited circumstance where a terminated employee is allowed to bring a case against her employer for a meaningful monetary recovery. If a nursing parent makes a clear complaint to her employer that her FLSA rights have been denied, and the employer retaliates against her for making that complaint, the employee can bring a retaliation claim.[126]

This exception provides a strong argument for fired employees who were lucky enough to know their rights and have the wherewithal to lodge a complaint before being fired. But it has limited use beyond that. Of the thirty cases in the WorkLife Law database where the breastfeeding employee was fired, only eight attempted to make an FLSA retaliation claim, and of those, only three survived the judge's scrutiny and were allowed to proceed. Employees are often not familiar enough with their legal rights to make a complaint, much less comfortable doing so.

A federal judge summed it up: "[I]t does not appear that the statute prohibits or provides a remedy for an allegedly wrongful termination related to breastfeeding... An employer faced with a request to allow an employee to take breaks to breastfeed may simply fire the employee rather than attempt to accommodate the request for breaks."[127] Faced with this "absurdity," the judge was quick to point out that a remedy might instead be found under the federal anti-discrimination law, Title VII of the Civil Rights Act.[128]

FIRE DEPARTMENT EMT FACED RETALIATION FOR ASKING TO PUMP: "I BECAME THE BLACK SHEEP."

Two months after her daughter was born, Sarah Spriesch reported for Chicago Fire Department retraining.

Sarah asked to take a pumping break in between watching training videos. Her supervisor responded, "what's pumping?" and forbid her from leaving the classroom. After going eight hours since she nursed her daughter, she "finally had the guts" to speak with the fire chief. "My shirt was soaked. I was in pain. And I tell him, by law I have a right to take care of myself." The chief said she would be considered AWOL if she left to pump, but a colleague pointed out that Sarah was entitled to a lunch break.

When Sarah returned from pumping in her car, she was forced to spend hours watching outdated training videos, while the other trainees were sent home early. "Why would these two guys get to leave early, but here I am, a new mom, stuck here, soaked through my shirt and bawling my eyes out?"

Things only got worse after that. She was given bad assignments at firehouses with "no women's area, just guys' locker rooms and a disgusting bathroom," even though there were open spots at firehouses with appropriate facilities. "The bathrooms I pumped in had old standing water, mousetraps, and bug traps. They were so dirty that I didn't even want to keep the milk that I was pumping. And the only reason they were putting me in these places is because I stepped up and said something." "I became the black sheep."

"There were days I was afraid I'd get fired, or get messed with on the job. Some days I felt super strong, thinking 'I can do this and they shouldn't be treating women like this.'" After Sarah filed a lawsuit, the department changed its policies.

"It is a boys club, they drill into your head this is how things are." "The only way it is going to change is if people start speaking up. There are laws to protect your right to breastfeed and there are laws to protect you if they try anything because you speak up."

Title VII of the Civil Rights Act of 1964

The federal anti-discrimination-in-employment law, Title VII, fills some of the gaps left by the Nursing Mothers law.[129]

Federal Law Prohibiting Employment Discrimination Now Protects Breastfeeding Workers

Title VII is a civil rights law that prohibits discrimination in employment against members of certain protected categories of employees, including based on race, color, national origin, religion, and "sex."[130] It is the law that makes it illegal to for an employer to pass over a job applicant because she is a woman and hire a less qualified man instead, or for a supervisor to sexually harass his assistant and fire her when she complains. It seeks to level the playing field for women by requiring non-discrimination from all employers nationwide, so long as they have 15 or more employees. Employers that do discriminate can be sued and held financially responsible for the harm they cause.

Title VII does not mention "breastfeeding" or "lactation." Breastfeeding was far from the minds of President Johnson and Congress when they enacted Title VII in 1964,[131] and for most of its history the law could not be relied on to protect workers from breastfeeding discrimination specifically. However based on the language and overarching purpose of Title VII, courts have begun in the last decade to interpret the law to prohibit lactation discrimination.

Whether breastfeeding workers are protected from discrimination under Title VII has depended on whether lactation discrimination is the same as discrimination because of "sex," made illegal by Title VII. Language added to the law in 1978, called the Pregnancy Discrimination Act, answers this question.

The Pregnancy Discrimination Act (PDA) says that unlawful "sex" discrimination includes discrimination based on "pregnancy, childbirth, or related medical conditions."[132] While lactation would seem to clearly qualify as a medical condition related to pregnancy and childbirth, early court rulings concluded, nonsensically, that it did not. They cited the fact that men too can lactate[133] or simply dismissed breastfeeding as a "childrearing concern"[134] not worthy of protection.

However in 2013, the Fifth Circuit Court of Appeals, in *EEOC v. Houston Funding*, was the first federal appellate court to rule that breastfeeding discrimination is sex discrimination. Citing the *dictionary*, the court wrote the obvious: "Lactation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth."[135] Since then, as a lower court in Rhode Island noted in 2016, "the trend post-*Houston Funding* … has been to follow the Fifth Circuit's reasoning and hold that lactation is a 'condition related to pregnancy' under the PDA."[136]

As the Supreme Court has not considered the question, Courts of Appeals are the most authoritative level of interpretation of what the law means. Both the Fifth and Eleventh Circuit Courts of Appeals have held what would have been practically unthinkable when the personal electric breast pump first hit the market in 1991: discrimination on the basis of breastfeeding is illegal under federal law.

Despite this meaningful expansion of rights under Title VII in recent years, the law still does not grant the full range of legal protections breastfeeding workers need to ensure their health and economic security. The remainder of this section reviews what legal rights Title VII provides, and where it falls short.

TRANSGENDER PARENTS

Lactation rights provided by Title VII are equally available to employees of all genders and gender expressions. Transgender men and gender-nonconforming people with lactation-related health needs should be given the same freedoms to address those needs as non-lactating employees, and they have a right to be free from discrimination because of chestfeeding, breastfeeding, nursing, and lactation.
For more information about lactation-related legal protections for transgender and gender-nonconforming workers, contact the Center for WorkLife Law.

A Law with Teeth That Prohibits Breastfeeding Discrimination

At its core, the right to be free from discrimination means the right not to be treated worse than other employees because of breastfeeding, pumping, or lactation. Under Title VII employers may not:

- Fire, demote, refuse to hire, or take other negative employment actions against a worker because she is breastfeeding, lactating, or pumping breast milk. (E.g., "Why don't you reapply when you're done nursing, sweetie.")
- Sexually harass a breastfeeding employee by making offensive or threatening comments related to breastfeeding or pumping that create a hostile work environment. (E.g., "Let me give them a squeeze, see if any milk comes out," as he reaches for her breasts.)
- Maintain a policy or practice that has a significant negative impact on breastfeeding employees without a business necessity for the policy, even if it is not intended to be discriminatory. (E.g., "Yes, we do give temporary job reassignments to your coworkers as needed for health reasons, but sorry ladies, breastfeeding isn't covered by our policy.")
- Retaliate against an employee for complaining about breastfeeding discrimination or harassment. (E.g., "I heard you complained; since you're so upset, I think it's best if you stay home and nurse your baby; you're fired.")
- Refuse to give lactating employees the same freedoms or accommodations provided to other employees (E.g., "Sure, other employees are allowed to leave the premises to smoke, eat lunch out, or attend doctor appointments, but that's different. You can't just leave to breastfeed your baby.")

Unlike the Nursing Mothers law, Title VII has a strong enforcement mechanism to deter unlawful behavior and provide a remedy to employees who have suffered the consequences of breastfeeding discrimination. Employees who believe they have been discriminated against can file a complaint against their employer with the Equal Employment Opportunity Commission (EEOC) and subsequently may file a lawsuit for money damages in court. Employers that run afoul of Title VII risk costly settlements or jury verdicts.

Stephanie Hicks, the breastfeeding police officer who sued her employer under Title VII and won (page 31) was awarded $161,320 in damages, plus tens of thousands of dollars more in litigation costs and attorney's fees.[137] Juries that find employers have unlawfully discriminated against pregnant workers or new mothers return verdicts for hundreds of thousands, and sometimes millions, of dollars in damages.[138]

Accommodation Rights May Not Exist When Workers Need Them Most

Although robust anti-discrimination protections exist under Title VII, the right to receive break time, space, or other accommodations is less straightforward. The source of confusion is the Pregnancy Discrimination Act's cryptic second clause. It requires of employers that "women affected by pregnancy, childbirth, or related medical conditions **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** . . ."[139]

In contrast to the Nursing Mothers law's clear statement of what accommodations must be given (break time and private space) and when (as needed, for up to a year), Title VII provides a much fuzzier comparative right to "be treated the same" as other employees who are "similar in their ability or inability to work."[140] For years, courts around the country were split on whether this language required employers to make accommodations for pregnancy, childbirth, and related medical conditions; and if so, under what circumstances.[141] In 2015, the U.S. Supreme Court stepped in to resolve this divide in a case called *Young v. UPS*. To learn more about Peggy Young and her lawsuit, see the box on page 37.

The Supreme Court's ruling in *Young v. UPS* makes clear that employers have an obligation under many circumstances to make accommodations for employees who need them for pregnancy and related medical conditions, to ensure those employees are being treated the same as other similar employees. It is easier now for workers and their advocates to hold employers accountable in court when they refuse to accommodate pregnancy-related health needs.[142] But despite these advances, relying on Title VII alone to secure accommodations still comes with significant challenges. The legal standard is complicated and fact-specific, making it difficult for workers, and their employers, to know for sure if they have any rights at all.

A comparative right is hard to grasp

The Pregnancy Discrimination Act's second clause hinges the provision of rights for pregnant and breastfeeding women who need accommodations on the employer's treatment of other employees. The Equal Employment Opportunity Commission explained that this means employees "must have the same freedom" to address lactation-related needs as other employees have to address their own non-lactation-related needs.[143] 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 lactating employees to do the same under similar circumstances for lactation-related needs.
- If an employer allows employees to freely use break time for personal reasons, it cannot prevent a nursing employee from using her break time to express milk.[144]

The problem with this comparative approach is that if no other employees receive accommodations or enjoy freedoms comparable to those needed for breastfeeding or milk expression, then a breastfeeding employee may be out of luck.[145] And an employer that treats all employees poorly by refusing to accommodate any health or personal needs might be excused from accommodating breastfeeding workers too.[146] The right to an accommodation should not be based on the chance that other employees also have accommodation needs, and the good luck that the employer decided to accommodate them.

Even when an employee is lucky enough to have a comparative right in theory, she may not be able to access it as a practical matter. To assert that her Title VII rights have been denied, a breastfeeding worker needs to be knowledgeable about the law's complicated legal standard and gather information about her employer's policies and how other employees were treated. Breastfeeding workers shouldn't have to know their co-workers' accommodation needs and HR dealings to predict whether they have a right to receive critical workplace support.

