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PRACTITIONERS' NOTES

LACTATION BREAKS IN THE WORKPLACE: WHAT EMPLOYERS NEED TO KNOW ABOUT THE NURSING MOTHERS AMENDMENT TO THE FLSA

*Sarah Andrews**

INTRODUCTION

Effective March 23, 2010, federal law now requires all employers to offer eligible employees an appropriate location and job-protected time off from work to express breast milk for their nursing infants.¹ The mandate for lactation breaks was a product of the 2010 Healthcare Reform Law,² which amended the provisions of the Fair Labor Standards Act (FLSA) by adding the Nursing Mothers Amendment to Section 207.³ This article examines the law with the goal of outlining the requirements of the Nursing Mothers Amendment and offering suggestions on constructive and cost-effective ways to comply.

This article has four parts. Part I considers the evolving role of breastfeeding in a labor force that is increasingly populated by female employees, and examines the resultant legal trends that will affect employers. Part II examines the statutory language of the Nursing

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4207, 124 Stat. 119, 577 (2010).

2. With the exception of 42 U.S.C. § 1396(c), related to the enforcement of an expansion of Medicaid, the U.S. Supreme Court recently affirmed the Affordable Care Act as a constitutional exercise of Congressional power. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2600, 2607 (2012).

3. 29 U.S.C. § 207(r) (2010). The Fair Labor Standards Act (FLSA) is the federal law that sets minimum wage and overtime standards. The other provisions of Section 207 pertain to premium payments mandated for hours worked over forty in one week.

Mothers Amendment to the FLSA and the existing interpretive guidance from the Department of Labor (DOL). Part III focuses on analogous state laws, which are sufficiently numerous that many employers either already have lactation programs in order to comply with state law, or may be out of compliance. Part IV will address employer concerns and recommends that employers consider the business case for developing comprehensive lactation support programs.

I. MOTHERS IN THE WORKFORCE AND THE RISE OF LEGISLATION TO SUPPORT BREASTFEEDING

A. U.S. Breastfeeding Rates and Female Participation in the Labor Force

In the 1800s, breastfeeding was the normative means of nurturing a child, as more than 95% of infants in the United States were breastfed until between the ages of two and four.⁴ Early substitutes for breast milk often lead to dehydration, diarrhea or illnesses contracted from tainted cow's milk.⁵ Women who had to rely on human milk substitutes in order to enter the workforce took a substantial risk with respect to the health of their children.⁶ For example, the infant mortality rate was fifteen times higher for bottle-fed babies than for breastfed infants in Chicago in 1910.⁷ Nonetheless, the advent of the pasteurization of milk and sterilized feeding vessels increased the perception that artificial milk was a safe and marketable alternative.⁸ Although the average American woman continued to breastfeed through the 1920s, the culture began to shift away from a reliance on breast milk to the use of infant formula; a move which was often recommended by pediatricians.⁹ By the 1940s, formula-feeding was the norm in the United States, with fewer than 30%

4. MEREDITH F. SMALL, OUR BABIES, OURSELVES: HOW BIOLOGY AND CULTURE SHAPE THE WAY WE PARENT 204 (1998).

5. JACQUELINE H. WOLF, DON'T KILL YOUR BABY: PUBLIC HEALTH AND THE DECLINE OF BREASTFEEDING IN THE NINETEENTH AND TWENTIETH CENTURIES 42-50 (2001).

6. *See id.*; *see also* SMALL, *supra* note 4, at 206.

7. WOLF, *supra* note 5, at 1, 19-20.

8. SMALL, *supra* note 4, at 206. By this date there were hundreds of varieties of condensed or evaporated milk for sale that did not need refrigeration. *Id.*

9. Linda C. Fentiman, *Marketing Mothers' Milk: The Commodification of Breastfeeding and the New Markets for Breast Milk and Infant Formula*, 10 NEV. L.J. 29, 36-37 (2009). There is considerable scholarly discussion related to the role of profit and how it influenced doctors' recommendations away from breast milk and towards artificial formulas. *Id.* at 37. *See also* SMALL, *supra* note 4, at 206-207.

of American babies fed from the breast.¹⁰ “[B]y 1971 only 21% of American infants were breastfed when they were discharged from the hospital, and only 6% were breastfeeding five to six months later.”¹¹

Meanwhile, the participation of American women in the civilian labor force grew from 28% in 1940 to 43.3% in 1970.¹² By 1975 women with children under the age of three made up 34.3% of the labor force, which nearly doubled to 61.1% of the labor force by 2009.¹³ Currently, over half of all mothers with infants under the age of one participate in the labor force.¹⁴

And yet, despite the steady increase in the amount of mothers with young children who work, breastfeeding rates are rebounding. In 2006, 43.4% of mothers were at least partially breastfeeding at six months,¹⁵ which is a significant increase over the 6% of women breastfeeding six months after discharge from the hospital in 1971.¹⁶ This shift coincides with ever increasing scientific evidence of the health benefits of breastfeeding.¹⁷ At the same time, there remains evidence that the demands of the labor market take a toll on employed mothers’ ability to breastfeed exclusively.¹⁸ For example, the rate of exclusive breastfeeding at six months for babies born in 2006 was 14%, which is a significant drop from the 33% of mothers exclusively breastfeeding at

10. SMALL, *supra* note 4, at 206-207.

11. Fentiman, *supra* note 9, at 38.

12. Kristin E. Smith and Amara Bachu, *Women’s Labor Force Attachment Patterns and Maternity Leave: A Review of the Literature*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/documentation/twps0032/twps0032.html> (last updated Oct. 31, 2011, 10:03 PM); *Women in the Labor Force: A Databook (2010 Edition)*, Table 2, U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, <http://www.bls.gov/cps/wlftable2-2010.htm> (last modified Mar. 16, 2011).

13. *Women in the Labor Force: A Databook (2010 Edition)*, Table 7, U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, <http://www.bls.gov/cps/wlftable7-2010.htm> (last modified Mar. 16, 2011).

14. *Labor Force Participation of Mothers with Infants in 2008*, U.S. BUREAU OF LABOR STATISTICS (May 29, 2009), <http://www.bls.gov/opub/ted/2009/may/wk4/art04.htm> (“The workforce participation rate for mothers with children under a year old was 56.4 percent in 2008.”).

15. *Statement on Lactation Accommodations in the Workplace*, U.S. BREASTFEEDING COMM., 3 n.4 (2011), available at <http://www.usbreastfeeding.org/Portals/0/Position-Statements/Workplace-Statement-2011-USBC.pdf>. However, in 2007, less than 23% of women breastfed when their child was one year of age. *Briefing Document to Support Appropriations for Breastfeeding*, U.S. BREASTFEEDING COMM., 2 <http://www.usbreastfeeding.org/Portals/0/Publications/Briefing-Documents/Approp-FY12.pdf> (last visited Nov. 23, 2012).

16. Fentiman, *supra* note 9, at 38.

17. See *infra* Part IV.A.1.

18. Fentiman, *supra* note 9, at 51.

three months.¹⁹ A 2007 survey found that 30% of new mothers gave up breastfeeding completely less than seven weeks after returning to work.²⁰ Low rates of exclusive breastfeeding can be translated into significant societal costs. In 2010 one study concluded that the United States could save \$13 billion every year in pediatric health care costs if 90% of women were able to breastfeed according to medical recommendations.²¹ More starkly, meeting the medical recommendation to breastfeed exclusively for the first six months of life would save the lives of over 900 infants every year.²² Legislators have begun to take notice of the potential to save both infant lives and healthcare costs by making longer periods of exclusive breastfeeding feasible,²³ and legislation is trending in a manner that will have a definite impact on employers.

B. The Move Towards Federal Legislation

As a party to the World Health Organization and United Nations Children's Fund joint policy statement in 1990, the United States pledged to enact "imaginative legislation protecting the breastfeeding rights of working women and established means for its enforcement."²⁴ Then in 1992, Congress enacted the Breastfeeding Promotion Program with the goals of promoting breastfeeding and distributing pumping equipment to breastfeeding women.²⁵

In 1998, the U.S. Department of Health and Human Services established the United States Breastfeeding Committee with the goal of improving the nation's health by supporting breastfeeding.²⁶ Two years later the Department rolled out a "Blueprint for Breastfeeding" program

19. *Id.* at 51 n.141. Perhaps coincidental to the drop in exclusive breastfeeding after three months is the fact that unpaid leave for childbirth for employees eligible for coverage under the Family and Medical Leave Act end after twelve workweeks. 29 U.S.C. § 2612(a)(1) (2006).

20. Meghan Casserly, *The Business of Breastfeeding*, FORBES.COM (Aug. 27, 2009), <http://www.forbes.com/2009/08/27/breastfeed-work-mother-forbes-woman-leadership-lactation.html>.

21. Melissa Bartick & Arnold Reinhold, *The Burden of Suboptimal Breastfeeding in the United States: A Pediatric Cost Analysis*, 125 PEDIATRICS e1048, e1052 (2010), available at <http://pediatrics.aappublications.org/content/early/2010/04/05/peds.2009-1616.full.pdf+html>.

22. *Id.*

23. *See infra* Part II.

