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6-2021

### **Compliance or Complaints? The Impact of Private Enforceability of Lactation Break Time and Space Laws**

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# Compliance or Complaints?

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## *The Impact of Private Enforceability of Lactation Break Time and Space Laws*

**JUNE 2021**



## **Compliance or Complaints?**

### *The Impact of Private Enforceability of Lactation Break Time and Space Laws*

June 2021

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### *About the Center for WorkLife Law*

The University of California, Hastings Law, Center for WorkLife Law is a research and advocacy organization that seeks to advance gender, racial, and class equity in employment and education. WorkLife Law collaborates with employees, employers, attorneys, and government officials to identify practical and legal solutions to work-family issues. More information about WorkLife Law can be found at [worklifelaw.org](http://worklifelaw.org).

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## Summary of Key Research Findings

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The Break Time for Nursing Mothers requirement<sup>1</sup> has been federal law for over a decade, requiring employers to provide reasonable break time and private space to employees for expressing breast milk. However, non-compliance remains a problem.<sup>2</sup> Employees who have been denied their break time and space – or fired outright simply for asking for it – cannot enforce their rights under this law in court.<sup>3</sup> One federal judge called the lack of an enforcement mechanism an “absurdity.”<sup>4</sup> The lack of incentive to become educated about and follow the law is a significant driver of non-compliance.

In response, a bipartisan group of lawmakers introduced the Providing Urgent Maternal Protections for Nursing Mothers Act, or the “PUMP Act.”<sup>5</sup> If passed into law, the legislation would allow employees to seek damages in court for economic and other harms resulting from noncompliance. This report examines one important question policymakers should consider:

### **Whether and to what extent adding a private enforcement mechanism to a lactation break time and space law increases litigation against employers.**

Researchers at the University of California, Hastings Law, Center for WorkLife Law conducted an in-depth review of lawsuits filed against employers in the four jurisdictions that have privately enforceable break time and space laws – Hawaii, Minnesota, Vermont, and Washington, D.C. – to examine the likelihood that employers will be sued.

#### *Key Findings*

- Researchers identified a total of 6 lawsuits filed against employers in all four jurisdictions over the combined 47 years that the laws have been in effect.
- One hundred percent (100%) of state-level lawsuits were brought by employees alleging actual economic damages, typically job loss.
- The annual likelihood a private company will be sued under an enforceable lactation break time and space law is essentially zero (0.0002%). A business owner is over 25 times more likely to be struck by lightning in their lifetime.<sup>6</sup>

WorkLife Law’s data show that allowing employees to enforce lactation break time and space laws in court does not lead to a meaningful increase in litigation. This may be because privately enforceable laws incentivize employers to follow the law, making lawsuits unnecessary.

## *Background on Lactation Break Time and Space Laws*

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Most women who were employed during pregnancy (59%) return to work within only three months of giving birth, and four out of five (79%) return by their baby's first birthday.<sup>7</sup> All relevant major medical associations in the U.S. recommend breastfeeding for at least the first year of life to benefit the health of the mother and baby.<sup>8</sup> Whether they are able to do so depends in large part on their workplace.

Nursing parents are constantly producing milk. When a breastfeeding parent is away from their child, they have to express the milk they are producing on roughly the same schedule as the child nurses.<sup>9</sup> If their employment situation prevents them from regularly expressing milk, serious health consequences may follow, including illness and painful infections, diminished milk supply, and weaning earlier than doctors recommend.<sup>10</sup> In addition to these health impacts, employees may suffer economic losses if they are terminated or put on unpaid leave following a request for break time and space.<sup>11</sup>

### *Federal Break Time for Nursing Mothers Law*

The federal Break Time for Nursing Mothers law was enacted in 2010 to ensure breastfeeding employees who are away from their babies during the workday have access to reasonable break time and private space for pumping milk. Despite its clear purpose, technicalities make the Break Time for Nursing Mothers law practically unenforceable, even in cases where an employee is fired for requesting breaks. The unavailability of a private enforcement mechanism is one reason why non-compliance is widespread.<sup>12</sup> Research has found that the single most impactful law that increased breastfeeding rates at six months postpartum was a workplace pumping law with an enforcement mechanism.<sup>13</sup>

The PUMP Act has been introduced in both the U.S. House of Representatives and the U.S. Senate with bipartisan support to encourage employer compliance by addressing the non-enforceability issue. If passed, the PUMP Act would allow employees whose rights have been violated to seek remedies in court, including legal and equitable relief for economic and other harms incurred.