Time is of the essence when employees need pumping breaks or other accommodations to continue breastfeeding, as going without for just several hours can have serious consequences like infection and diminished milk supply. The added stress of investigating how coworkers were treated and presenting a legal case to an employer—all to feed one's newborn baby—can simply be too much to bear for a new parent. It is no wonder so many breastfeeding discrimination cases end in job loss, illness, and early weaning.[147]

YOUNG V. UPS: THE U.S. SUPREME COURT RULED IN FAVOR OF ACCOMMODATIONS, BUT IT'S COMPLICATED

Peggy Young was a pregnant UPS pickup and delivery driver who was forced out on unpaid leave and lost her medical coverage when UPS refused to accommodate her doctor's directive that she avoid heavy lifting. Peggy sued UPS for violating Title VII, arguing she had a comparative right to receive accommodations under the Pregnancy Discrimination Act because countless other UPS employees had received "light duty" positions when they had work restrictions. UPS drivers who were injured on the job, lost their licenses, or had a disability were accommodated; it seemed pregnant women were the only ones who were not.[148]

Peggy's case made it all the way to the United States Supreme Court to resolve whether this differential treatment violated the Pregnancy Discrimination Act's mandate to treat "women affected by pregnancy, childbirth, and related medical conditions" "the same" as other employees who are "similar in the ability or inability to work." In 2015, the Supreme Court resolved a longstanding dispute over the meaning of the PDA's mandate when it ruled that employers are obligated to provide accommodations for pregnancy and related conditions when the employer has a policy or practice of providing accommodations for other reasons, absent a strong non-discriminatory reason to treat pregnancy and related conditions differently.[149]

The Court announced a new legal test to determine exactly when this obligation arises, and it's complicated. First, the employee must show that she sought an accommodation but it was denied, even though the employer accommodated other employees with a "similar [] ability or inability to work." The employer has an opportunity to respond by offering evidence that it actually had a good reason—other than discrimination—to deny the requested accommodation. "Cost" or "convenience" is normally not a good enough reason. In the end, the employee can argue that the employer's reason is untrue, and that it is merely a cover for discrimination because of pregnancy, childbirth, or a related medical condition.
The Court summarized the essential inquiry in determining whether UPS discriminated against Peggy Young as "why, when the employer accommodated so many, could it not accommodate pregnant women as well?"[150]

This new legal standard is far from a model of clarity. Its meaning has been the source of ongoing litigation since the case was decided, and will continue to be unless Congress provides a clear right to accommodations for workers with pregnancy-related conditions.

POLICE OFFICER FORCED TO CHOOSE BETWEEN BREASTFEEDING AND HER BULLET PROOF VEST RESIGNS AND MAKES LEGAL HISTORY

When Officer Stephanie Hicks returned to work with a nursing newborn son at home, her doctor advised that wearing her tightly-fitted bullet proof vest would put her at risk for infection and diminished milk supply. Stephanie asked to be placed temporarily in a desk job, the same accommodation regularly given to other officers with medical restrictions. But the police chief refused, telling Stephanie she could stop breastfeeding, or go out on patrol without a properly-fitting vest, which would have, quite literally, risked her life.

Stephanie resigned. "Having to choose to leave a career I loved was one of the most difficult decisions of my life. But I had to do what I thought was best for my family."

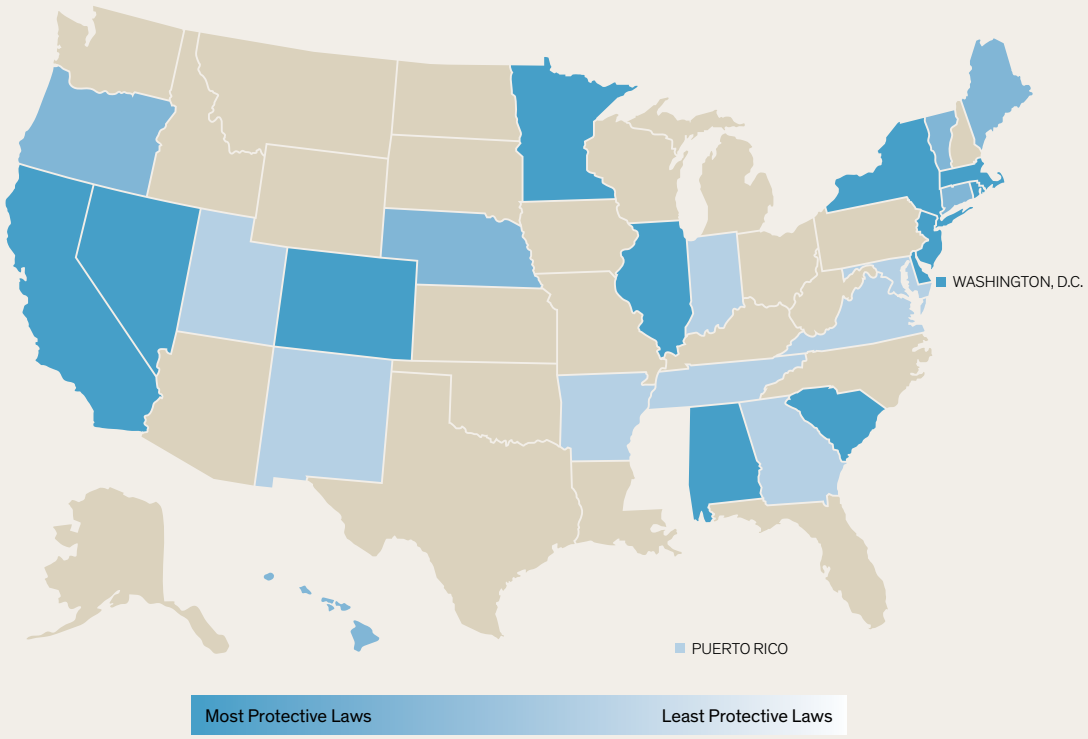
Stephanie believed that "doing what's best for your family shouldn't be a bad thing that makes you choose between a career you love and your child." An Alabama jury agreed, finding that the Tuscaloosa police department discriminated against Stephanie and essentially forced her to resign.

When the police department appealed the jury's verdict, a higher court ruled in 2017 that Title VII's Pregnancy Discrimination Act requires employers to provide accommodations to breastfeeding workers on the same terms as they provide them to other employees.

But Stephanie's landmark legal victory came at great personal cost to her and her family. She endured four years of litigation in federal court before receiving a final ruling saying that she did in fact have a legal right. Her husband, also a police officer, was fired from the force in retaliation for Stephanie's lawsuit. He "was my biggest supporter." Without a steady income, they struggled to get by, doing whatever necessary to make ends meet. "It is crazy that two careers were lost, just to feed my son."

"Our careers meant the world to us. . . . It hurt to have the other officers turn their backs on me after all of that, especially because I never asked to be treated differently than other officers. I simply wanted to be treated the same." "All I ever wanted when I took a stand was to protect the next working mother who chooses to breastfeed."

As it has turned out, the legal ruling in Stephanie's case in many ways does exactly that.



For a state-by-state guide to workplace lactation laws, visit www.PregnantAtWork.org/state-workplace-lactation-laws

States Step In Where the Federal Government Has Failed to Act

In the absence of universal, clear, and enforceable breastfeeding rights at the federal level, it is up to individual states to cover the gaps. Since 1998, just over half of all states have enacted legislation to provide additional rights, beyond federal law, to breastfeeding workers. These vary widely, from laws requiring that public school boards maintain lactation policies, to laws giving every employee across the state a right to break time, space, and other reasonable accommodations needed for breastfeeding.[151]

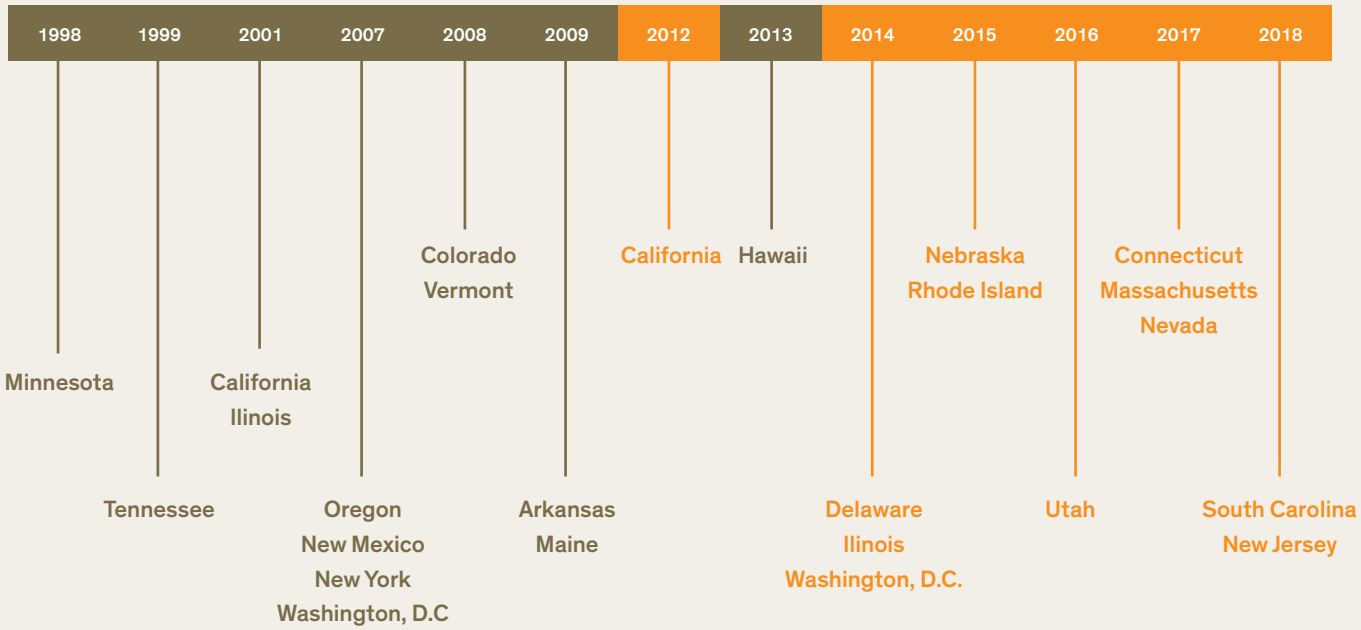
This state-by-state patchwork offers critical coverage to millions of women left exposed by federal law. Yet too many breastfeeding workers are still left without adequate legal rights, even after taking these additional protections into account. **Despite the recent flurry of state legislation, still more than 27.6 million women of childbearing age (73%) do not have the basic protections needed by all breastfeeding workers**—a clear right to break time, space, and other accommodations that may be necessary like modification of job duties, temporary transfer, or time off.[152]

Putting aside for a moment the other accommodations that breastfeeding workers may need, there are 21 states and the District of Columbia[153] that have laws clearly mandating that employers provide both time and space for expressing breast milk.[154] These laws help fill the federal Nursing Mothers law's coverage gap by giving a clear right to receive break time and space to over 4 million women excluded by that law. The majority of states, however, do not have clear break time and space laws on the books, **leaving at least 5 million women with no explicit legal protections—either federal or state—safeguarding their access to time and space to pump at work.**[155]

PART II: CURRENT LAWS LEAVE BREASTFEEDING WORKERS EXPOSED

This section reviews the various ways state lawmakers have given lactating employees rights to break time, space, and other reasonable accommodations. Thirteen states have enacted "stand-alone" break time and space laws that clearly require employers to provide those two accommodations. Twelve states have enacted broader laws that require employers to provide reasonable accommodations for pregnancy, childbirth, and related conditions, explicitly including break time and space for expressing breast milk.[156] Eight states provide some lesser level of lactation accommodation rights. We examine each type of law to track trends and evaluate the qualities of strong state-level protections.