24. Heather M. Kolinsky, *Respecting Working Mothers with Infant Children: The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States*, 17 DUKE J. GENDER L. & POL'Y 333, 342 (2010).

25. *Id.* at 343.

26. *Id.* at 343-44.

and recognized the fact that mothers needed workplace support in order to be successful at breastfeeding their infants.²⁷

These programs allocated resources to educating the public about the value of breastfeeding, but did little to change the practical realities that often make breastfeeding difficult to sustain. Congress did pass a law making it clear that a woman may breastfeed her child at any location in a federal building or on federal property, if the woman and her child are otherwise authorized to be present at the location.²⁸ However, numerous attempts to amend the Pregnancy Discrimination Act to expressly provide protection to lactating women under Title VII have failed to be passed into law.²⁹ Likewise, proposals that include changes to the Family and Medical Leave Act to require lactation breaks and proposals for tax incentive for workplace lactation programs have gained no traction.³⁰

Nevertheless, in 2009, Congresswoman Carolyn B. Maloney (D-NY) introduced a bill in the House of Representatives called the Breastfeeding Promotion Act of 2009.³¹ The Bill noted that “[w]omen with infants and toddlers are a rapidly growing segment of the labor force,” and that the American Academy of Pediatrics recommends that mothers breastfeed exclusively for six months and to continue for at least the first year of life, thus arrangements should be made to allow women to express milk if the mother and child must separate.³² The Bill then stated that it had been Congress’s intent to include breastfeeding as

27. *Id.* at 344.

28. 41 C.F.R. § 102-74.426 (2011). See *infra* Part III for analogous state laws.

29. See H.R. 1478, 106th Cong. (1st Sess. 1999). The Pregnancy Discrimination Act is codified at 42 U.S.C. § 2000e(k) (2006). See *infra* Part II for court cases interpreting current law. See also Breastfeeding Promotion Act, H.R. 285, 107th Cong. §§ 103, 201 (2001). Section 103 of the Breastfeeding Promotion Act provided:

Section 701(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(k)) is amended— (1) by inserting “(including lactation)” after “childbirth”, and (2) by adding at the end of the following: “For purposes of this subsection, the term ‘lactation’ means a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.”

H.R. 103. Section 201 of the Breastfeeding Promotion Act detailed a tax credit that would be provided to employers who provide “appropriate environment on business premises for employed mothers to breastfeed or express milk for their children.” H.R. 201. The bill continues to be reincarnated, but has yet to become law. See DOUGLAS REID WEIMER, CONG. RESEARCH SERV., RL32908, BREASTFEEDING: FEDERAL LEGISLATION 5-9 (2006), available at http://maloney.house.gov/sites/maloney.house.gov/files/documents/women/breastfeeding/20061012_CRS_fedleg.pdf.

30. See, e.g., H.R. 3531, 105th Cong. (2d Sess. 1998); H.R. 1163, 106th Cong. (1st Sess. 1999).

31. H.R. 2819, 111th Cong. (1st Sess. 2009).

32. *Id.*

protected conduct under the Pregnancy Discrimination Act as a category covered under “pregnancy, childbirth or related medical conditions,” but proposed to clarify this point by adding the term “(including lactation)” after “childbirth.”³³ The proposed law included a tax credit for employers providing lactation spaces in the workplace, notice requirements in order to label those breast pumps which are appropriate for use on a regular basis in a workplace, changes in the tax code to incentivize breastfeeding, and it introduced changes to Section 207(r) of the FLSA to require lactation breaks.³⁴

Senator Jeff Merkley (D-OR) introduced a companion bill in the Senate.³⁵ Although neither bill was passed into law in its entirety, a modified version of the portion of the law amending the FLSA was incorporated into the Patient Protection and Affordable Care Act, enacted on March 23, 2010.³⁶

II. THE NURSING MOTHERS AMENDMENT TO THE FAIR LABOR STANDARDS ACT

A. Requirements

The Nursing Mothers Amendment added subsection (r) to Section 207 of the FLSA, which requires all employers subject to the Act to provide employees who are nursing mothers with “reasonable” break time to express breast milk.³⁷ This break, which can be unpaid, must be provided “each time an employee has a need” to express breast milk for the first year following the birth of a child.³⁸ Additionally, the employer must provide a workplace location for the purpose of expressing breast milk which is not a bathroom and one “that is shielded from view and

33. *Id.*

34. *Id.* It is interesting to note that the section related to the FLSA originally only required a reasonable effort by the employer to offer a private space that was not a bathroom for lactation breaks. Compare this with the final law as outlined in Part II of this article. Additionally, House Bill 2819 included a penalty section to be added to 29 U.S.C. 216(b) to provide solely for equitable relief. H.R. 2819, 111th Cong. § 501(b) (1st Sess. 2009). Compare this with the final law, which appears to allow for a far wider range of remedies. See *infra* Part IV.

35. Carolyn B. Maloney, *Breastfeeding*, CONGRESSWOMAN CAROLYN B. MALONEY, <http://maloney.house.gov/issue/breastfeeding> (last visited Nov. 23, 2012).

36. *Id.* Congresswoman Maloney and Senator Merkley have since introduced the Breastfeeding Promotion Act of 2011, which would expand the protections already enacted into law. See H.R. 2758 112th Cong. (1st Sess. 2011). See *infra* Part IV for a discussion of the proposed law.

37. 29 U.S.C. § 207(r) (2006).

38. *Id.* §§ 207(r)(1)(A), (B)(2).

free from intrusion by coworkers and the public.”³⁹

1. Interpretive Guidance from the Department of Labor

The DOL has published informal guidance on its website and has issued a Request for Information seeking commentary from the public and outlining preliminary guidance on how to comply with the law.⁴⁰ The DOL declined to initiate formal rulemaking recognizing “wide variety of workplace environments, work schedules, and individual factors that will impact the number and length of breaks required by a nursing mother,” but stated that it would be guided by its experience implementing and enforcing the break time requirement in determining if formal regulations would be necessary in the future.⁴¹ This informal guidance is extremely important to employers attempting to comply with the mandates of the Nursing Mothers Amendment, as to date, there is extremely limited interpretation in case law.

2. Unpaid Break Time

The lactation break time required under the Nursing Mothers Amendment need not be paid, although employers should be aware that some states require paid breaks for this purpose.⁴² However, although the FLSA does not require rest periods or breaks, if an employer nonetheless permits short breaks, generally defined as twenty minutes or less, then the time is compensable and must count “as hours worked when determining if the FLSA requirements for payment of minimum wage and/or overtime have been satisfied.”⁴³ Therefore, if an employee uses break time that is normally paid for the purpose of expressing milk, the employer must pay for that time in the same manner it compensates other employees for break time.⁴⁴ Should the employee use additional time beyond authorized paid break time for lactation purposes, the

39. *Id.* § 207(r)(1)(B).

40. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073 (Dec. 21, 2010), available <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24540&Month=12&Year=2010>. The period for public commentary ended February 22, 2011. *Id.* at 80074.

41. *Id.* at 80073.

42. 29 U.S.C. §§ 207(r)(2), (4).

43. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80074-75 (citing 29 C.F.R. § 785.18 (2011)).

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

additional time may be uncompensated.⁴⁵ Furthermore, the FLSA requires that all time suffered or permitted to be worked must be compensated.⁴⁶ Therefore, unless an employee is completely relieved from duty while expressing milk, the time is compensable work time.⁴⁷

To the extent that an employment takes unpaid time for lactation breaks, the DOL encourages employers to provide flexible scheduling for those employees who request to make up for any unpaid break time.⁴⁸ However, the FLSA does not require employers to allow employees to begin work earlier or end work later in order to make up for unpaid break time used for expressing milk.⁴⁹

3. Reasonable Break Time

The duration and frequency of mandated break time is predicated on the employee's need to express milk.⁵⁰ This is a highly subjective standard, which means that employers will need to become educated about the process of expressing breast milk. Recognizing this, the DOL has consulted with public health officials and lactation experts from the U.S. Department of Health and Human Services, including the Centers for Disease Control and Prevention (CDC) and the Health Resources and Services Administration.⁵¹ The DOL's stated purpose was to better understand the physiological needs of nursing mothers in order to provide guidance to employers on the frequency and timing of breaks necessary to express breast milk.⁵²

The DOL has noted that the frequency of breaks needed to express breast milk varies depending, *inter alia*, "on factors such as the age of the baby, the number of breast feedings in the baby's normal daily

45. *Id.* By way of example, should an employer provide a twenty minute paid break and a nursing employee uses that time to express milk but takes a total of twenty-five minutes for this purpose, then the first twenty minutes of break time must be paid, but the remaining five minutes may be uncompensated. *Id.*

46. 29 C.F.R. § 785.11 (2011).

47. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80075 (citing *Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., <http://www.dol.gov/whd/regs/compliance/whdfs22.pdf> (last modified July 2008)). See generally *infra* Part IV (discussing the policy considerations for employers when complying with the new regulations).

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

49. *Id.*

50. 29 U.S.C. § 207(r) (2006).