### *State-Level Break Time and Space Laws*

The majority of states require employers to accommodate lactation in some way. Fifteen states and Washington, D.C. have passed laws that are substantially similar to the federal Break Time for Nursing Mothers law, explicitly requiring employers to provide both break time and private space.<sup>14</sup> Of these fifteen states, only three – Hawaii, Minnesota, and Vermont – and the District of Columbia allow aggrieved employees to file lawsuits seeking damages.<sup>15</sup> In these jurisdictions employees are generally permitted to seek legal and equitable relief, such as “any and all damages recoverable at law”<sup>16</sup> in Minnesota and “compensatory and punitive damages or equitable relief”<sup>17</sup> in Vermont.

## Litigation Data

WorkLife Law researchers conducted comprehensive searches to identify cases brought under the four privately enforceable lactation break time and space laws.<sup>18</sup> Researchers reviewed all complaints and court orders available in Westlaw, Lexis, and Bloomberg Law through 2020 to ensure as many lawsuits as possible were identified.

Researchers identified a total of 6 lawsuits filed through the end of 2020. All 6 lawsuits alleged actual economic damages – in 5 cases as a result of job loss, and in 1 case as a result of a lengthy involuntary unpaid leave.

### Lawsuits Brought Under Privately Enforceable Lactation Break Time and Space Laws (2007-2020)

State (year enacted)	Total Lawsuits Filed	Average # of Lawsuits Per State Per Year	Actual Economic Damages Sought
	<b>6</b>	<b>0.16</b>	<b>100% of cases</b>
Hawaii (2008)	0	0	n/a
Minnesota (2014)	3	0.43	100% of cases
Vermont (2008)	0	0	n/a
Washington, D.C. (2007)	3	0.21	100% of cases

WorkLife Law researchers also determined the likelihood that any *individual business* will face a lawsuit in a given year under an enforceable break time and space law, either at the federal level or within a single state. Based on an analysis from the Kaiser Family Foundation reporting the number of private employers operating in each state,<sup>19</sup> researchers calculated the annual rate at which private businesses have been sued under these laws.

### Lawsuits Brought Under Privately Enforceable Lactation Break Time and Space Laws Against Private Employers (2007-2020)

	Number of Private Employers	Lawsuits Against Private Employers	Annual Rate of Break Time and Space Lawsuits	Annual Likelihood for an Individual Employer
Hawaii (2008)	29,216	0	0 employers	0.0000%
Minnesota (2014)	146,430	3	1 out of every 340,534 employers	0.0003%
Vermont (2008)	20,101	0	0 employers	0.0000%
Washington, D.C. (2007)	20,921	2	1 out of every 149,435 employers	0.0007%
<b>Average Based on all States<sup>20</sup></b>			<b>1 out of every 410,004 employers</b>	<b>0.0002 %</b>

## Analysis

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These data demonstrate how rare it has been for employers of any size to face a lawsuit under a privately enforceable break time and space statute. The annual likelihood an individual business will be sued is 0.0002%. A business owner is over 25 times more likely to be struck by lightning in their lifetime than they are to face a lawsuit alleging a violation of a lactation break time and space law.<sup>21</sup> Even in Washington, D.C., where there is a robust plaintiffs' bar, only 1 out of every 149,435 businesses per year has been sued on average. The odds are significantly lower in other states. Hawaii and Vermont each had zero (0) lawsuits since their lactation break time and space laws were enacted in 2008.

Although the sample size is small, the 6 state-level lawsuits show that employees have filed claims only in the most serious cases where they have incurred significant economic harms, normally job loss. Irregular violations that are remedied without delay, such as an accidental intrusion, have not led to litigation. This is likely due to a lack of desire on the part of employees to sue their current employer who acted in good faith, but also because attorneys are unlikely to take cases with no actual economic damages, especially when the employer acted reasonably.