TIMELINE: PASSAGE OF LACTATION ACCOMMODATION LAWS*



- Comprehensive Break Time and Space Mandate
- Reasonable Accommodation Law Specifically Including Lactation

* *Some states not listed here have additional protections. For more information, see appendix, or visit www.PregnantAtWork.org/state-workplace-lactation-laws.*

Stand-Alone Break Time and Space Laws

These laws are similarly constructed, with a few variations across jurisdictions.

Breaks: As under federal law, state-mandated breaks typically need not be paid, unless they run concurrently with pre-existing paid breaks. The lone exception is Illinois, which in late 2018 adopted a law guaranteeing reasonable paid lactation breaks until the baby is a year old.[157]

In contrast with federal law, it is not standard to explicitly require that breaks be provided "as-needed." Rather, most state laws simply require "reasonable" break time. Statutes that require breaks "as needed" reflect the reality that breastfeeding workers have differing milk expression schedules and that diverging from those schedules poses health risks. "As needed" makes the employer's obligation clear. However the absence of that language likely does not change the employer's legal obligation, as it is *reasonable* to seek breaks as they are needed to avoid diminished milk supply, pain, and infection.

Typically, stand-alone statutes excuse employers from providing break time if doing so would impose an undue hardship, or a significant difficulty or expense when considered in light of certain factors, usually the size of the business, its financial resources, the nature of the accommodation, and the employer's structure or location.[158] Several states use modified language to provide an exception for business disruption, including "seriously disrupt" (California), "unduly disrupt" (Minnesota and Tennessee), or "substantially disrupt" (Vermont).

Unlike federal law, which makes the undue hardship defense available only to businesses with fewer than 50 employees, most states allow employers of *all* sizes to claim undue hardship, with the exception of Hawaii, where the defense is available only to employers with fewer than 20 employees. Maine provides no employer exemption from providing break time.

HUMAN RESOURCES PROFESSIONAL FORCED TO PUMP ON THE TOILET

Leah returned to work when her baby was just seven weeks old. As an expert in human resource management, Leah knew she didn't have a clear right to lactation accommodations under Virginia law. "I'd sit on the toilet and pump half naked" in a single-stall bathroom shared with ten coworkers. "The whole time I'd pray that no one else is going to need the bathroom, because then I'd have to rush. I can't believe I was literally sitting on a dirty toilet twice a day making what was food for my kid."

Leah never complained. She "didn't want to take up space, and didn't want to cause trouble. But looking back it was so stupid. Men don't have to deal with this." Just months after she returned to work, Leah found a new job where she was able to pump in an office. Receiving just that basic support was transformational: "I felt human. I felt respected and honored."

Interview with Leah, October 9, 2018.

Space: Most state laws require covered employers to make "reasonable efforts" to provide a private space for a breastfeeding worker to express breast milk, other than a bathroom or toilet. Arkansas, Illinois, Minnesota, New Mexico, New York, and Tennessee go a step further, requiring that the space be in close proximity to the employee's work area.[159] In addition to the proximity requirement, New Mexico requires the space be *clean*,[160] while Minnesota mandates that the space include access to an electrical outlet, and California requires that the space be "free from intrusion."[161]

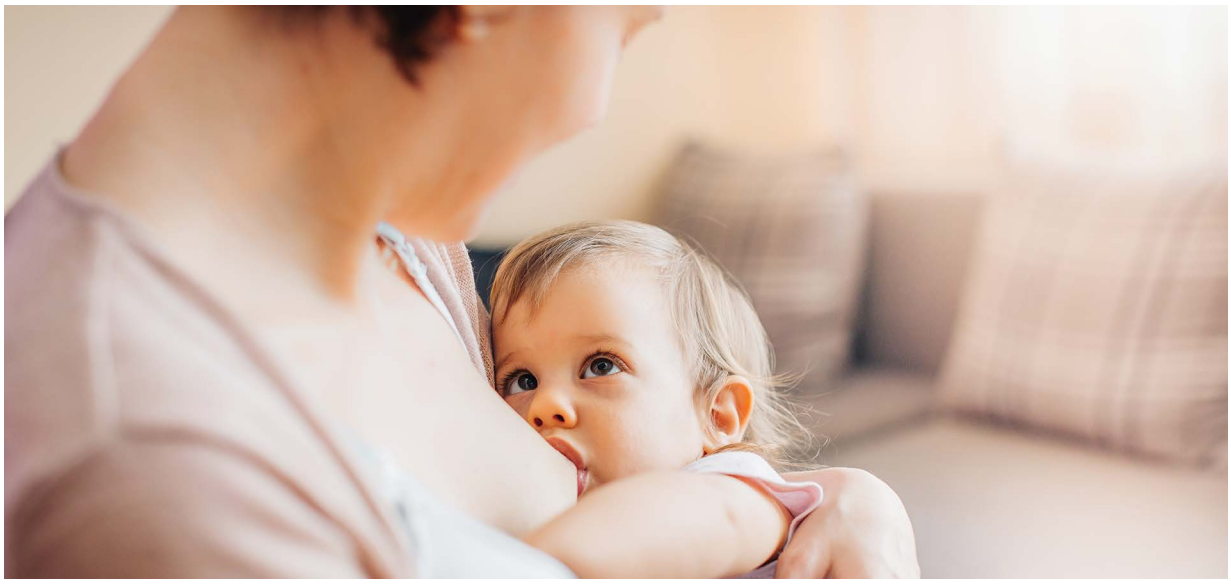
Perhaps the most descriptive guidance on space requirements comes from Washington D.C. and Arkansas, which both require that the space be sanitary, private, and in a secure location in close proximity to the work area, and not a toilet stall.[162]

State laws typically excuse employers from providing space when doing so is overly burdensome by including an undue hardship exemption[163] or by establishing that employers must make "reasonable efforts" to provide space. "Reasonable efforts" has been defined by some states, like Colorado, as "any effort that would not impose an undue hardship on the operation of the employer's business."

Employer-size thresholds: One in ten American workers are employed by firms with under 10 employees, with half of those employed by firms with four or fewer employees.[164] States have responded to this reality by protecting workers at small businesses; all but three of the laws apply to employers of *any* size. The exemption of small businesses in those three states likely reflects a concern about perceived costs of providing accommodations. However providing breastfeeding accommodations actually saves money.[165]

Child-Age Cutoffs: Because the federal Nursing Mothers law protects breastfeeding workers only until their baby is one year of age, state laws can be critical for those workers who breastfeed their babies longer. Most states do not impose any age limit, though some states mirror the federal one-year cap. States that explicitly require pumping accommodations for more than a year range from eighteen months (Oregon) to up to three years (Maine, New York, and Vermont).

Direct Breastfeeding: As the federal Nursing Mothers law provides a right only for "expressing milk," a couple state laws provide a critical right for nursing mothers who wish to engage in direct breastfeeding. Rhode Island requires employers to provide break time and private space for an employee to "express her milk or breastfeed her child."[166] Connecticut provides that "[a]ny employee may, at her discretion, express breast milk or breastfeed on site at her workplace during her meal or break period."[167]



Broader Reasonable Accommodation Laws

Usually called "pregnant worker fairness acts," these laws require employers to provide reasonable accommodations for pregnancy and related conditions. Reasonable accommodation laws require employers to make modifications to how, where, or when the job is done as needed because of pregnancy and related conditions, like lactation. This may include break time and space, or other accommodations a nursing mother needs to stay healthy and continue breastfeeding.

In twelve states, the reasonable accommodation laws explicitly protect lactation/breastfeeding. An additional six states require employers to accommodate medical or other conditions related to pregnancy and childbirth, and so reasonably can be read to require lactation accommodations. Because ten of these states have no stand-alone law on the books that explicitly mandates the provision of break time and space, the reasonable accommodation law may represent a worker's only right to take adequate pumping breaks at work.

Advantages of reasonable accommodation laws

Reasonable accommodation laws have the benefit of flexibility. While they often provide a non-exclusive list of reasonable accommodations that may be available—like more frequent or longer breaks, job restructuring, modified work schedules, light duty, and temporary transfers to less strenuous or hazardous work—the appropriate accommodation for an individual employee will be determined by her unique physical needs.

A worker with recurring breast infections, for example, may need to take time off to visit her doctor. Employees in certain jobs may seek to temporarily transfer to an alternate position to avoid exposure to smoke, radiation, or other toxins that can contaminate breast milk.[168] A worker whose uniform restricts her breasts, and therefore jeopardizes her milk production, may ask for a modified uniform. These examples represent the type of modifications that are considered reasonable accommodations.

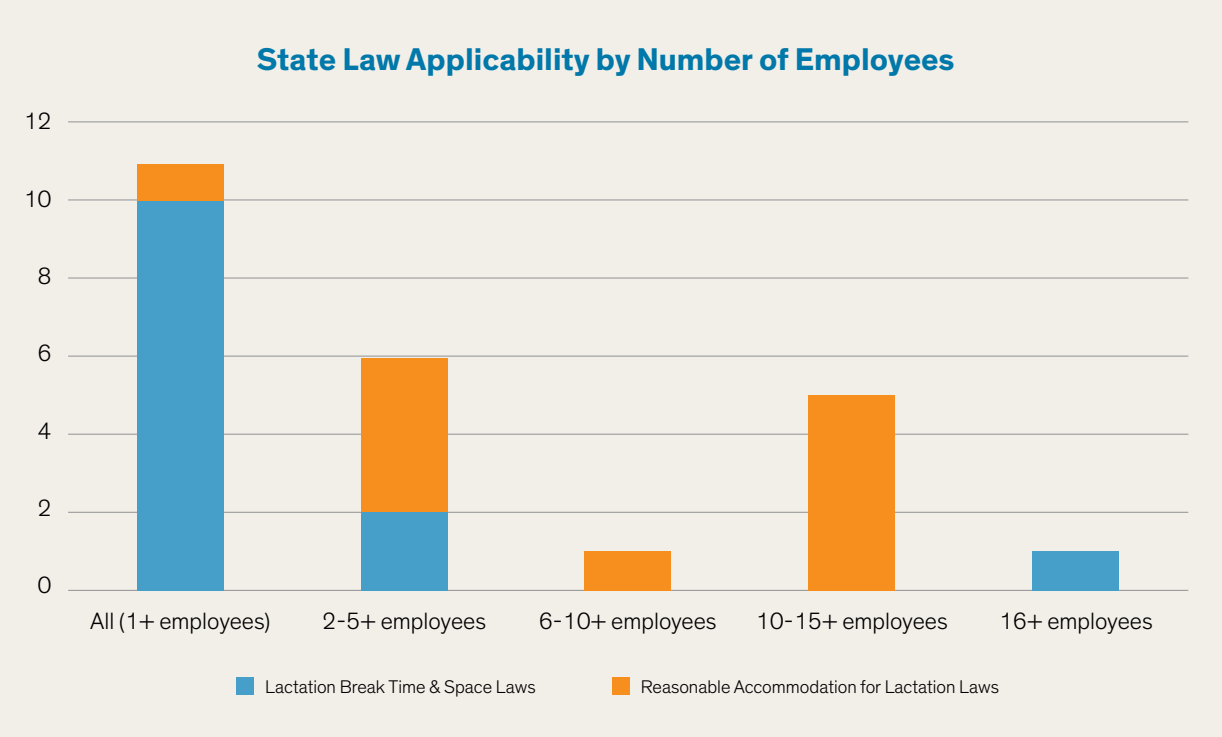
Disadvantages of reasonable accommodation laws

Reasonable accommodation laws are not a perfect substitute for stand-alone break time and space laws, as they often impose additional hurdles on employees seeking breaks and space. As compared to stand-alone break time and space laws, reasonable accommodation laws are less likely to apply to small employers; may require doctor's notes; and almost always have undue hardship exemptions available to employers of all sizes.