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

52. *Id.*

schedule, [and] whether the baby is eating solid food.”⁵³ When the infant is very young, it may need as many as eight to twelve feedings per day, which translates to a feeding every two to three hours.⁵⁴ The nursing mother produces milk throughout the day, and if the mother is at work and unable to nurse her infant, she must express the milk with a pump about as frequently as the baby usually nurses.⁵⁵ Because milk production is dependent on the infant’s demand, if the milk is not expressed on the same schedule as if she was nursing the baby, the mother “may experience a drop in her milk supply which could result in her being unable to continue nursing her child.”⁵⁶ Nursing mothers who cannot express milk on an appropriate schedule are also at risk for infection.⁵⁷ Most notably for employers, although it may be that the frequency of breaks needed will correspond with regular breaks and lunch periods; this will not necessarily be the case.⁵⁸ Based upon this information, the DOL expects that nursing mothers will typically need two to three lactation breaks during an eight-hour shift, and additional breaks for a longer shift.⁵⁹

The DOL further offers guidance with respect to the necessary length of the break, noting that although the time necessary to express milk varies from woman to woman, it is typical that fifteen to twenty minutes will be required for the expression alone.⁶⁰ The DOL is clear that determining a reasonable break time and location also includes evaluation of the following factors:

- (i) The time it takes to walk to and from the lactation space and the wait, if any, to use the space;
- (ii) Whether the employee has to retrieve her pump and other supplies from another location;

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* Missed or irregular feedings increase the risk of a blockage in the milk ducts and/or an infection of the breast called mastitis. Bonnie Tilson, *Mastitis—Plugged Ducts and Breast Infections*, LE LECHE LEAGUE INT’L, available at <http://www.llli.org/llleaderweb/lv/lvmarapr93p19.html> (last modified Oct. 14, 2007).

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

59. *Id.*

60. *Id.* If an employee indicates that expressing milk takes her considerably more time than the norm, this may be a function of inadequate equipment or technique. However, employers should be cautious that a medical condition affecting pumping time might come under the scope of the Americans with Disabilities Act as amended. See *infra* Part IV.A.6.

(iii) Whether the employee will need to unpack and set up her own pump or if a pump is provided for her; the pump attachments;

(iv) The efficiency of the pump used to express milk (employees using different pumps may require more or less time);

(v) Whether there is a sink and running water nearby for the employee to use to wash her hands before pumping and to clean the pump attachments when she is done expressing milk, or what additional steps she will need to take to maintain the cleanliness of the pump attachments;

(vi) The time it takes for the employee to store her milk either in a refrigerator or personal cooler.⁶¹

In order to develop shared expectations and an understanding of what will constitute reasonable break time and how to incorporate the breaks into the workday, the DOL recommends that employers and nursing mothers enter into a dialogue regarding what the nursing mother will need.⁶² Such a dialogue should include the frequency and timing of breaks to express milk, as well as the location and availability of space for expressing milk, which will affect the time required for breaks.⁶³ The employer should keep the lines of communications open because the need for breaks may evolve over time. The DOL notes that as a nursing child grows the frequency of nursing may decrease, “and the need for a nursing mother to take breaks to express [breast] milk may also gradually diminish.”⁶⁴

4. Space for Lactation Breaks

Employers must provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the

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

62. *Id.*

63. *Id.*

64. *Id.* Each employee’s need to take lactation breaks will vary according to the proportion of nutritional needs which are being met with solids, as opposed to breast milk, and therefore any reduction in the needs for breaks will be unique to each employee. *Id.* See also *When Should my Baby Start Solids?*, LE LECH LEAGUE INT’L (Jan. 30, 2012, 4:38 PM), <http://www.llli.org/faq/solids.html> (explaining that most infants are developmentally ready for the introduction of solid foods at six months of age when they are able to sit up without support, have lost the tongue-thrusting reflex and can accept solids into the mouth, and when they can grasp food with their hands).

public.”⁶⁵ The DOL’s initial interpretation of this requirement is that it requires employers to make a room available for use by employees taking breaks to express milk.⁶⁶ This room can be “private or with partitions for use by multiple nursing employees.”⁶⁷

The DOL explains that in cases where a room is not practicable, the requirement can be met by creating a space with partitions or curtains.⁶⁸ The employer must take steps to ensure the privacy of this space by posting signs to designate when the space is in use or installing a lock on the door.⁶⁹ The space provided need not be a permanent space or dedicated solely to the purpose of lactation breaks, and instead a temporary space made available when needed by a nursing mother is sufficient as long as it remains shielded from view and is free from intrusion.⁷⁰

The lactation space can never be a bathroom, however, the DOL notes that an anteroom or lounge area connected to the bathroom may meet the requirements of the law, as long as “there is a wall with a door separating the lounge area from the bathroom, and if there is a space for nursing mothers within the lounge that is ‘shielded from view’ and ‘free from intrusion.’”⁷¹ The same considerations apply to the use of locker rooms that function as changing rooms, but the DOL warns that a locker room without sufficient distinction between the toilet area and the space reserved for expressing breast milk would presents similar health and sanitation concerns as a bathroom and would, therefore, not meet the requirements of the law.⁷²

Being mindful that breaks must be permitted each time an employee has a need to express milk and that a reasonable period of time each break is partially dependent on the employee’s ability to access a suitable space, the DOL advises employers to consider the number of nursing mothers in any given workplace as well as their schedules in order “to determine the location and number of spaces to designate or

65. 29 U.S.C. § 207(r)(1)(B) (2006).

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

67. *Id.*

68. *Id.* Privacy may require windows in the designated room or space to be covered. *Id.*

69. *Id.* at 80076.

70. *Id.*

71. *Id.* The DOL has specifically sought public comment on this issue. *Id.*

72. *Id.* The DOL expressed concern that locker rooms might not be appropriate because “wet environments are at risk of being contaminated with pathogenic bacteria and have been linked to outbreaks of methicillin-resistant *Staphylococcus aureus* (MRSA),” but did seek public comment on the issue. *Id.*

create.”⁷³ The DOL stresses that it will only consider employers to be in compliance with the law if the designated space is close enough to the employee’s workspace so as to be practical and so long as the space is available without a prolonged wait.⁷⁴ The DOL envisions that “some large employers may choose to include nursing mothers’ rooms in their floor plans and provide a room on multiple floors of their facility or in an on-site health facility.”⁷⁵

The DOL has further offered guidance on what constitutes a functional lactation space, commenting that the minimum requirements must include “a place for the nursing mother to sit, and a flat surface, other than the floor, on which to place the pump.”⁷⁶ The DOL notes that an ideal space will include access to electricity to allow the employee to plug in an electric pump to avoid relying on battery power.⁷⁷ The DOL suggests that employers may reduce the amount of break time needed by taking additional measures such as ensuring that lactation spaces are close to facilities where the employee can wash her hands and pump parts, and places where the employee can store milk in a refrigerator.⁷⁸ The DOL is clear that it interprets an employee’s right to express milk for a nursing child to include the ability to safely store breast milk, and directs employers to the CDC’s recommended guidelines⁷⁹ for the safe preparation and storage of expressed breast milk.⁸⁰

Employers such as retailers, quick service food stores and restaurants, construction or outdoor work sites, factories and other work settings that are not in office buildings may face particular challenges in providing an adequate lactation space for employees. The DOL has recognized that some of these workplaces may have limited space available to convert into an appropriate space to express breast milk, but

73. *Id.*

74. *Id.*

75. *Id.* The DOL states that a single room would be acceptable for the use of multiple employees, as long as privacy screens were available. *Id.*

76. *Id.*

77. *Id.* This seems a sensible consideration for employers, as employees will be more quickly able to return to work if there is no concern related to keeping the pump charged.

78. *Id.*

79. *Proper Handling and Storage of Human Milk*, THE CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/breastfeeding/recommendations/handling_breastmilk.htm (last updated Mar. 4, 2010).

80. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80076. Employers are not required by federal law to provide refrigeration, however, “they must allow a nursing mother to bring a pump and insulated food container to work for expressing and storing the milk and ensure there is a place where she can store the pump and insulated food container” where they will not be disturbed or contaminated. *Id.*

notes that in order to meet the obligations of the law, the lactation space need not be permanent nor dedicated solely to the purpose of expressing breast milk, but can be repurposed from other spaces, or shared with employees of various tenants in a mall or shopping center.⁸¹ The DOL has sought public commentary on whether spaces such as manager's offices, storage spaces, utility closets, and other such spaces normally used for other purposes could be considered adequate spaces for use by nursing mothers under the statute, as well as how employers can offer adequate break time and space for nursing employees who are not in a fixed place during a work shift such as "bus drivers, mail or parcel delivery workers, law enforcement officers, emergency medical technicians, etc" and has indicated that it will publish examples of how employers have dealt with these situations.⁸² The DOL has been clear that employers remain obligated to follow the law no matter how logistically difficult, even including situations where an employee is located at a client's worksite.⁸³ Moreover, the DOL's preliminary interpretations suggest that it is the employer's duty, not the employee's, to make any necessary arrangements in order to be able to take lactations breaks at an off-site location.⁸⁴

5. Undue Hardship Exemption

The Nursing Mothers Amendment does include an exemption for an employer with fewer than fifty employees that would experience an undue hardship were it to offer unpaid lactation breaks.⁸⁵ Because the Nursing Mothers Amendment is a part of the FLSA, an employee is defined as "any individual employed by an employer."⁸⁶ For the purposes of the Amendment, the DOL has stated that this means all employees in all worksites must be counted, including full-time and part-time employees, when attempting to establish eligibility for the exemption.⁸⁷ The burden to establish the hardship lies with the employer, and the DOL has commented that according to the statute, an

81. *Id.*

82. *Id.*

83. *Id.* at 80076-77.