Given the similarities between the state-level laws and the PUMP Act – with regard to employer requirements, enforceability, and available damages – we expect litigation rates to remain low should the PUMP Act pass. When employers have clear standards to meet, and appropriate consequences if they do not, businesses have shown that they are able to provide the break time and space that breastfeeding employees need. Following the law is simple, and creative solutions exist in all industries.<sup>22</sup> As described by the U.S. Department of Health and Human Services, employers that support breastfeeding with affordable solutions realize cost savings from increased loyalty and retention, reduced sick time, and decreased health care and insurance costs.<sup>23</sup>

The data presented in this study show that privately enforceable break time and space laws can achieve these benefits for American companies and their lactating employees by encouraging employer education and compliance without a significant increase in litigation.

## *Acknowledgements:*

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The authors gratefully acknowledge the hard work of the WorkLife Law team that made this report possible. Thank you to research assistant Sam Pannell for your excellent, thorough legal research. Many thanks also to Policy and Research Fellow Mikayla Boginsky for your research contributions; Alaina Harwood for your meticulous editing; Director of Research on Organization Bias Rachel Korn for your quantitative savvy; Staff Attorney Juliana Franco for your skilled research; and WorkLife Law Senior Advisory Cynthia Calvert for your wise counsel.

This report is based on the pioneering work of Joan C. Williams, Distinguished Professor of Law at the University of California, Hastings Law and Founding Director of the Center for WorkLife Law, and would not be possible without her leadership and support.