Employer Size: Reasonable accommodation laws generally have higher employer-size thresholds, as compared to stand-alone break time and space laws, as illustrated in the chart below. This likely represents the *political* feasibility of requiring small businesses to accommodate break time and space, as compared to requiring them to provide the full spectrum of accommodations.

Medical Certification: Unlike stand-alone break time and space laws, some reasonable accommodation laws allow employers to require certification from a health care provider to establish the employee's need for the accommodation. Administrative requirements like providing medical certification can derail a nursing employee who learns of the requirement only upon return to work—with her next pumping break just hours away. Moreover, the expense and time required to obtain medical certification presents a challenge for many new parents returning to work with a newborn baby at home, particularly low-wage workers and those who lack health insurance.

Undue Hardship: With the exception of California, reasonable accommodation laws offer undue hardship exemptions to employers of all sizes, whereas a number of stand-alone laws do not make exceptions.



Less Robust State-Level Protections

An additional eight states provide some additional accommodation rights for breastfeeding workers but do not go as far as providing a clear right to break time and space or reasonable accommodations for workers in all industries.

Laws protecting only certain public employees

Texas and Montana have laws that apply only to public employees. Texas, for example, requires public employers to provide reasonable break time and "a private place, other than a multiple user bathroom" to express milk.[169]

Louisiana and Virginia have laws related to the provision of break time and space within public schools.[170] These laws fill an important gap by protecting teachers, who are exempt from the federal law. However, the laws don't spell out a comprehensive mandate, instead requiring local school boards to enact policies providing break time and space.

Time and space, but without a clear requirement

Several states have laws regarding break time and space that do not clearly articulate an employer mandate. Laws in Georgia and Oklahoma state that an employer "may" provide these accommodations.[171] Because these laws go on to explain when employers are excused from compliance (undue hardship/disruption), they very well may be interpreted to impose a strict mandate. However, because "may" is permissive, these laws leave employers and employees alike guessing as to their meaning. Over 400,000 employees in those states are uncovered by the federal Nursing Mothers law.

Time, but not space, or vice versa

Indiana law requires the provision of a space to express breast milk, and even a space for the cold storage of milk, yet is silent on the provision of break time to use this space. Mississippi, on the other hand, states that employers cannot prevent an employee from expressing breast milk during a pre-existing break or meal period, but does not require as-needed break time or a space for pumping.

Anti-Discrimination Laws

Seven states have anti-discrimination laws that *explicitly* prohibit discrimination on the basis of lactation.[172] Although federal courts now find that Title VII protects lactation as a "medical condition" related to pregnancy, these state laws provide an additional level of protection because they do not require further interpretation. Moreover, they cover smaller workplaces than Title VII. With one exception, these laws apply to employers below the Title VII threshold of 15 employees. Breastfeeding workers benefit from the coverage added by these laws also because state agencies typically have the authority to receive complaints and launch investigations to enforce them.

NEXT GENERATION OF LAWS: WILL CITIES LEAD THE WAY?

A San Francisco law[173] that went into effect in 2018 represents one of the most comprehensive protections for breastfeeding workers in the country. It updates the building code to require newly constructed or renovated buildings to include lactation spaces.

It requires all employers within the city to provide a lactation space that:

- Is safe, clean, and free of toxic or hazardous materials;
- Contains a surface to place a pump and other items on; and
- Has a place to sit and access to electricity.

The employer must also:

- Provide access to a refrigerator near the employee's workplace;
- Inform other employees that may use the space that the primary and priority use of the room is lactation;
- Have a lactation accommodation policy identifying the right to accommodations, the process for establishing accommodations, and that retaliation is prohibited; and
- Keep records of all requests for lactation accommodations and any denials of accommodations for at least 3 years.

San Francisco's Office of Labor Standards Enforcement will begin enforcing penalties for violations of the rule in 2019.

PART III: SEVEN COMPONENTS OF A MODEL LACTATION POLICY

Far too many breastfeeding workers don't have the legal protections they need, contributing to the health and economic harms documented by this report. Robust breastfeeding laws already in effect in a number of states have been proven to work.[174] Studies that compare breastfeeding rates before legal protections were in place to afterwards show that state-level lactation laws have a positive impact on breastfeeding initiation and duration, particularly for Hispanic and Black women.[175]

American workers need a universal law to give parents a right to receive the job modifications they need to pump milk or address other lactation-related health needs. They also need a way to enforce that right. This final section examines the seven components of model breastfeeding legislation.

Strong Enforcement Mechanisms: No law will be effective unless it is enforceable. Enforcement by government agencies is vital - but limited due to chronic lack of funding. Individuals covered by the law need to be able to enforce it too. The Nursing Mothers law's weak enforcement mechanism helps explain why it has been so frequently ignored. Despite that law, 60% of women reported that their employer still did not provide access to break time and space.[176]

One study that examined eight different types of breastfeeding-support laws found that the single most impactful law that increased breastfeeding rates at six months postpartum was a workplace pumping law with an enforcement mechanism. Children in states that passed enforceable laws were over 3 times more likely to ever breastfeed and over 2 times more likely to breastfeed for at least six months as a result.[177]

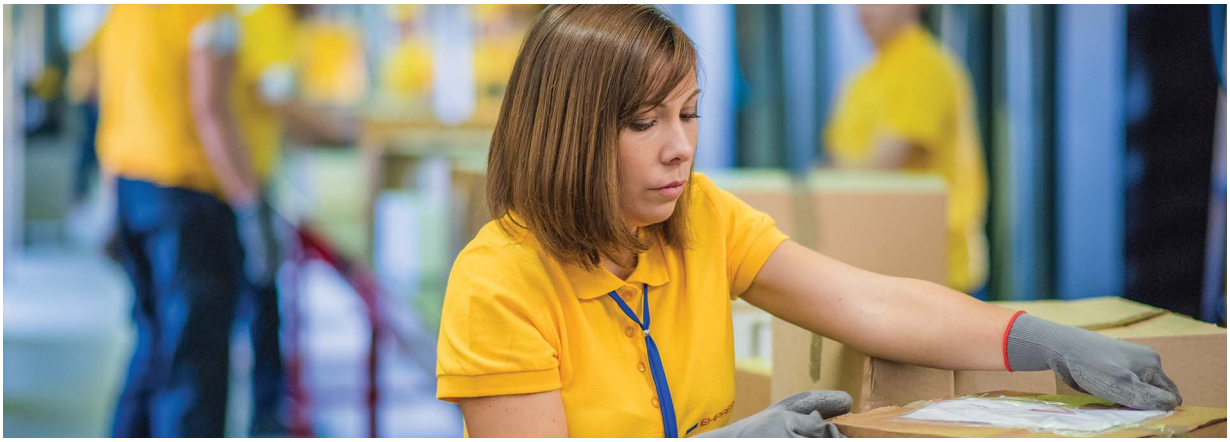
To ensure vigorous enforcement, model laws should be enforceable by private individuals suing their employers in court for monetary damages, as well as by a government agency that has the power to issue penalties for each violation. Employees should be compensated for economic harms like job loss or increased health care costs.[178] They should also be compensated for harms like pain and suffering that compensate for the physical and emotional toll of the kinds of breastfeeding discrimination documented by this report.[179] Employees who sue their employers should be entitled to recover attorneys' fees and costs of bringing a lawsuit, as is typical with worker-protective laws to ensure litigation expenses do not prevent workers from seeking justice.

BREASTFEEDING PARENTS NEED PAID LEAVE

Employees returning to work following childbirth need protection from discrimination and a right to reasonable accommodations. But the employment-related needs of breastfeeding workers start even earlier. A lack of paid maternity leave presents a huge barrier to breastfeeding.[180] However 1 in 4 moms in the U.S. return to work just 10 days after giving birth[181] Women with longer leaves are more likely to start breastfeeding and breastfeed longer.[182]

Four out of every ten women of childbearing age is not covered by the Family and Medical Leave Act (FMLA),[183] the federal law that gives a right to job-protected unpaid family leave for up to 12 weeks. Even for those who are covered, taking sufficient leave can be unaffordable. The United States stands alone as the only industrialized country with no national paid family leave policy.[184]

Breastfeeding workers need a comprehensive, universal paid family leave policy, so they are able to firmly establish breastfeeding before returning to the workforce.



Universal Coverage: Solutions that meet the health needs of breastfeeding workers exist in all industries.[185] Given the cost-effectiveness of accommodating breastfeeding workers,[186] model legislation should apply to employers of all sizes, both private and public, and should not exclude any occupations. Eleven states already have workplace breastfeeding laws that cover employers of all sizes.

Reasonable Accommodations: Employers are already required to provide reasonable accommodations for workers in many contexts, including under the Americans with Disabilities Act.[187] Due to health needs or the nature of their jobs, some lactating employees require job modifications, other than break time and space. Each situation is unique, but this can include reasonable accommodations like permission to carry a water bottle, a temporary change in job duties to avoid exposure to toxic chemicals, a temporary transfer to a position that does not jeopardize milk production, or time off for medical appointments. Model legislation should allow for these and other reasonable accommodations as needed.

No Employer Exemption: Given the ease with which accommodations can be provided and the cost savings associated with providing accommodations,[188] model legislation should follow the pattern of states that do not include an undue hardship or similar exemption in their accommodation laws.[189] Exceptions may be appropriate for statutes that allow direct breastfeeding (e.g., in cases where it would be unsafe or infeasible for a child to be present at the worksite).