84. *Id.* at 80077. The DOL maintains that the statutory language requires an appropriate place for lactation breaks whenever an employee is required to work off-site and that joint employers are mutually obligated to provide reasonable break time and an appropriate space in which to express milk. *Id.*

85. 29 U.S.C. § 207(r)(3) (2006).

86. 29 U.S.C. § 203(e)(1) (2006).

87. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80077.

employer that wishes to invoke the exemption must demonstrate that compliance would cause the employer “significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.”⁸⁸ Citing these factors and the fact that the number of employees employed by a particular employer may vary, the DOL will not grant prospective exemptions, and states that eligibility for the exemption will depend on the circumstances at the time the request for break time is made.⁸⁹ The DOL expects an employer to evaluate potential eligibility for the exemption on a case-by-case basis by raising the undue hardship exemption as an affirmative defense to demonstrate to the Department why it is unable to accommodate a particular nursing employee under the law.⁹⁰

Employers should be extremely cautious in depending on qualifying for the exemption, as the DOL has commented that the statute requires a demonstration of “significant” difficulty or expense,⁹¹ which raises a high bar as the space and time for unpaid breaks must be provided for only one year after a child’s birth.⁹² Therefore, the DOL “believes that this is a stringent standard that will result in employers being able to avail themselves of the exemption only in limited circumstances.”⁹³ The DOL warns that no employer should presume that merely having a smaller workforce will demonstrate “that compliance would pose a significant difficulty or expense,” and encourages small employers to approach compliance “creatively and constructively.”⁹⁴

There is no statutory language addressing an exemption for employers of more than fifty employees, and the DOL affirms that such employers “must comply with the law without exception.”⁹⁵

88. *Id.* (quoting 29 U.S.C. § 207(r)(3) (2006)).

89. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80077.

90. *Id.* The DOL offers to give an employer the opportunity to demonstrate that it qualifies for an undue hardship exemption in a given situation based on the statutory factors if an employee raises a complaint. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 80077-78. The undue hardship standard is described in terms very similar to the undue hardship standard in the Americans with Disabilities Act, 42 U.S.C. § 12111(10) (2009), which requires “significant difficulty or expense” when considered in light of factors such as financial resources, size, type of operation and workforce structure, but the DOL has yet to comment on whether these standards should be given analogous interpretation under the law. Americans with Disabilities Act, 42 U.S.C. § 12111(10) (2009).

95. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80077.

6. Coverage

Absent the exception discussed above, almost all employers are subject to the law at least with respect to some employees, because the Nursing Mothers Provision is a part of the FLSA, which applies broadly to mandate minimum wage, overtime, recordkeeping, and youth employment standards.⁹⁶ Employers must follow the FLSA with respect to each employee who is eligible for coverage under the law, which technically requires an individual assessment of each employee.⁹⁷ Employees are covered under the FLSA in two ways, enterprise coverage and individual coverage.

a. Enterprise Coverage

Employees are covered by the FLSA when they work for employers that have both an annual dollar volume of sales or gross revenue of at least \$500,000 and have “employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person” are covered.⁹⁸ Additionally employers are covered when the employer is engaged in the activity of a public agency, or engaged in healthcare or school operation.⁹⁹

b. Individual Coverage

Moreover every employee who is “engaged in commerce or in the production of goods for commerce” is likewise covered by the FLSA¹⁰⁰ “The Act makes no distinction as to the percentage, volume, or amount of activities of either employee or employer which constitute engaging

96. See generally Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2006).

97. See 29 C.F.R. § 776.2 (2011). “Some employers in a given industry may have no employees covered by the Act; other employers in the industry may have some employees covered by the Act, and not others; still other employers in the industry may have all their employees within the Act’s coverage.” *Id.*

98. 29 U.S.C. § 203(s)(1) (2006).

99. *Id.* (includes employers “engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)”).

100. 29 C.F.R. § 776.0a (2011).

in commerce or in the production of goods for commerce.”¹⁰¹ The DOL speaks in terms of employees who are involved in interstate commerce and includes those who:

- produce goods that will be sent out of state (such as a worker assembling components in a factory or a secretary typing letters in an office);
- regularly make telephone calls to persons located in other states;
- handle records of interstate transactions;
- travel to other states on their jobs;
- and do janitorial work in buildings where goods are produced for shipment outside the state.¹⁰²

Between enterprise coverage and coverage for individuals whose jobs touch on commerce, most employees are covered under the FLSA and eligible for minimum wage and overtime protections.¹⁰³ What’s more, the federal law does not preempt the numerous state minimum wage and overtime laws,¹⁰⁴ and therefore, most employers adopt a uniform policy to treat all employees as eligible employees under the FLSA absent specific exemptions for administrative, executive and

101. 29 C.F.R. § 776.3 (2011).

102. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80074 (Dec. 21, 2010), *available at* <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24540&Month=12&Year=2010> (citing 29 U.S.C. § 202(a)). The DOL notes that “domestic service workers such as housekeepers, full-time babysitters and cooks are typically covered” by the law. *Id.*

103. See 29 C.F.R. § 776.0 (2011) for detailed guidance on interpreting employee coverage. Because of the broad scope of these provisions and the fact that there are penalties for any employer that engages in commerce with respect to any goods which were produced in violation of the minimum wage or overtime provisions, employers tend to treat all employees as covered as opposed to making individual assessments in hopes of carving out some employee at a small company whose job does not relate to commerce. See 29 U.S.C. §§ 215, 216 (2006). However, arguing that an employee is not covered under the FLSA may provide a reasonable litigation defense in some circumstances. See *Thorne v. All Restoration Servs., Inc.*, 448 F.3d 1264, 1268-69 (11th Cir. 2006) (upholding the ruling of the lower court that an employee was not covered under the FLSA where his employer was primarily a local service provider, whose water restoration services “had little effect on commercial establishments, let alone the production of goods for commerce”).

104. *Minimum Wage Laws in the States*, WAGE AND HOUR DIV., U.S. DEP’T OF LABOR (Jan. 1, 2012), <http://www.dol.gov/whd/minwage/america.htm>.

professional employees.¹⁰⁵

c. Exempt Employees

The Nursing Mothers Amendment modified Section 207 of the FLSA, which sets for overtime wage premium requirements.¹⁰⁶ Therefore, any employee classified as exempt from overtime requirements under Section 213 of the FLSA is technically not entitled to take lactation breaks. However, exempt employees must generally be paid on a predetermined salary or fee basis that may not fluctuate in relation to the actual hours worked or the quality of the work.¹⁰⁷ Because of this, exempt employees typically have a good deal of control over their workday and are often assessed on a project, as opposed to an amount-of-time worked basis. Employers should carefully consider whether it is worthwhile to parse out access to lactation breaks to exclude exempt employees who may already be afforded break time or great flexibility in organizing their day.¹⁰⁸ Moreover, while employers are not required to offer this benefit to exempt employees under federal law, many states do not draw such distinctions.¹⁰⁹

7. Penalties and Enforcement

Ignoring the mandates of the Nursing Mothers' Amendment has potential costs to employers, although the enforcement landscape is still developing. The FLSA provides that attorneys' fees and costs are available in addition to any judgment for a plaintiff.¹¹⁰ This provision incentivizes plaintiff's attorneys to litigate FLSA issues.

As noted earlier, the right to lactation breaks is codified at Section 207 of the FLSA.¹¹¹ Employers who violate "section 207 are liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the

105. See 29 U.S.C. § 213 (2006).

106. 29 U.S.C. § 207(r) (2006).

107. 29 C.F.R. § 541.602 (2011).

108. See *infra* Part IV for a discussion of best practices in the workplace. The DOL has encouraged employers to offer lactation breaks uniformly to all employees. See Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80074 (Dec. 21, 2010), available at <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24540&Month=12&Year=2010>.

109. See *infra* Part III.

110. 29 § U.S.C. § 216 (2006).

111. See *supra* Part II (noting that the right to lactation breaks is codified at 29 U.S.C. § 207(r) (2006)).

case may be, "and in an additional equal amount as liquidated damages."¹¹² This measure of damages seem inapplicable to an employee who wishes to claim she was denied unpaid break time.¹¹³

Noting this fact, one district court has held that there is no private cause of action under 29 U.S.C. § 207(r).¹¹⁴ The plaintiff in *Salz v. Casey's Marketing Co.*, sued under Section 207(r) claiming constructive discharge after she complained about the lactation break accommodations she had been offered.¹¹⁵ The nursing employee alleged that her employer came under new ownership and installed a video camera in the office she had been offered to use for her lactation breaks.¹¹⁶ She was not warned about the presence of the camera, but noticed it one day when her breast was exposed.¹¹⁷ Despite her complaints, the employer declined to remedy the situation, finally suggesting that she cover the camera with a plastic bag.¹¹⁸ The nursing employee informed the employer that she was uncomfortable and that she was suffering from a reduction in her milk supply.¹¹⁹ The employer did not respond to these concerns, but did reprimand her for allegedly "failing to fill an ice cream machine, failing to put hot dogs on a grill, and leaving dirty dishes."¹²⁰

The nursing employee in *Salz* left her position and sued for a direct violation of Section 207(r).¹²¹ The court held that because the enforcement provisions for Section 207 are limited to unpaid wages by Section 216 of the law, "there does not appear to be a manner of enforcing the express breast milk provisions."¹²² Instead, the court interpreted the DOL's informal guidance to suggest that nursing employees should file claims with the DOL to allow the DOL to seek injunctive relief in court.¹²³

112. 29 U.S.C. § 216.