- 1 29 U.S.C. § 207(r).
- 2 See Katy B. Kozhimannil et al., *Access to Workplace Accommodations to Support Breastfeeding after Passage of the Affordable Care Act*, 26 WOMENS HEALTH ISSUES 6 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4690749/pdf/nihms715360.pdf>.
- 3 LIZ MORRIS, JESSICA LEE & JOAN WILLIAMS, EXPOSED: DISCRIMINATION AGAINST BREASTFEEDING WORKERS 32 (2019), <https://repository.uchastings.edu/wll/1/> (hereinafter “EXPOSED”).
- 4 Hicks v. City of Tuscaloosa, No. 7:13-cv-02063-TMP, 2015 U.S. Dist. LEXIS 141649, at \*104 n. 14 (N.D. Ala. Oct. 19, 2015).
- 5 Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act, H.R. 3110 & S. 1658, 117th Cong. (2021); see Press Release, Maloney, Congressional Maternity Care Caucus, & Black Maternal Health Caucus Co-Chairs Introduce Bill to Ensure Breastfeeding Rights for Working Moms (May 11, 2021), <https://maloney.house.gov/media-center/press-releases/maloney-congressional-maternity-care-caucus-black-maternal-health-caucus>.
- 6 NATIONAL WEATHER SERVICE, *How Dangerous is Lightning?*, <https://www.weather.gov/safety/lightning-odds> (last visited Jun. 4, 2021) (the odds of being struck by lightning in the United States in a lifetime is 1 in 15,300).
- 7 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>.
- 8 Am. Acad. of Pediatrics, *Policy Statement, Breastfeeding and the Use of Human Milk*, 129 PEDIATRICS e827, 32 (2012), <https://pediatrics.aappublications.org/content/pediatrics/129/3/e827.full.pdf>; Am. Acad. Of Fam. Physicians, *Breastfeeding (Policy Statement)* (1988, 2017 COD), <http://www.aafp.org/about/policies/all/breastfeeding.html>; Am. Coll. of Obstetricians & Gynecologists, *ACOG Committee Opinion No. 756: Optimizing Support for Breastfeeding as Part of Obstetric Practice*, 132 OBSTETRICS & GYNECOLOGY e187 (2018); 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>.
- 9 See U.S. Dep’t of Labor, Wage & Hour Div., *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010).
- 10 Lisa Amir & The Academy of Breastfeeding Medicine Protocol Committee, *ABM Clinical Protocol #4: Mastitis*, BREASTFEEDING MEDICINE, 9 (5), 239, 239 (Revised Mar. 2014); Mayo Clinic, *Mastitis*, <https://www.mayoclinic.org/diseases-conditions/mastitis/symptoms-causes/syc-20374829>.
- 11 EXPOSED, *supra* note 3, at 13.
- 12 EXPOSED, *supra* note 3.
- 13 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. 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), note 4.
- 14 Arkansas (Ark. Code Ann. § 11-5-116); California (Cal. Lab. Code §§ 1030-31); Colorado (Colo. Rev. Stat. § 8-13.5-104); Connecticut (Conn. Gen. Stat. § 31-40w); Georgia (Ga. Code Ann. § 34-1-6); Hawaii (Haw. Rev. Stat. § 378-92); Illinois (802 Ill. Comp. Stat. §§ 260/10, 15); Maine (Me. Rev. Stat. Ann. tit. 26, § 604); Minnesota (Minn. Stat. § 181.939); New Mexico (N.M. Stat. Ann. § 28-20-2); New York (N.Y. Lab. Law § 206-c); Oregon (Or. Rev. Stat. § 653.077); Rhode Island (R.I. Gen. Laws § 23-13.2-1); South Carolina (S.C. Code Ann. § 41-1-130); Tennessee (Tenn. Code. Ann. § 50-1-305); Vermont (21 V.S.A. § 305.21); and Washington, D.C. (D.C. Code Ann. § 2-1402.82.). Note, in addition to the explicit lactation break time and space laws found in the above jurisdictions, several state laws require lactation accommodations be provided to groups of workers (e.g. public employees) or do not address both time and space. Further, the federal Pregnancy Discrimination Act and various state-level Pregnant Worker Fairness Acts also require employers to provide break time and space for lactation under certain circumstances.
- 15 See Haw. Rev. Stat. Ann. § 378-93 (individuals may file a lawsuit seeking injunctive relief and actual damages, defined as “damages for injury or loss caused by each violation,” reasonable attorneys’ fees, and \$500 civil fine); Minn. Stat. Ann. § 181.944 (individuals may file a lawsuit to “recover any and all damages recoverable at law,” including injunctive relief, along with costs, disbursements, and reasonable attorney’s fees.); 21 V.S.A. § 495b(b) (aggrieved employees may seek “compensatory and punitive damages or equitable relief, including restraint of prohibited acts, restitution of wages or other benefits, reinstatement, costs, reasonable attorney’s fees and other appropriate relief.”); D.C. Code §§ 2-1403.16(a)-(b), 2-1403.07, 2-1403.13(a) (individuals may file a lawsuit for “damages and such other remedies as may be appropriate,” including compensatory damages, reinstatement with back pay, reasonable attorneys’ fees, payment of hearing costs, and civil penalties).
- 16 Minn. Stat. Ann. § 181.944.
- 17 21 V.S.A. § 495b(b).
- 18 Haw. Rev. Stat. §§ 378-91 – 93; Minn. Stat. Ann. § 181.939; 21 V.S.A. § 305; D.C. Code Ann. § 2-1402.82.
- 19 WorkLife Law researchers used the average number of private employers based on data for each relevant state from 2016, 2017, 2018, and 2019, the latest year for which data was available. See *Number of Private Sector Firms, By Size, State Health Facts*, KAISER FAMILY FOUNDATION, <https://www.kff.org/other/state-indicator/number-of-firms-by-size/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22:%22sort%22:%22asc%22%7D>.
- 20 The averages give equal weight to each of the four states with break time and space laws.
- 21 NATIONAL WEATHER SERVICE, *supra* note 6 (the odds of being struck by lightning in the United States in a lifetime is 1 in 15,300).
- 22 See U.S. Dep’t of Health & Human Serv., Office on Women’s Health, *Lactation Break Time and Space in All Industries* (last updated Aug. 10, 2018), <https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries>.
- 23 U.S. Dep’t of Health & Human Serv., Maternal Childcare Bureau, *Business Case for Breastfeeding* (last updated Oct. 26, 2018), <https://www.womenshealth.gov/breastfeeding/breastfeeding-home-work-and-public/breastfeeding-and-going-back-work/business-case>.

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