Recognition of Diverse Physical Needs and Circumstances: Breastfeeding workers have differing physical needs, as illustrated throughout this report. A one-size-fits-all approach does not work. Model legislation should take into account:

- *Adequate and Flexible Break Schedules*: The necessary frequency and duration of breaks depends on a range of factors, including the employee's own body, her child's age and eating habits, workplace conditions, and the effectiveness of the breast pump. Breaks should be provided as regularly as needed and should last for as long as it takes the employee to express milk, as well as to complete all tasks incident to milk expression (e.g., walking to/from the space, retrieving and setting up the pump, cleaning up, and storing the milk).
- *Milk Expression Allowed for All Purposes*: Workers may need to express milk for their own health or to provide milk for children other than their own. These needs may arise, for example, in cases of gestational surrogacy or following the loss of a child. Milk expression should not be limited to only for the purpose of providing nutrition for the employee's own child.
- *No Infant-Age Limits*: One in three babies is still breastfeeding at one year,[190] and the World Health Organization recommends breastfeeding for up to the first two years of a child's life, or beyond.[191] Many nursing mothers require lactation breaks past the one-year mark, particularly employees who work extended shifts, travel away from home for long stretches, or alternate between daytime and nighttime shifts. Infant age-limits should not be imposed.

- *Direct Breastfeeding Allowed*: Some nursing employees may need to engage in direct breastfeeding for medical reasons. Others may prefer to directly breastfeed their children in contexts when it is feasible. Direct breastfeeding should be allowed when it can be accomplished without safety risks to the employee, child, or others.
- *Available to All Gender Identities*: Not all nursing parents identify as women. Model legislation should cover any person who needs to express milk, not only mothers or women.

Functional Space Requirements: Model legislation should specify that lactation spaces be fully functional for expressing milk and breastfeeding, including that they be:

- *Nearby*: The lactation space should be in close proximity to the employee's work area so that it is practical to access it on a regular basis during the workday.
- *Private*: Milk will not as easily release inside the breast (let-down) if the lactating parent is not relaxed and secure.[192] Embarrassment and fear from lack of privacy hinders milk release and can cause mothers to stop breastfeeding. The employee should be shielded from view, and the space should be free from intrusion by coworkers and members of the public.
- *Sanitary*: Model statutes should specify that the space must be clean enough for handling food and not a bathroom.
- *Equipped*: The space must include a place to sit, and a flat surface to place the pump, other than the floor. Model legislation should also require employers to provide spaces that are moderate in temperature and have access to electricity and running water, whenever possible.

Economically Realistic: Hourly employees, particularly low-wage workers, struggle to take pumping breaks when doing so results in wage loss. Model policies should address this reality. For example, the law should include one or more of the following:

- *Overlapping Breaks*: Employers must allow nursing employees to take their pumping breaks during and/or as an extension of another already-existing rest or lunch break, to minimize the amount of time away from work duties for which the employee is not paid.
- *Option to Use Paid Time*: Employers must give lactating employees the option of choosing to use sick days or other paid time off (PTO) in small, incremental amounts for milk expression. Employers cannot require the employee to use her PTO for this purpose.
- *Compensable Lactation Breaks*: This is the most effective means of ensuring low-wage workers are realistically able to express milk or breastfeed. Model legislation should prohibit employers from reducing an employee's compensation for time used expressing milk or breastfeeding, as already required in Illinois.[193] An alternative is to require employers to provide a fixed amount of paid lactation break time each workday (e.g., a 25-minute lactation break for every three hours worked), in the same way that the laws of nine states currently require employers to provide paid rest breaks.[194] Unlike rest breaks, however, lactation breaks must last for as long as is reasonable for expressing milk (as currently required by federal law), even if only a portion of the break must be paid.
- *Clarification of Work Time*: Legislation that does allow employers to reduce compensation for time spent on lactation breaks should always make clear that any lactation break during which the employee is not *completely* relieved of all of her work duties must be paid as normal work time.

Breastfeeding Breakthroughs

Laws prohibiting discrimination and requiring accommodation of breastfeeding workers have passed in states and cities across the country with bipartisan support, some receiving support or non-opposition from business groups as well as women's rights, religious, and health organizations.[195] Enforceable lactation laws improve working conditions for breastfeeding parents and increase breastfeeding rates. They also have the power to create critical cultural and social change. Workplace lactation laws signal that breastfeeding is an important health issue and send the message that workplaces must take women's needs, as well as men's, into account.

WANT TO KNOW MORE?
CONTACT THE CENTER FOR WORKLIFE LAW.

Advocates for expanding breastfeeding rights call 415-565-4640 or email info@worklifelaw.org.

Free legal hotline for workers and students call 415-703-8276 or email hotline@worklifelaw.org.

Legal resources and practical tips for employees, and their health care providers, employers, and lawyers visit www.PregnantAtWork.org.

Legal resources and practical tips for students, Title IX officers, and college/university administrators visit www.ThePregnantScholar.org.

REFERENCES

1 Predominantly-male industries are defined as those where no more than 35% of workers are women.

2 David Cooper, *Workers of color are far more likely to be paid poverty-level wages than white workers*, WORKING ECONOMICS BLOG, ECONOMIC POLICY INSTITUTE, https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/.

3 The Center for WorkLife Law partnered with economists at the Economic Policy Institute (EPI) to calculate the number of women of childbearing age uncovered by the Nursing Mothers law. For more information, see Heidi Shierholz, *Millions of Working Women of Childbearing Age Are Excluded from Key Protections for Nursing Mothers*, ECONOMIC POLICY INSTITUTE (Dec. 2018), https://www.epi.org/blog/break-time-for-nursing-mothers/.

4 Hawkins, Stern & Gillman, *Do state breastfeeding laws in the USA promote breast feeding*?, J. EPIDEMIOL COMMUNITY HEALTH 67(3):250, 254 (Mar 2013); *See also* Smith-Gagen et. al., *The Association of State Law to Breastfeeding Practices in the U.S.*, MATERN CHILD HEALTH J. 18(9):2034-43 (Nov. 2014).

5 This publication often uses "woman," "mother," and the female gendered pronouns "she" and "her" because most people who face discrimination because of breastfeeding are women and mothers. The authors recognize that this population also includes workers and parents who do not identify as women or mothers, including some gender nonconforming people and some transgender men.

6 CDC, *Breastfeeding Report Card,* https://www.cdc.gov/breastfeeding/data/reportcard.htm (among infants born in 2015 in the United States, 83.2% started to breastfeed); There were 3,978,497 births in the United States in 2015. See National Center for Health Statistics, *National Vital Statistics: Birth Data,* Centers for Disease Control and Prevention, https://www.cdc.gov/nchs/nvss/births.htm.

7 Am. Acad. of Pediatrics, Policy Statement, *Breastfeeding and the Use of Human Milk*, 129 PEDIATRICS e827, 32 (2012), available at http://pediatrics.aappublications.org/content/pediatrics/early/2012/02/22/peds.2011-3552.full.pdf; Am. Acad. Fam. Physicians, Policy Statement, *Breastfeeding* (2012), http://www.aafp.org/about/policies/all/breastfeeding.html; Am. Acad. Of Fam. Physicians, Policy Statement, *Breastfeeding* (1988, 2017 COD); Am. Coll. of Obstetricians and Gynecologists, *ACOG COMMITTEE Opinion #756 Optimizing Support for Breastfeeding as Part of Obstetric Practice;* Am. Pub. Health Ass'n. *A Call to Action on Breastfeeding: A Fundamental Public Health Issue.* Policy No. 200714 (2007) https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/29/13/23/a-call-to-action-on-breastfeeding-a-fundamental-public-health-issue; *See also* World Health Organization, *Factsheet: Infant and young child feeding* (2018) http://www.who.int/en/news-room/fact-sheets/detail/infant-and-young-child-feeding (recommending breastfeeding for two years).

8 Am. Acad. of Pediatrics, supra note 7.

9 Melissa Bartick & Arnold Reinhold, *The Burden of Suboptimal Breastfeeding in the United States: A Pediatric Cost Analysis,* PEDIATRICS 125(5) (May 2010), www.pediatrics.org/cgi/content/full/125/5/e1048.

10 Am. Acad. of Pediatrics, supra note 7 at e831-32.

11 Six in ten mothers stop breastfeeding earlier than the intended. Odom EC et al., *Reasons for Earlier Than Desired Cessation of Breastfeeding.* PEDIATRICS. 131(3), e726-32 (Mar. 2013).

12 CDC, *Breastfeeding Report Card* (2018), https://www.cdc.gov/breastfeeding/data/reportcard.htm.

13 Erica Anstey et al., *Racial and Geographic Differences in Breastfeeding — United States, 2011-2015.* MMWR MORB MORTAL WKLY REP 2017; 66, 723, 724, https://www.cdc.gov/mmwr/volumes/66/wr/mm6627a3.htm.

14 *See* Office of the Surgeon General (US), *Barriers to Breastfeeding in the United States,* CDC (2011), https://www.ncbi.nlm.nih.gov/books/NBK52688/; *See also* Samantha Artiga et. al., *Key Facts on Health and Health Care by Race and Ethnicity,* KFF, available at https://www.kff.org/disparities-policy/report/key-facts-on-health-and-health-care-by-race-and-ethnicity/ (black people, American Indians, and Alaska Natives fare worse than white people on a majority of measures of health status and outcomes).

15 Non-conformity with standard breastfeeding guidelines can be attributed to other structural and health barriers as well. They include inappropriate hospital care, widespread infant formula advertising, lack of availability of accurate breastfeeding information/education, and a culture that regards breasts primarily as sexual objects and so discourages breastfeeding in front of others. Employment-related structural barriers also include lack of access to paid leave, early return to work, and unsupportive work environments. *See* Office of the Surgeon General (US), supra note 14.

16 Katy B. Kozhimannil et al., *Access to Workplace Accommodations to Support Breastfeeding after Passage of the Affordable Care Act*, 26 WOMEN'S HEALTH ISSUES, 6 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4690749/pdf/nihms715360.pdf

17 *Id*. at 5.

18 *Id*. at 6.

19 *Id*. at 3.

20 *Id*.

21 Forste R & Hoffmann JP, *Are U.S. Mothers Meeting the Healthy People 2010 Breastfeeding Targets for Initiation, Duration, and Exclusivity? The 2003 and 2004 National Immunization Surveys*. J OF HUM. LACT. 24(3):278-88 (Aug 2008).

22 Lynda Laughlin, Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008, HOUSEHOLD ECONOMIC STUDIES, table 8, (Oct. 2011), https://www.census.gov/prod/2011pubs/p70-128.pdf.

23 *See* U.S. Dep't of Labor, Wage & Hour Div., Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010).

24 Lisa Amir. & The Academy of Breastfeeding Medicine Protocol Committee, ABM Clinical Protocol #4: Mastisis, BREASTFEEDING MEDICINE, 9 (5), 239, 239 (Revised March 2014).