113. It might be a different case were an employee to claim that other employees received paid break time for lunch or bathroom breaks, but she was required to take equivalent break periods unpaid merely because of the activity she choose to conduct during her breaks.

114. *Salz v. Casey's Mktg. Co.*, No. 11-CV-3055-DEO, 2012 WL 2952998, at *6 (N.D. Iowa July 19, 2012).

115. *Id.* at *2-4.

116. *Id.* at *3.

117. *Id.*

118. *Id.* at *3-4.

119. *Id.* at *4.

120. *Id.*

121. *Id.* at *1, *4.

122. *Id.* at *7 (citing 29 U.S.C. § 216(b) (2006)).

123. *Salz*, 2012 WL 2952998, at *7 (citing Reasonable Break Time for Nursing Mothers, 75 Fed.Reg. 80073, 80078 (Dec. 21, 2010), available at <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24540&Month=12&Year=2010>).

The *Salz* case may provide some defense to litigation, however, lactation break litigation is likely to be far more costly than compliance in most cases. For example, the Court of Appeals for the Eleventh Circuit recently issued a decision upholding a lower court's decision to grant summary judgment as a matter of law to an employer whose employee brought a claim under 29 U.S.C. § 207(r)(1) and § 215(a)(3).¹²⁴ The Court found that the employee had been granted complete discretion to take lactation breaks as needed and that an e-mail she sent to request a place to express milk for a day when she was scheduled to work off site did not constitute filing a complaint such that the employer could be liable for retaliation when the employer did not immediately respond.¹²⁵ It is worth considering that the defendant-employer had to fund the cost of preparing for a trial and briefing the appeal.¹²⁶

What is more, the *Salz* plaintiff also filed suit under Section 215 of the FLSA,¹²⁷ which makes it illegal to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the FLSA.¹²⁸ The *Salz* court declined to dismiss this cause of action, holding "once an employer discriminates or discharges an employee in relation to an employee's complaint about the employer's express breast feeding policy, they have violated not only Section 207(r) but also Section 215(a)(3)."¹²⁹

According to a recent decision handed down by the U.S. Supreme Court, a qualifying complaint of a FLSA violation can be oral or written.¹³⁰ Therefore, even if other courts follow the lead of the court in

124. *Miller v. Roche Sur. & Cas. Co., Inc.*, 12-10259, 2012 WL 6698786 (11th Cir. Dec. 26, 2012) (ruling on the merits of §§ 207 and 215 but not discussing the issue of a private cause of action).

125. *Id.* The text of the e-mail was as follows: "Shannon, I'm scheduled tomorrow all day at the bail office, so therefore, I need to know where I can use my breast pump at and who will cover the office while I'm doing it. I'll need to be able to do it at least twice while there. Please let me know. Thanks." *Id.* at *3.

126. The facts of the *Miller* case are better outlined in the Appellee's Brief, *Miller v. Roche Sur. & Cas. Co., Inc.*, 2012 WL 3144674 (11th Cir. 2012) (No. 12-10259-BB). The case is troubling because the employer absolutely accommodated the employee's lactation break needs in the office. The facts suggest that the employee was generally unhappy with her job and with being separated from her infant and may have been looking for a reason to leave. However, the employer did not respond to the employee's request for off-site accommodations, which seems to have triggered the plaintiff's desire to bring suit. A proactive approach to foreseeable issues such as this may be the only way to reduce litigation risk.

127. *Salz*, 2012 WL 2952998, at *2.

128. 29 U.S.C. § 215(a)(3) (2006).

129. *Salz*, 2012 WL 2952998, at *10.

130. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1335 (2011).

Salz by dismissing cases which allege a direct violation of Section 207(r), a nursing employee can preserve a FLSA retaliation claim if she complains to her employer and discriminatory conduct continues. In *Salz*, of course, the employer made an adverse employment decision seemingly unrelated, but contemporaneously with her complaint.¹³¹ It is unclear whether simply refusing to address the complaint of a nursing employee related to her right to lactation breaks poses the same risk, but it seems reasonable that such a claim is foreseeable.

Civil damages under the relevant portion of Section 216 include, without limitation, “employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.”¹³² In addition to its non-retaliation provisions, Section 215 of the FLSA prohibits the shipment of goods in interstate commerce that were produced in violation of Section 207,¹³³ which could put an employer out of compliance with the lactation provisions at further risk, even if no nursing employee makes an internal complaint. Adding to the risks of civil penalties, willful violation of any provisions of Section 215 carry criminal penalties including a fine of not more than \$10,000, or imprisonment for not more than six months, or both.¹³⁴

The DOL can also bring suit and seek a civil money penalty of up to \$1,100 for each willful or repeated violation of Section 207.¹³⁵ Although the fact that the penalties listed for violation of Section 207 leave some question about how damages might be calculated with respect to an individual complaint, the civil penalties available, if awarded, have a costly multiplier implication for employers who fail to implement a lactation policy and open themselves up to collective action by failing to comply with the law in a uniform manner company-wide.¹³⁶

In the end, however, it seems much more likely that an employee

However, the Court was clear that in order to be within scope of the anti-retaliation provision of the FLSA, “a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.” *Id.*

131. *Salz*, 2012 WL 2952998, at *3-4.

132. 29 U.S.C. § 216(b) (2006).

133. 29 U.S.C. § 215(a)(1) (2006).

134. 29 U.S.C. § 216(a).

135. 29 C.F.R. § 579.1(a)(2) (2011).

136. *See id.* Theoretically, collective action exposure would remain limited to only those employees who were actively nursing children under the age of one. Furthermore, it seems certain that the highly individualized nature of each employee’s need to express milk would pose some difficulty in assessing the amount of employer violations. But as no employer is likely to want to be the test case for this type of litigation, employers should be proactive in creating a comprehensive lactation policy. *See supra* Part II.

seeking relief under this law will pursue the possibility of immediate injunctive relief in order to be able to preserve the nursing relationship. Recognizing this, the DOL has stated that it “intends to give priority consideration to complaints alleging that an employer is failing to provide break time and a space to express milk as required by law specifically to allow expeditious resolution of the matter so as to preserve the employee’s ability to continue to breastfeed and express milk for her child.”¹³⁷

Employers should also be aware that the DOL asserts that a nursing employee may have a claim for disparate treatment under Title VII of the Civil Rights Act of 1964 should an employer treat the employee who takes breaks to express breast milk differently than employees who take breaks for other personal reasons.¹³⁸ Precedent addressing the issue of nursing mothers under Title VII has been favorable to employers.¹³⁹ Recently, a judge in the Southern District of Texas granted summary judgment on a Title VII claim to an employer who had terminated a nursing mother, holding that lactation is not a pregnancy-related condition.¹⁴⁰ The EEOC responded by convening a public meeting on February 15, 2012 regarding pregnancy discrimination and caregiver issues¹⁴¹ and by filing an appeal with the Court of Appeals for the 5th

137. Reasonable Break Time for Nursing Mothers, 75 Fed.Reg. 80073, 80078 (Dec. 21, 2010), available <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24540&Month=12&Year=2010>.^{at}

138. *Id.*

139. For example, it seems clear that any condition related to the nursing child, as opposed to the employee, is not currently covered under the Pregnancy Discrimination Act. *McNil v. N.Y.C. Dep’t of Corr.*, 950 F. Supp. 564, 569 (S.D.N.Y. 1996) (holding that the medical needs of an infant, who needed to breastfeed due to a malformation of his palate and lip which prevented him from taking a bottle, was not a discrimination based on “pregnancy, childbirth or related medical condition” and granting summary judgment to the employer). *See also* *Wallace v. Pyro Mining Co.*, 789 F.Supp. 867, 869 (W.D. Ky. 1990), *aff’d without opinion*, 951 F.2d 351 (6th Cir. 1991) (upholding summary judgment for an employer where an employee’s six-week old child “tenaciously” refused to take a bottle in lieu of breastfeeding or any other type of food and the employee was terminated after she failed to return to work at the end of her disability period). Likewise, a desire to spend more time with an infant child is not a medical condition related to pregnancy. *See, e.g.*, *Hollstein v. Caleel & Hayden, LLC*, No. 11-CV-00605-CMA-BNB, 2012 WL 4050302, at *4 (D. Colo. Sept. 14, 2012).

140. *E.E.O.C. v. Houston Funding II, Ltd.*, No. H-11-2442, 2012 WL 739494, at *1-2 (S.D. Tex. Feb. 2, 2012). *But see* *Falk v. City of Glendale*, No. 12-CV-00925-JLK, 2012 WL 2390556, at *3-4 (D. Colo. June 25, 2012) (granting a motion to dismiss plaintiff’s claims of pregnancy and gender discrimination, hostile work environment, and retaliation, but noting in dicta that it was possible to show discrimination in a case involving lactation and including several footnotes outlining the plaintiff’s deficiencies in pleading; as noted by the court, the plaintiff failed to raise issues under 29 U.S.C. § 207(r)).