25 Mayo Clinic, Mastisis, https://www.mayoclinic.org/diseases-conditions/mastitis/symptoms-causes/syc-20374829.

26 Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80075.

27 *Id*.

28 *Id*.

29 *Id*.

30 *Id*.

31 The Nat'l Inst. for Occupational Safety and Health, *Reproductive Health and the Workplace*, CDC, https://www.cdc.gov/niosh/topics/repro/breastfeeding.html.

REFERENCES

32 See page 38 to read about Stephanie Hicks, a breastfeeding police officer who requested an alternate work assignment after her doctor recommended that she not wear a bulletproof vest to avoid risk of infection and decreased milk supply.

33 U.S. Dep't of Health and Human Serv., Maternal Childcare Bureau, *The Business Case for Breastfeeding* (2008), https://www.womenshealth.gov/files/documents/bcfb_business-case-for-breastfeeding-for-business-managers.pdf.

34 The Center for WorkLife Law maintains a database of family responsibilities discrimination cases, including lawsuits filed in federal and state court and complaints filed with administrative agencies. This report examines the 70 cases involving allegations of breastfeeding discrimination that have written opinions issued between 2008 and April 2018. The cases in the family responsibilities discrimination database were identified in a number of ways, including extensive internet and computerized legal research, docket searches, case information sent to us by attorneys handling the cases, news reports, weblogs, EEOC press releases, hotline inquiries that resulted in litigation, and verdict and settlement reporters. Because it is not possible to identify all cases filed, and because many victims of discrimination do not file complaints for a variety of reasons, the number of cases within the dataset cannot be used to measure the prevalence of breastfeeding discrimination in the workplace. The cases are useful to examine the various forms of breastfeeding discrimination, to understand the impact it has on breastfeeding parents, and to assess the strength of the laws being used to address it. For information about the other cases in the Center for WorkLife Law's family responsibilities discrimination database, see Cynthia Calvert, *Caregivers in the Workplace: Family Responsibilities Discrimination Litigation Update 2016*, The Center for WorkLife Law, UC Hastings College of the Law (2016), https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf.

35 EEOC v. Vamco Sheet Metals, Inc., No. 13 Civ. 6088(JPO), at 2014 U.S. Dist. LEXIS 77436, at *6 (S.D.N.Y June 5, 2014).

36 Michael Abou-Dakn et. al., *Psychological Stress and Diseases During Lactation*, BREASTFEEDING REVIEW, 17(3), 1,1 (2009), https://www.researchgate.net/publication/40820670_Psychological_stress_and_breast_diseases_during_lactation.

37 Pawlow v. Dep't of Emergency Servs. & Pub. Prot., 172 F. Supp. 3d 568, 572 (D. Conn. 2016).

38 Mayer v. Prof'l Ambulance, LLC, 211 F. Supp. 3d 408, 412-13 (D.R.I. 2016).

39 Falk v. City of Glendale, No. 12-cv-00925-JLK, 2012 U.S. Dist. LEXIS 87278, at *3-4 (D. Colo. June 25, 2012).

40 Thomas v. Home Depot, U.S.A., Inc., No. 2:13-cv-02250-TLN-AC, 2015 U.S. Dist. LEXIS, at *4-6 40801(E.D. Cal. Mar. 26, 2015).

41 David Cooper, supra Note 2 (workers of color far more likely to be paid poverty-level wages than white workers).

42 Dep't of Fair Employment & Hous. v. Acosta Tacos, No. E200708 T-0097-00se, 2009 CAFEHC LEXIS 2, at *8-10 (Cal. Fair Employment & Hous. Comm'n June 16, 2009).

43 Kozhimannil, supra note 16, at 3.

44 Office of the Surgeon General, supra note 14.

45 Wexler v. Kennesaw Pediatrics, P.C., No. 1:16-cv-1491-TCB, 2017 U.S. Dist. LEXIS 111037, at *2-3 (N.D. Ga. July 17, 2017).

46 Kim v. Goldberg, 862 F. Supp. 2d 311, 315 (S.D.N.Y. 2012); Amended Complaint at 3-4, Kim v. Goldberg, No. 10-6101 (S.D.N.Y. Aug 13, 2010).

47 Ames v. Nationwide Mutual Ins. Co., 747 F.3d 509, 511 (8th Cir. 2014).

48 *Id.*

49 *Id*.

50 Waters v. AXL Charter Sch., No. 12-cv-01384-LTB, 2013 U.S. Dist. LEXIS 31643, at *11 (D. Colo. Mar. 7, 2013).

51 *See generally* Stephen Benard, In Paik, and Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359 (2008).

52 *See* Stephanie Bornstein, *Poor, Pregnant, and Fired: Caregiver Discrimination Against Low-Wage Workers*, Center for Worklife Law, UC Hastings College of the Law, 27-28 (2011), https://worklifelaw.org/publications/PoorPregnantAndFired.pdf; *See also* Mays et. al., *Perceived Race-Based Discrimination, Employment Status, and Job Stress in a National Sample of Black Women: Implications for Health Outcomes*, J OF OCCUPATIONAL HEALTH PSYCH 1(3):319-29 (1996); Milia Fisher, Women of Color and the Gender Wage Gap, CNTR FOR AM. PROGRESS (Apr. 14, 2015), https://cdn.americanprogress.org/wp-content/uploads/2015/04/WomenOfColorWageGap-brief.pdf; Jennifer Berdahl. & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, J. OF APPLIED PSYCH. 91(2):426-36 (2006).

53 U.S. Air Force Instruction 44-102, section 4.15 (Feb. 20, 2018); Dep't of the Army, Army Directive 2015-43 (Revised Breastfeeding and Lactation Policy); U.S. Coast Guard, Commandant Instruction 1000.9, Section 7(2), (Sep. 29, 2011); Marine Corps Order 5000.12E (as amended by MARADMIN 358/07; Dep't of the Navy, OPNAVINST 6000.1D, (Mar. 12, 2018). For more information and links to relevant policies and procedures, visit https://breastfeedingincombatboots.com/military-policies/.

54 Interview with Amy Smolinski, Director, Mom2Mom Global (October 29, 2018).

55 Calculations based on data Labor Force Statistics from the Current Population Survey, Bureau of Labor Statistics, 2017, available at https://www.bls.gov/cps/cpsaat18.htm

56 We define "predominantly-male" industries as those where no more than 35% of workers are women.

57 Ruther v. Babcock & Wilcox Tech. Servs. Y-12 LLC, No. 3:14-CV-599-PLR-CCS, 2016 U.S. Dist. LEXIS 81621, at *10-11 (E.D. Tenn. June 23, 2016).

58 *Id.* at *13.

59 King v. City of New Kensington, No. 06-1015, 2008 U.S. Dist. LEXIS 76485, at *9 (W.D. Pa. Sep. 30, 2008).

60 Kim Parker, *Women in majority-male workplaces report higher rates of gender discrimination*, PEW RESEARCH CENTER: FACT TANK, http://pewrsr.ch/2G5booM.

61 Mayer, 211 F. Supp. 3d at 419.

62 O'Brien v. Baca, Nos. A145949, A147555, 2017 Cal. App. Unpub. LEXIS 8268, at *4 (Cal. Ct. App. Dec. 4, 2017).

63 Taylor v. OWN: Oprah Winfrey Network, No. BC640884, 2017 Cal. Super. LEXIS 8053, at *2-3 (Cal. Super. Ct. Oct. 13, 2017).

64 White v. Schafer, 738 F. Supp. 2d 1121, 1129 (D. Colo. 2010).

REFERENCES

65 Jill Lepore, *Baby Food: If breast is best, why are women bottling their milk?,* THE NEW YORKER (Jan. 19, 2009).

66 Galen Sherwin, *Top 10 Reasons the ACLU Fights for Breastfeeding Rights*, ACLU (Aug. 4, 2016), https://www.aclu.org/blog/womens-rights/pregnancy-and-parenting-discrimination/top-10-reasons-aclu-fights-breastfeeding.

67 *See* Cynthia Calvert, supra note 34 at 4.

68 *See* Equal Employment Opportunity Comm'n v. Houston Funding II, Ltd., 717 F.3d 425, 426, 430 (5th Cir. 2013).

69 GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK, 1-3 (2016).

70 *See* Jill Lepore, supra note 65.

71 Jacobson v. Regent Assisted Living, Inc., CV-98-564-ST, 1999 U.S. Dist. LEXIS 7680, at *28 (D. Or. Apr. 9, 1999); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990).

72 Houston Funding, 717 F.3d at 425, 426, 430.

73 EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, § I.A.4.b (June 25, 2015).

74 *See* Young v. UPS, 135 S. Ct. 1338, 1355 (2015).

75 *See* Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1261 (11th Cir. 2017).

76 *See* 29 U.S.C. § 207(r) (2018).

77 *Id.*

78 29 U.S.C. § 207(r) (2018).

79 *See* U.S. Dep't of Labor, Wage & Hour Div., Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010). The Department's interpretation does not have the force of law, as it is not a regulation issued pursuant to the Administrative Procedure Act. However it is the most reliable source of guidance as to the meaning of the law's requirements.

80 *See* id.

81 *See* id.

82 U.S. Dep't of Health and Human Serv., Maternal Childcare Bureau, *The Business Case for Breastfeeding* (2008), https://www.womenshealth.gov/files/documents/bcfb_business-case-for-breastfeeding-for-business-managers.pdf.

83 *See* U.S. Dep't of Labor, Wage & Hour Div., Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010).

84 *See* id.

85 *See id.*

86 *See id.* at 80074.

87 *See id.* at 80079.

88 29 U.S.C. § 213 (2018).

89 *See* United States Breast Feeding Committee, Supporting Working Moms Act (SWMA), http://www.usbreastfeeding.org/swma.

90 U.S. DEP'T OF LABOR, WOMEN'S BUREAU, MOST COMMON OCCUPATIONS FOR WOMEN, https://www.dol.gov/wb/stats/most_common_occupations_for_women.htm.

91 *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #17S: HIGHER EDUCATION INSTITUTIONS AND OVERTIME PAY UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/whd/overtime/whdfs17s.htm.

92 *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #17N: NURSES AND THE PART 541 EXEMPTIONS UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/whd/overtime/fs17n_nurses.htm

93 *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT (Rev. Sept. 2016), https://www.dol.gov/whd/regs/compliance/hrg.htm#8

94 *See* Id.