141. *Lana Birbrair Title VII Doesn’t Protect Breastfeeding Women: Judge*, LAW360 (February 8, 2012, 8:55 PM), http://www.law360.com/employment/articles/307956?nl_pk=6c088094-1f2a-

Circuit, challenging the lower court's ruling.¹⁴² It is notable that the termination at issue in the *Houston Funding* case occurred before the Nursing Mothers Amendment was signed into law.¹⁴³ Further, although current case law is employer-friendly as to Title VII, the Nursing Mothers Amendment has increased awareness of breastfeeding issues on a national level.¹⁴⁴ For example, as will be further discussed in the next section, California has amended its definition of "sex" to specifically include breastfeeding or related medical conditions.¹⁴⁵ Given that and the fact that federal legislation is pending in this area, it does not seem unreasonable to suspect that this issue is not yet settled.¹⁴⁶

III. ANALOGOUS STATE LAW

A. States with Lactation Break Laws

The Nursing Mothers Amendment does not "preempt any State law that provides greater protections to employees than the protections provided for under federal law."¹⁴⁷ Twenty-one states, the District of Columbia and Puerto Rico have laws specifically addressing lactation in the workplace, and Kentucky has codified the right to express breast milk in any place a woman is otherwise authorized to be.¹⁴⁸ Generally, these laws provide greater coverage for employees than does the federal statute, often covering exempt employees, increasing the age of the nursing child for whose benefit breaks must be offered, requiring not only the expression of milk, but breaks to breastfeed the child on-site and encouraging or requiring paid breaks.¹⁴⁹ Some states extend

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142. See *Houston Funding II*, 2012 WL 739494, *appeal docketed*, No. 12-20220 (5th Cir. May 21, 2010). See also Judge Says "Lactation Discrimination" is Legal, WHEN THE ABUSER GOES TO WORK (Feb. 12, 2012), <http://abusergoestowork.com/2012/02/12/judge-says-lactation-discrimination-is-legal>.

143. While acknowledging that breastfeeding and weaning are natural concomitants of pregnancy and childbirth, the court in *Wallace* noted that the Pregnancy Discrimination Act does not define what constitutes "related medical conditions," but holds that such conditions are limited to incapacitating conditions for which medical care or treatment is usual and normal. *Wallace*, 789 F.Supp. at 868.

144. Lactation is a pregnancy-related condition in Virginia. See *infra* note 165.

145. See *infra* Part III.A.2.

146. See *infra* Part IV (discussing pending legislation).

147. 29 U.S.C. § 207(r)(4) (2006).

148. This would, presumably, include the workplace during non-work time. See *infra* app. A for citations to state laws.

149. See *infra* app. A.

protected-class status to breastfeeding employees and some include enforcement measures that allow for penalties, both civil and/or criminal or liquidated damages.¹⁵⁰

On the other hand, many states offer undue hardship exceptions from at least the state requirement that are not confined to employers with fewer than fifty employees, although some states offer no exceptions at all.¹⁵¹ Most state laws apply to all employers, but some require a certain threshold number of employees before employees become eligible.¹⁵²

1. Breaks Required for Longer Periods

Some states specifically extend the time an employer must offer lactation breaks from the date of the child's birth. For example, in Oregon breaks are required up to eighteen months, in Colorado, breaks are required for up to two years; in Maine, New York and Vermont, the limit is up to three years.¹⁵³ In all of the remaining states with lactation break laws, no age limit for the nursing infant or child is stated in the lactation leave statutes.¹⁵⁴ Employers should note that the requirements for leave in some states are more limited than the federal standard in that they may only require reasonable efforts to offer breaks or lactation space, and could choose to tier their policies accordingly, guaranteeing breaks for the first year and agreeing to make reasonable efforts thereafter – if all the applicable state laws impose only the reasonableness standard. However, this will place an administrative burden on the employer to keep abreast of state requirements. Further, most nursing employees will find that the need to express milk is likely to be greatly diminished after one year of age due to the child's increasing reliance on solid food.¹⁵⁵ Therefore, employees will likely need less time for lactation breaks or be able to express sufficient milk during their normal break or meal periods.

150. See *infra* app. A.

151. See *infra* app. A.

152. See *infra* app. A.

153. See *infra* app. A.

154. See *infra* app. A.

155. See Kelly Bonyata, *Frequently Asked Questions about Milk Production*, KELLYMOM (Aug. 10, 2011), <http://www.kellymom.com/bf/supply/milkproduction-faq.html>.

2. Break Required for Breastfeeding – Not Just Expression of Milk

A handful of states expressly require that the employer not only accommodate an employee who needs to express milk on site, but also an employee who chooses to breastfeed the child at work. This is currently the law in Connecticut, Oklahoma, Puerto Rico and Rhode Island.¹⁵⁶ It is also encouraged, but not required in North Dakota.¹⁵⁷ California's lactation break law does not expressly require on-site breastfeed, however, its Fair Employment and Housing Commission has recently promulgated a new set of regulations related to a separate law requiring disability leave transfer or accommodation for women because of pregnancy, childbirth or a related medical condition.¹⁵⁸ These new rules specifically note that lactation is "a condition related to pregnancy, childbirth, or a related medical condition."¹⁵⁹ The regulations specifically reference California Labor Code section 1030 with respect to breaks to express milk at work, but it is an open question in California whether a reasonable accommodation in a given situation might be to allow on-site nursing.¹⁶⁰

However, a significantly larger amount of states have laws which allow a woman to breastfeed her child in any private place where she is otherwise authorized to be.¹⁶¹ A discussion of how this impacts employers is below in Part III.B.

3. Paid Leave

Only employees in Puerto Rico are entitled to pay for certain periods taken for lactation breaks.¹⁶² However, as with federal law, most states require that employers allow employees to use paid breaks they are otherwise entitled to for lactation purposes.¹⁶³ A number of states make it a matter of public policy to support breastfeeding mothers and encourage employers to offer paid breaks, or to allow employees to

156. See *infra* app. A (indicating that such is currently the law in Connecticut, Oklahoma, Puerto Rico and Rhode Island).

157. See *infra* app. A.

158. CAL. CODE REGS. tit. 2, §§ 7291.2-7291.18 (2012).

159. *Id.* § 7291.2(d).

160. See also the discussion *infra* Part III.A.2. and App. B, which notes that breastfeeding is a personal right in California.

161. See *infra* app. B.

162. See *infra* app. A.

163. See *infra* app. A.

make up for unpaid break time at the beginning or end of each shift.¹⁶⁴

4. Exempt Employees

The states that have lactation break mandates grant breaks to all employees, not just non-exempt employees.¹⁶⁵ This raises the issue of pay, because employees that are exempt under the FLSA, but protected by state law providing unpaid lactation breaks, may not, in fact, be required to take their breaks without pay. Part of the definition of an exempt employee is that he or she is paid the same amount each week, irrespective of the amount of work done, and therefore employers could forfeit the exempt status of an employee by making an improper deduction in pay to account for time spent expressing milk.¹⁶⁶

5. Penalties and Enforcement of State Laws

In Connecticut, the District of Columbia, Hawaii, Maine, Mississippi, New York and Vermont, employers may not discriminate against employees for taking lactation leave.¹⁶⁷ Maine, New York, Tennessee and Vermont employees have whistleblower and/or retaliation protection.¹⁶⁸ New York requires judges to award liquidated damages, and Puerto Rico makes them available.¹⁶⁹ California has recently amended the definition of “sex” to include “breastfeeding or medical conditions related to breastfeeding,” giving California employees access to a cause of action that has largely been read out of federal law.¹⁷⁰ Other available penalties and fees, both civil and

164. See *infra* app. B.

165. See *infra* app. A. Note that the state of Oregon expressly includes exempt employees, whereas the other state statutes simply include all employees within the ambit of their statutes. See *infra* app. A.

166. 29 C.F.R. § 541.602 (2011).

167. See *infra* app. A.; see also *infra* note 172 (in relation to protected classes in Virginia).

168. See *infra* app. A.

169. See *infra* app. A.

170. CAL. GOV'T CODE § 12926 (2012); see also *supra* note 145. The change in California law was sparked by the administrative agency decision in *Dfeh v. Acosta Taco*, Case No. E200708 T-0097-00se (Cal. Fair Emp. & Hous. Comm'n June 16, 2009). See Debra L. Reilly, *Breastfeeding During Employee's Rest Break: Hefty Fines if Disallowed*, Workplace Investigations (Aug. 31, 2009), <http://www.workplaceinvestigationsblog.com/tags/acosta-taco/> for information about the decision, which can no longer be found on FEHC's website. The employee in *Acosta* met her child's father in the parking lot of her workplace so that she could nurse her infant in her car during her break time. *Id.* Her employer terminated her employment after she objected to the suggestion that she delay her return to work until she had weaned the child. *Id.* The agency found this to be an act of sex discrimination and ordered the employer to pay \$46,645 of damages in back pay, compensatory damages for emotional distress and fines. *Id.*

criminal, are listed in Appendix A.

The laws of North Dakota, Texas and Washington do not mandate lactation breaks, but do encourage them and allow for certain designations regarding the employer’s support of mothers or infants on company promotional literature.¹⁷¹

States with Law Related to Lactation Breaks in the Workplace

See Appendix A for citation and summary of each state’s law.

- The states listed in grey boxes have workplace lactation laws.
- The states in white boxes have no law directly related to lactation in the workplace.

Alabama	Hawaii	Michigan	North Carolina	Texas
Alaska	Idaho	Minnesota	North Dakota	Utah
Arizona	Illinois	Mississippi	Ohio	Vermont
Arkansas	Indiana	Missouri	Oklahoma	Virginia ¹⁷²
California	Iowa	Montana	Oregon	Washington
Colorado	Kansas	Nebraska	Pennsylvania	West Virginia
Connecticut	Kentucky	Nevada	Puerto Rico	Wisconsin
Delaware	Louisiana	New Hampshire	Rhode Island	Wyoming
District of Columbia	Maine	New Jersey	South Carolina	
Florida	Maryland	New Mexico	South Dakota	
Georgia	Massachusetts	New York	Tennessee	

B. Other State Laws Related to Breastfeeding Mothers

In addition to laws that specifically address lactation breaks in the workplace, almost all states have laws protecting a woman’s right to

171. See *infra* app. A.

172. Virginia does not have a lactation break law, but it does define lactation as a medical condition related to pregnancy. VA. CODE ANN. § 2.2-2639 (Supp. 2011). No Virginia employer employing more than five but less than fifteen persons may discharge any employee on the basis of pregnancy, childbirth or related medical conditions, including lactation, which is defined as “a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.” *Id.*

breastfeed her child in any public place or sometimes place of public accommodation where the woman is otherwise authorized to be. As outlined in Appendix B, some of these laws include the rule that the child must also be authorized to be present, but most predicate the right on where the mother is authorized to be.¹⁷³ Further, a number of these laws privilege a woman to breastfeed in any *private* place where the woman is otherwise authorized to be.¹⁷⁴

States with Laws Related to Where a Woman has a Right to Breastfeed her Child

See **Appendix B** for citation and summary of each state's law.

States marked with a slash have no related law.

- States where women are privileged by statute to breastfeed in private places.
- ▣ States where a woman may breastfeed in public or places of public accommodation.
- Other state laws related to breastfeeding locations that are unlikely to affect most private employers.

Alabama	Hawaii	Michigan	North Carolina	Texas
Alaska	Idaho	Minnesota	North Dakota	Utah
Arizona	Illinois	Mississippi	Ohio	Vermont
Arkansas	Indiana	Missouri	Oklahoma	Virginia
California	Iowa	Montana	Oregon	Washington
Colorado	Kansas	Nebraska	Pennsylvania	West Virginia
Connecticut	Kentucky	Nevada	Puerto Rico	Wisconsin
Delaware	Louisiana	New Hampshire	Rhode Island	Wyoming
District of Columbia	Maine	New Jersey	South Carolina	
Florida	Maryland	New Mexico	South Dakota	
Georgia	Massachusetts	New York	Tennessee	

173. See *infra* app. B.

174. See *infra* app. B.

These laws have implications for employers and the way they craft their policies related to lactation breaks because they suggest that there are states where, when a woman is authorized to be in a place, she may also be authorized to breastfeed her child there. Obviously, absent employer approval, the employee cannot breastfeed her child if it interferes with work duties. But these laws arguably mean that, depending on the state, an employee could use her break time to nurse her child on either parts of an employer's facility that are open to the public, or in any part of the facility where she is authorized to be if the law protects her right to nurse her child in any private location. If a state law restricts the right to breastfeed to places where the child is also authorized to be, employers still must consider whether they have a formal or informal policy or practice of authorizing children to be present in some workspaces or break rooms, which would mean that employees are authorized to breastfeed in those spaces. A number of these laws make breastfeeding a civil right and/or include both civil fines and criminal penalties for persons or entities that interfere with the woman's right to breastfeed the child.

Lastly, many states have laws that exclude women engaged in the act of breastfeeding from criminal sanctions for indecent exposure or some variation on the theme of lewd behavior.¹⁷⁵

IV. THE TAKE-AWAY FOR EMPLOYERS REGARDING COMPLIANCE

Any employer with fifty or more total employees, including part-time employees and irrespective of location, must provide lactation breaks to covered employees.¹⁷⁶ It is worthwhile for smaller employers

175. ALASKA STAT. § 29.25.080 (2010); ARIZ. REV. STAT. ANN. § 13-1402 (2010); 720 ILL. COMP. STAT. ANN. 5/11-30 (West Supp. 2012); KY. REV. STAT. ANN. § 211.755 (LexisNexis Supp. 2007); LA. REV. STAT. ANN. § 51:2247.1(E) (2012); MICH. COMP. LAWS ANN. § 117.5h (West 2006); MINN. STAT. ANN. § 617.23(4) (West 2009); MISS. CODE ANN. § 97-29-31 (West 2011); MISS. CODE ANN. § 97-35-7 (West 2011); MISS. CODE ANN. § 97-35-11 (West 2011); MISS. CODE ANN. § 97-35-15 (West 2011); MONT. CODE ANN. § 50-19-501 (Supp. 2011); NEV. REV. STAT. ANN. § 201.220 (West 2008); N.Y. PENAL LAW § 245.01 (CONSOL. 2000); N.D. CENT. CODE § 12.1-20-12.1 (2012); OKLA. STAT. ANN. tit. 63, § 1-234.1 (West Supp. 2012); 35 PA. STAT. ANN. § 636.4 (West Supp. 2012); P.R. LAWS ANN. tit. 24, § 3518 (2011); R.I. GEN. LAWS § 11-45-2 (Supp. 2011); S.C. CODE ANN. § 63-5-40 (2008); S.D. CODIFIED LAWS § 22-24A-2 (2006); TENN. CODE ANN. § 68-58-102 (Supp. 2011); UTAH CODE ANN. § 10-8-50 (LexisNexis 2007); UTAH CODE ANN. § 76-10-1229.5 (LexisNexis Supp. 2008); VA. CODE ANN. § 18.2-387 (2009); WASH. REV. CODE ANN. § 9A.88.010 (West 2009); WIS. STAT. ANN. § 944.17 (West 2005); WIS. STAT. ANN. § 944.20 (West 2005); WIS. STAT. ANN. § 948.10 (West 2005); WYO. STAT. ANN. § 6-4-201 (2011).

176. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80074, 80077 (Dec. 21, 2010), *available at* <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24540&Month=12&Year=2010>.

to offer the same benefits. For most, the administrative burden of doing so is likely less than attempting to prove eligibility for the hardship exemption on a case-by-case basis, especially if the employer is located in a state that has a lactation break law applicable irrespective of size. The DOL has stated that employers are required, where practicable, to make a room available for use by covered employees.¹⁷⁷ However, if there is simply no room that can be made periodically available for this purpose, a temporary space will put an employer in compliance with federal law as long as the space is not in a bathroom and privacy is ensured.¹⁷⁸ The employer's obligation extends to off-site situations.¹⁷⁹ So if an employee must travel for work, the employer continues to have a duty to secure appropriate lactation space.

Lactation break time is unpaid.¹⁸⁰ But, if the employer offers paid break time to all employees and a nursing employee uses paid break time to express milk then that time should remain paid. Additionally, if the employee engages in compensable work while expressing milk, that time should be paid. Employers should never reduce the pay of exempt employees for taking lactation breaks.

A. Making Lemonade – How Employers Can Benefit from Compliance

New regulation is always a challenge for employers. It is expensive to make new policies in any workplace, especially with a change such as this one that requires not only appropriating time, but also physical space. Acknowledging this fact, there are a number of reasons for employers to embrace this change beyond the ever-present goal of litigation and liability avoidance. Specifically, there is evidence that employers who have introduced workplace lactation programs have seen a reduction in healthcare costs, absenteeism and turnover rates.

1. Healthcare Costs

Most employers bear a large portion of the burden of the cost of healthcare for their employees, including their employees' families.¹⁸¹

177. *Id.* at 80075.

178. *Id.* at 80075-76. Notably, the guidance from the DOL seems to focus on visual, as opposed to aural privacy. Breast pumps are not necessarily quiet. If space constraints allow, employers may wish to consider this factor when choosing a space in order to minimize disruption.

179. *Id.* at 80077.

180. *Id.* at 80074.

181. Office of the Assistant Sec'y for Planning & Evaluation, Final Report for Task Order No.

Ultimately a healthy workforce directly impacts an employer's bottom line in terms of healthcare premiums. As noted earlier, exclusive breastfeeding for the first six months of life translates into a savings of \$13 billion in U.S. pediatric health care costs¹⁸² and would prevent over 900 infant deaths each year.¹⁸³

Both infants and mothers benefit from breastfeeding.¹⁸⁴ In 2007, the DHHS Agency for Healthcare Research and Quality published a comprehensive review of research on the benefits of breastfeeding and concluded that breastfeeding mothers enjoy a reduced risk of breast cancer, ovarian cancer, type 2 diabetes, and postpartum depression.¹⁸⁵ Another study concluded that breastfeeding mothers had a decreased risk of cardiovascular disease.¹⁸⁶ Breastfeeding protects women against the risk of osteoporosis.¹⁸⁷ Mothers who breastfeed may experience an easier time returning to pre-pregnancy weight,¹⁸⁸ as well as a delay in the

HP-06-12, The Effect of HealthCare Cost Growth on the U.S. Economy 17 (2008), available at <http://aspe.hhs.gov/health/reports/08/healthcarecost/report.pdf>.