95 *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #19: THE MOTOR CARRIER EXEMPTION UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/whd/regs/compliance/whdfs19.htm

96 *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #12: AGRICULTURE EMPLOYERS UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/whd/regs/compliance/whdfs12.htm

97 *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #17E: EXEMPTION FOR EMPLOYEES IN COMPUTER-RELATED OCCUPATIONS UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/whd/overtime/fs17e_computer.htm

98 *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #20: EMPLOYEES PAID COMMISSIONS BY RETAIL ESTABLISHMENTS WHO ARE EXEMPT UNDER SECTION 7(I) FROM OVERTIME UNDER THE FLSA, https://www.dol.gov/whd/regs/compliance/whdfs20.pdf

99 *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #17A: EXEMPTION FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER & OUTSIDE SALES EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/whd/overtime/fs17a_overview.pdf

100 *See* U.S. DEP'T OF LABOR, LEGISLATION & POLICY, FACT SHEET #17B: EXEMPTION FOR EXECUTIVE EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/whd/overtime/fs17b_executive.pdf

101 *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #17D: EXEMPTION FOR PROFESSIONAL EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA), https://www.dol.gov/whd/overtime/fs17d_professional.pdf

102 *See* ELLEN KEARNS ET. AL., FAIR LABOR STANDARDS ACT WITH 2017 CUMULATIVE SUPPLEMENT (3d ed. 2015); See also, e.g., Berne C. Kluber, *FLSA Exceptions and the Computing Workforce,* 33 HOUS. L. REV. 859, 864 (1996); Patrick M. Anderson, The Agricultural Employee Exemption From the Fair Labor Standards Act of 1938, 12 Hamline L. Rev. 649, 663-65 (1989).

103 *See* United States Breast Feeding Committee, Supporting Working Moms Act (SWMA).

104 The Center for WorkLife Law partnered with economists at the Economic Policy Institute (EPI) to calculate the number of women of childbearing age uncovered by the Nursing Mothers law. For more information, see Heidi Shierholz, *Millions of Working Women of Childbearing Age Are Excluded from Key Protections for Nursing Mothers*, ECONOMIC POLICY INSTITUTE (Dec. 2018), https://www.epi.org/blog/break-time-for-nursing-mothers/.

105 *See* U.S. DEP'T OF LABOR, supra note 90; National Center for Education Statistics, DIGEST OF EDUCATION STATISTICS (2016), https://nces.ed.gov/programs/digest/d16/ch_2.asp.

106 *See* note 104.

107 *See* Judi Conti, *The Case for Reforming Federal Overtime Rules: Stories from America's Middle Class*, NAT'L EMPLOYMENT LAW PROJECT POLICY BRIEF 1, 3 (Dec. 2014) https://nelp.org/wp-content/uploads/2015/03/Reforming-Federal-Overtime-Stories.pdf.

108 *See* La Leche League GB, Expressing Your Milk, https://www.laleche.org.uk/expressing-your-milk/

109 *See* Olivia Campbell, *The Unseen Consequences of Pumping Breast Milk*, PACIFIC STANDARD (Nov. 17, 2014), https://psmag.com/economics/unseen-consequences-pumping-breast-milk-94181

110 Frederick v. N.H. HHS, No. 14-cv-403-SM, 2015 U.S. Dist. LEXIS 132652, at *17 (D.N.H. Sept. 30, 2015).

111 *Id.* at *23.

112 *See* CDC, Breastfeeding Report Card (2018).

113 World Health Organization, supra note 7.

114 Gonzales v. Marriott Int'l, Inc., 142 F. Supp. 3d 961, 966 (C.D. Cal. 2015).

115 29 U.S.C. § 216(b).

116 Salz v. Casey's Marketing Co., No. 11-CV-3055-DEO, 2012 U.S. Dist. LEXIS 100399, at *7 (N.D. Iowa July 19, 2012).

117 Mayer, 211 F. Supp. 3d at 415.

118 *See* e.g., Eddins v. SSP Am., Inc., No. 4:12-cv-00177-JEG, 2013 U.S. Dist. LEXIS 195022, at *10 (S.D. Iowa Jan. 31, 2013); Ball v. Ohio Ambulance Sols., LLC, No. 1:14-CV-00355-LW, 2015 U.S. Dist. LEXIS 114664, at *48 (N.D. Ohio June 15, 2015); Tolene v. T-Mobile, USA, Inc., 178 Supp. 3d 674, 680 (N.D. Ill. 2016); Hicks, 870 F.3d at 1261; Frederick, 2015 U.S. Dist. LEXIS 132652, at *26.

119 Lico v. TD Bank, No. 14-CV-4729 (JFB) (AKT), 2015 U.S. Dist. LEXIS 70978, at *1 (E.D.N.Y. June 1, 2015).

120 *Id.* at *9-10.

121 United States District Court, Eastern District of New York, Court Fees, https://www.nyed.uscourts.gov/court-fees (last accessed Oct. 13, 2018).

122 Hicks v. City of Tuscaloosa, No. 7:13-cv-02063-TMP, 2015 U.S. Dist. LEXIS 141649, at *99 (N.D. Ala. Oct. 19, 2015).
In the other case that was allowed to proceed for "lost wages," a fire department paramedic used up eight of her sick and vacation days to stay home from work when she was assigned to duty at certain fire stations that had no private place to pump. She argued the employer was liable to her for the monetary value of those eight days, as she could have traded them in later for income. Clark v. City of Tuscon, 2018 U.S. Dist. LEXIS 69547 (D. Ariz. Apr. 28, 2018).

123 *See* Katy Kozhimannil, supra note 16 at 6.

124 U.S. Dep't of Labor, Wage & Hour Div., Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010).

125 *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #44: VISITS TO EMPLOYERS, (revised January 2015), https://www.dol.gov/whd/regs/compliance/whdfs44.pdf (last accessed Nov. 26, 2018) (outlining investigation procedure, including relevant laws and available remedies).

126 *See* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 14 (2011).

127 Hicks, 2015 U.S. Dist. LEXIS 141649, at *104.

128 Hicks, 2015 U.S. Dist. LEXIS 141649, at *104 n. 14.

129 Lactating employees may also have rights under the Americans with Disabilities Act, which was amended in 2008 to broaden the meaning of "disability," for which an employee is entitled to receive a reasonable accommodation. 42 U.S.C. §12101 et seq. While lactation alone is not a disability, physical and psychological impairments experienced by breastfeeding workers that substantially limit one or more major life activities can constitute a disability, such as for example recurrent mastitis or postpartum depression or anxiety. Worklife Law, UC Hastings College of the Law, *Pregnancy Accommodation Outline of the Law,* https://www.pregnantatwork.org/wp-content/uploads/Pregnancy-Accommodation-Laws-Outline.pdf. For more information about applicability of the Americans with Disabilities Act to breastfeeding employees, contact the Center for WorkLife Law.

130 *See* 42 U.S.C § 2000e et seq.

131 GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK, 1-3 (2016).

132 42 U.S.C § 2000e (k).

133 Ames v. Nationwide Mut. Ins. Co., No. 4:11-cv-00359, 2012 WL 12861597, at *6 n. 28 (S.D. Iowa Oct. 16, 2012). The authors recognize that trans men may chestfeed their infants. See e.g., Britini De La Cretaz, *What it's Like to Chestfeed: The Many Obstacles Trans Men and Other Transmasculine People Run Into When Feeding Infants*, THE ATLANTIC, (Aug. 23, 2016), https://www.theatlantic.com/health/archive/2016/08/chestfeeding/497015/. Recognizing this fact of course does not change the fact that discrimination on the basis of lactation is a form of discrimination against women.

134 Jacobson v. Regent Assisted Living, Inc., CV-98-564-ST, 1999 U.S. Dist. LEXIS 7680, at *30 (D. Or. Apr. 9, 1999); *See also* Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990).

135 Houston Funding EEOC, 717 F.3d at 428.

136 Mayer, 211 F. Supp. 3d at 417.

137 Hicks v. City of Tuscaloosa, No. 7:13-cv-02063-TMP, Memorandum Opinion,- Doc. 86 (N.D. Ala. March 28, 2016).

138 *See* Cynthia Calvert, supra note 34, at 26-27.

139 42 U.S.C. § 2000(e) (k).

140 Employees claiming that their employers failed to accommodate them in violation of Title VII can also rely on a disparate impact theory, to the extent the employer maintained a policy that had a significant negative impact on breastfeeding employees. See EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, § I.A.4.b (June 25, 2015).

141 *See* Young, 135 S. Ct. at 1348.

142 *See* Liz Morris, Cynthia Thomas Calvert & Joan C. Williams, *What Young vs. UPS means for Pregnant Workers and Their Bosses*, HARVARD BUSINESS REVIEW (March 26, 2015), https://hbr.org/2015/03/what-young-vs-ups-means-for-pregnant-workers-and-their-bosses.

143 EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, § I.A.4.b (June 25, 2015).

144 *Id.*

145 Even where a worker lacks evidence that other similar employees have been accommodated, *Young v. UPS* contemplates that the existence of a discriminatory policy alone may be sufficient to raise an inference of discrimination. *See Young,* 135 S. Ct. at 1344 (stating that courts should "consider the extent to which an employer's policy treats pregnant workers less favorably than it treats non-pregnant workers similar in their ability or inability to work," emphasis added.); *See also Legg v. Ulster Cnty.*, 820 F.3d 67, 74 (2d Cir. 2016) (stating that an employer's policy of accommodating employees injured on the job was enough, if not adequately justified, for a reasonable jury to find discriminatory intent behind the employer's failure to accommodate pregnant employees).

146 Non-comparative legal rights may be available, such as for example in situations where an employer's failure to accommodate breastfeeding workers has a disparate impact on them, in violation of Title VII, even when the employer does not accommodate others. For more information on non-comparative legal rights under the Pregnancy Discrimination Act, contact the Center for WorkLife Law.

147 *See* pages 11-13 of this report.

148 *See* Young, 135 S. Ct. at 1344-48.

149 *Id. at 1354.*

150 *Id.* at 1355.

151 *See* State Workplace Lactation Laws, Pregnant at Work, www.PregnantAtWork.org/state-workplace-lactation-laws.

152 This statistic reflects all women workers of childbearing age who work in states that do not provide a clear right to break time, space, and other reasonable accommodations. Because employer-size thresholds have not been calculated, this is a conservative estimate. This figure does not include states that have laws providing reasonable accommodations solely for pregnancy or related conditions, which do not explicitly mention lactation, breastfeeding, break time, or space. Even though such laws should be interpreted to require reasonable accommodations for breastfeeding workers, the right is not clear in that it requires legal analysis, and the laws could potentially be interpreted to not provide lactation accommodations. For more information about the lactation laws in each state, visit www.PregnantAtWork.org/state-workplace-lactation-laws.

The number of women workers of childbearing age in each state relied on throughout this report was provided by economists at the Economic Policy Institute, based on their analysis of data from the Bureau of Labor Statistics' Current Population Survey [2015-2017].

153 Hereinafter, Washington, D.C. may be described as a "state" for purposes of summarizing state laws.

154 This statistic includes states with stand-alone laws that mandate that both public and private employers provide break time and space for expressing breast milk (or breastfeeding) at work, as well as broader reasonable accommodation laws that explicitly mention the provision of break time and space. It does not include states that have incomplete break time and space laws, such as those which cover only public employees, include only time or only space, or which include permissive language (e.g. "employers *may* provide…"). This figure also does not include those state laws which provide reasonable accommodations solely for pregnancy or related conditions, but do not explicitly mention lactation, breastfeeding, break time, or space, even though these laws should be interpreted to provide protections for breastfeeding workers. Note, Puerto Rico mandates break time and space, but is not included in the population statistics because detailed data was unavailable.

155 This estimate is conservative in that it assumes that state laws providing break time and space apply to all workers within the given state, even though under some state laws employees that work for small employers are excluded. On the other hand, a small number of states provide limited protections to certain public employees. These employees have not been counted in this estimate.

156 An additional 6 states require employers to provide reasonable accommodations for pregnancy-related conditions or pregnancy-related "medical conditions," but do not explicitly mention either lactation/breastfeeding or break time/space.

157 An employer, "may not reduce an employee's compensation for the time used for the purpose of expressing milk or nursing a baby." 802 Ill. Comp. Stat. §§ 260/10 as amended by Illinois Public Act 100-1003. (Effective August 21, 2018).

158 *See* e.g. Colo. Rev. Stat. § 8-13.5.103 (2017); 19 Del. Code §§ 710(17) (2014); D.C. Code Ann. § 2-1402.82 (2007).

159 *See* Ark. Code Ann. § 11-5-116; 802 Ill. Comp. Stat. Ann. 260/15; Minn. Stat. § 181.939(b); N.M. Stat. Ann. § 28-20-2; N.Y. Lab. Law § 206-c.; Tenn. Code. Ann. § 50-1-305.

160 N.M. Stat. Ann. § 28-20-2.

161 Minn. Stat. § 181.939(b); Cal. Lab. Code §§ 1030-31.

162 Ark. Code Ann. § 11-5-116(c); D.C. Code Ann. § 2-1402.82 D.C. does not permit "bathroom or toilet stall".

163 D.C., D.C. Code Ann. § 2-1402.82; Connecticut, Conn. Gen. Stat. § 31-40w(d); Colorado, Colo. Rev. Stat. § 8-13.5.103; Hawaii (if less than 20 employees), Haw. Rev. Stat. § 378-92(c).

164 Bureau of Labor Statistics, Distribution of private sector employment by firm size class (2017), https://www.bls.gov/web/cewbd/table_f.txt.

165 U.S. Dep't of Health and Human Serv., supra note 33.

166 R.I. Gen. Laws § 23-13.2-1.

167 Conn. Gen. Stat. § 31-40w.

168 The Nat'l Inst. for Occupational Safety and Health, supra note 31.

169 Tex. Gov't Code § 619.004 (2017).

170 La. Rev. Stat. § 17:81(W); Va. Code Ann. § 22.1-79.6. Oregon also requires local school boards to accommodate milk expression, in addition to the general requirement for break time and space. Or. Rev. Stat. § 653.077(10).

171 Ga. Code Ann. § 34-1-6; 40 OK Stat. § 40-435.

172 California, Cal. Gov't Code § 12926(r)(1)(C); D.C., D.C. Code Ann. §§ 2-1401.05(a), 2-1402.11; Delaware, 19 Del. Code §§ 710(17), 711; Massachusetts, Mass. Gen. Laws ch. 151B, §4; New Jersey, N.J. Stat. Ann. § 10:5-5(e); South Carolina, S.C. Code Ann. §§ 1-13-30(l), 1-13-80; Virginia, Va. Code Ann. §§2.2-3901, 2.2-3903. Visit www.PregnantAtWork.org/state-workplace-lactation-laws for more information on state lactation laws.

173 San Francisco Police Code §§ 3300l.1 et seq.

174 Hawkins, Stern & Gillman, supra note 4; Smith-Gagen, supra note 4.

175 Hawkins, supra note 4 (finding that most gains in breastfeeding rates due to passage of workplace and public breastfeeding laws were observed among Hispanic and Black women).

176 Kozhimannil, supra note 16, at 2.

177 Smith-Gagen, supra note 4.

REFERENCES

178 In assessing monetary damages, employees who leave their jobs because they were not provided necessary breastfeeding accommodations should be presumed to have acted reasonably and entitled to the same monetary recovery as if they had been terminated.

179 Compensation for non-monetary harms ensures that employees who lose the ability to breastfeed, develop mastitis, or face increased health risks can still receive financial compensation for those harms, even if they do not lose their job or suffer other economic harm. This kind of compensation, and punitive damages, which are already available to employees under federal anti-discrimination law, both serve the important purpose of motivating employers to comply with the law.

180 Office of the Surgeon General (US), supra note 14.

181 PAID LEAVE U.S., http://paidleave.us/ (last visited Nov. 9, 2018).

182 Office of the Surgeon General (US), supra note 14.

183 Helene Jorgensen & Eileen Appelbaum, *Expanding Federal Family and Medical Leave Coverage: Who Benefits from Changes in Eligibility Requirements?* Ctr. for Economic & Pol'y Research 2 (February 2014), http://cepr.net/documents/fmla-eligibility-2014-01.pdf.

184 PAID LEAVE U.S., supra note 181.

185 See U.S. Dep't of Health and Human Serv., Office on Women's Health, *Lactation break time and space in all industries,* https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries..

186 U.S. Dep't of Health and Human Serv., supra note 33.

187 Lactating employees may also have rights under the Americans with Disabilities Act. See note 129.

188 *See* U.S. Dep't of Health and Human Serv., supra note 33.

189 Cal. Gov't Code § 12954(a)(3); Me. Rev. Stat. Ann. Tit. 26, § 604.

190 *See* CDC, *Breastfeeding Report Card* (2018).

191 World Health Organization, supra note 7.

192 *See* La Leche League GB, supra note 108.

193 802 Ill. Comp. Stat. § 260/10.

194 *See* U.S. Dep't of Labor, Wage and Hour Division, *Minimum Paid Rest Period Requirements Under State Law for Adult Employees in Private Sector* (Jan. 1, 2018), https://www.dol.gov/whd/state/rest.htm (California, Colorado, Illinois, Kentucky, Minnesota, Nevada, Oregon, Vermont, and Washington).

195 Interview with Amelia Psmythe, Interim Executive Director, United States Breastfeeding Committee (October 2, 2018); See also *Pregnant Workers Fairness*, A BETTER BALANCE, https://www.abetterbalance.org/our-campaigns/pregnant-workers-fairness/.

APPENDIX

STATE-BY-STATE WORKPLACE LACTATION PROTECTIONS:

* For more information about the laws in each state, visit www.PregnantAtWork.org/state-workplace-lactation-laws.

FEDERAL NURSING MOTHERS LAW			STATE-LEVEL LACTATION LAWS*		
Women Workers of Childbearing Age Not Covered (in thousands)	Percentage of Women Workers of Childbearing Age Not Covered	State	Clear Right to Break Time and Space?	Clear Right to Reasonable Accommodations for lactation or pregnancy-related conditions?	Some level of additional lactation protections?
104	20%	Alabama	No	No	No
19	23%	Alaska	No	No	No
151	20%	Arizona	No	No	No
79	23%	Arkansas	Yes	No	No
994	23%	California	Yes	Yes	n/a
174	25%	Colorado	Yes	Yes	n/a
107	26%	Connecticut	Yes	Yes	n/a
28	24%	Delaware	Yes	Yes	n/a
70	54%	District of Columbia	Yes	Yes	n/a
474	22%	Florida	No	No	No
308	25%	Georgia	No	No	Yes
31	20%	Hawaii	Yes	No	No
32	17%	Idaho	No	No	No
378	25%	Illinois	Yes	Yes	n/a
155	19%	Indiana	No	No	Yes
90	21%	Iowa	No	No	No
71	20%	Kansas	No	No	No
106	21%	Kentucky	No	No	No
114	22%	Louisiana	No	No	Yes
27	19%	Maine	Yes	No	No
228	30%	Maryland	No	No	No
269	30%	Massachusetts	Yes	Yes	n/a
231	20%	Michigan	No	No	No
180	24%	Minnesota	Yes	Yes	n/a
68	20%	Mississippi	No	No	Yes

STATE-BY-STATE WORKPLACE LACTATION PROTECTIONS:

* For more information about the laws in each state, visit www.PregnantAtWork.org/state-workplace-lactation-laws.

FEDERAL NURSING MOTHERS LAW			STATE-LEVEL LACTATION LAWS*		
Women Workers of Childbearing Age Not Covered (in thousands)	Percentage of Women Workers of Childbearing Age Not Covered	State	State Law Providing Clear Right to Break Time and Space?	Clear Right to Reasonable Accommodations for lactation or pregnancy-related conditions?	Some level of additional lactation protections?
186	23%	Missouri	No	No	No
21	18%	Montana	No	No	Yes
54	22%	Nebraska	Yes	Yes	n/a
58	17%	Nevada	Yes	Yes	n/a
39	24%	New Hampshire	No	No	No
312	31%	New Jersey	Yes	Yes	n/a
51	24%	New Mexico	Yes	No	No
712	31%	New York	Yes	Yes	n/a
272	23%	North Carolina	No	No	No
22	22%	North Dakota	No	No	No
293	21%	Ohio	No	No	No
101	24%	Oklahoma	No	No	Yes
99	21%	Oregon	Yes	No	Yes
373	24%	Pennsylvania	No	No	No
29	21%	Rhode Island	Yes	Yes	n/a
125	22%	South Carolina	Yes	Yes	n/a
18	17%	South Dakota	No	No	No
163	21%	Tennessee	Yes	No	No
800	25%	Texas	No	No	Yes
64	17%	Utah	Yes	Yes	n/a
18	23%	Vermont	Yes	Yes	n/a
328	31%	Virginia	No	No	Yes
205	25%	Washington	No	Yes	No
37	21%	West Virginia	No	Yes	No
157	21%	Wisconsin	No	No	No
13	20%	Wyoming	No	No	No

APPENDIX

FEDERAL BREAK TIME FOR NURSING MOTHERS LAW, COVERAGE BY INDUSTRY

Industry	Women Workers of Childbearing Age Not Covered (in thousands)	Percentage of Women Workers of Childbearing Age Not Covered
Educational and health services	4,610	34%
Professional and business services	1,172	31%
Financial activities	760	28%
Public administration	563	40%
Wholesale & retail trade	522	10%
Manufacturing	444	20%
Leisure and hospitality	253	5%
Other services	246	14%
Information	210	32%
Transportation and utilities	142	17%
Construction	71	18%
Agriculture, forestry, fishing, hunting	25	14%
Mining	22	39%

Race	Women Workers of Childbearing Age Not Covered (in thousands)	Percentage of Women Workers of Childbearing Age Not Covered
White	6,046	27%
Black	1,007	19%
Hispanic	976	14%
Asian	825	34%
Other	185	18%

Photo Credits

Many thanks to: United States Breastfeeding Committee: Cover, Table of Contents (top photo), and pages 3, 5, 19, 23, 31; Kris Haro and Johnathan Wenske, When Nature Calls: Page 9; Simone Teagle: Page 12; Sharon Gustafson and Peggy Young: Page 21; Kate Frederick: Page 30; Stephanie Hicks: 38