182. See *Briefing Document to Support Appropriations for Breastfeeding*, *supra* note 15, at 2, 7.

183. Melissa Bartick & Arnold Reinhold, *supra* note 21, at e1048.

184. Lara M. Gardner, *A Step Toward True Equality in the Workplace: Requiring Employer Accommodation for Breastfeeding Women*, 17 Wis. Women's L.J. 259, 266-270 (2002) (which collects many of the studies referenced below).

185. Tufts-New England Med. Ctr. Evidence-Based Practice Ctr., *Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries*, in EVIDENCE REPORT/TECHNOLOGY ASSESSMENT NO. 153, at v (AHRQ Pub. No. 07-E007, 2007). See also Polly A. Newcomb et al., *Lactation in Relation to Postmenopausal Breast Cancer*, 150 AM. J. EPIDEMIOLOGY 174, 174 (1999); Pamela M. Marcus et al., *Adolescent Reproductive Events and Subsequent Breast Cancer Risk*, 89 AM. J. PUB. HEALTH 1244, 1244 (1999); Shelley M. Enger et al., *Breastfeeding Experience and Breast Cancer Risk Among Postmenopausal Women*, 7 CANCER EPIDEMIOLOGY BIOMARKERS & PREVENTION 365, 365 (1998); Helen A. Weiss et al., *Prenatal and Perinatal Risk Factors for Breast Cancer in Young Women*, 8 EPIDEMIOLOGY 181, 181 (1997); Louise A. Brinton et al., *Breastfeeding and Breast Cancer Risk*, 6 CANCER CAUSES & CONTROL 199, 199 (1995); Polly A. Newcomb et al., *Lactation and a Reduced Risk of Premenopausal Breast Cancer*, 330 NEW ENG. J. MED. 81, 81 (1994); Alice S. Whittemore et al., *Characteristics Relating to Ovarian Cancer Risk: Collaborative Analysis of 12 U.S. Case-Controlled Studies*, 136 AM. J. EPIDEMIOLOGY 1184, 1184 (1992).

186. Eleanor Bila Schwarz et al., *Duration of Lactation and Risk Factors for Maternal Cardiovascular Disease*, 113 OBSTETRICS & GYNECOLOGY 974, 976-77 (2009).

187. Myroslaw M. Hreshchyshyn et al., *Associations of Parity, Breast-feeding and Birth Control Pills with Lumbar Spine and Femoral Neck Bone Densities*, 159 AM. J. OBSTETRICS & GYNECOLOGY 318, 318 (1988). Lactating mothers may suffer from a temporary decrease in mineral bone density; however bone density and lumbar spine density ultimately increase each time a woman breastfeeds a child. See Heidi J. Kalkwarf & Bonny L. Specker, *Bone Mineral Loss During Lactation and Recovery After Weaning*, 86 OBSTETRICS & GYNECOLOGY 26, 26 (1995).

188. Kathryn G. Dewey et al., *Maternal Weight-Loss Patterns During Prolonged Lactation*, 58 AM. J. CLINICAL NUTRITION 162, 164 (1993).

return of fertility.¹⁸⁹

Children who are breastfed have a reduced risk of ear, skin, stomach, and respiratory infections, diarrhea, and necrotizing enterocolitis as well as long-term benefits such as a reduced risk of obesity, type 1 and 2 diabetes, asthma, and childhood leukemia.¹⁹⁰ There is also evidence of reduced incidences of pneumonia,¹⁹¹ urinary tract infections¹⁹² and invasive bacterial infections.¹⁹³ Breastfed children

189. Alan S. McNeilly, *Lactational Amenorrhea*, 22 *ENDOCRINOLOGY METABOLISM CLINIC N. AM.* 59, 59 (1993). This benefit is most likely to be seen with mothers who breastfed exclusively. *Id.*

190. Tufts-New England Med. Ctr. Evidence-Based Practice Ctr., *supra* note 185, at v. See also W. H. Oddy et al., *Association Between Breast Feeding and Asthma in 6 Year Old Children: Findings of a Prospective Birth Cohort Study*, 319 *BRIT. MED. J.* 815, 815 (1999); Denise Hammond-McKibben & Hans-Michael Dosch, *Cow's Milk, Bovine Serum Albumin, and IDDM: Can We Settle the Controversies?*, 20 *DIABETES CARE* 897, 897 (1997); David J. Pettitt et al., *Breastfeeding and Incidence of Non-Insulin-Dependent Diabetes Mellitus in Pima Indians*, 350 *THE LANCET* 166, 166 (1997); Jill M. Norris & Fraser W. Scott, *A Meta-Analysis of Infant Diet and Insulin-Dependent Diabetes Mellitus: Do Biases Play a Role?*, 7 *EPIDEMIOLOGY* 87, 87-88 (1996); Micheline Beaudry et al., *Relation Between Infant Feeding and Infections During the First Six Months of Life*, 126 *J. PEDIATRICS* 191, 195 (1995); Kathryn G. Dewey et al., *Differences in Morbidity Between Breast-Fed and Formula-Fed Infants*, 126 *J. PEDIATRICS* 696, 700 (1995); Anne L. Wright et al., *Relationship of Infant Feeding to Recurrent Wheezing at Age 6 Years*, 149 *ARCHIVES PEDIATRIC & ADOLESCENT MED.* 758, 758 (1995); Ulla M. Saarinen & Merja Kajosaari, *Breastfeeding as Prophylaxis Against Atopic Disease: Prospective Follow-Up Study Until 17 Years Old*, 346 *THE LANCET* 1065, 1068 (1995); Hertzell C. Gerstein, *Cow's Milk Exposure and Type 1 Diabetes Mellitus*, 17 *DIABETES CARE* 13, 13 (1994); S. Forgie et al., *Management of Acute Otitis Media*, 14 *Paediatrics & Child Health* 1, 1 (2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2786953/pdf/pch14457.pdf>; Mary Jean Owen et al., *Relation of Infant Feeding Practices, Cigarette Smoke Exposure, and Group Child Care to the Onset and Duration of Otitis Media with Effusion in the First Two Years of Life*, 123 *J. PEDIATRICS* 702, 706 (1993); Peter W. Howie et al., *Protective Effect of Breast Feeding Against Infection*, 300 *BRIT. MED. J.* 11, 11 (1990); Barry M. Popkin et al., *Breast-Feeding and Diarrheal Morbidity*, 86 *PEDIATRICS* 874, 878 (1990); Michael S. Kramer, *Does Breast Feeding Help Protect Against Atopic Disease? Biology, Methodology, and a Golden Jubilee of Controversy*, 112 *J. PEDIATRICS* 181, 181 (1988); Arthur L. Frank et al., *Breast-Feeding and Respiratory Virus Infection*, 70 *PEDIATRICS* 239, 242 *tbl. 4* (1982).

191. Orin S. Levine et al., *Risk Factors for Invasive Pneumococcal Disease in Children: A Population-Based Case-Control Study in North America*, 103 *PEDIATRICS* 1, 4 (1999), available at <http://pediatrics.aappublications.org/content/103/3/e28.full.pdf>; B. D. Gessner, *Risk Factors for Invasive Disease Caused by Streptococcus Pneumoniae Among Alaska Native Children Younger than Two Years of Age*, 14 *PEDIATRIC INFECTIOUS DISEASE* 123, 123 (1995).

192. Staffan Marild et al., *Breastfeeding and Urinary-Tract Infection*, 336 *THE LANCET* 942, 942 (1990); Alfredo Pisacane et al., *Breast-Feeding and Urinary Tract Infection*, 120 *J. PEDIATRICS* 87, 87, 89 (1992).

193. Aino K. Takala et al., *Risk Factors of Invasive Haemophilus Influenzae Type B Disease Among Children in Finland*, 115 *J. PEDIATRICS* 694, 699 (1989); Stephen L. Cochi et al., *Primary Invasive Haemophilus Influenzae Type B Disease: A Population-Based Assessment of Risk Factors*, 108 *J. PEDIATRICS* 887, 894 (1986); Gregory R. Istre et al., *Risk Factors for Primary Invasive Haemophilus Influenzae Disease: Increased Risk from Day Care Attendance and School-Aged Household Members*, 106 *J. PEDIATRICS* 190, 195 (1985).

enjoy a lower risk of celiac disease,¹⁹⁴ inflammatory bowel disease¹⁹⁵ and childhood cancer.¹⁹⁶ Most dramatically, breastfeeding has been shown to reduce the risk of sudden infant death syndrome.¹⁹⁷

With respect to the health benefits of breastfeeding to children, it is often difficult to determine whether these benefits come from the chemical properties of human milk or are a byproduct of the intense nurturing and attentiveness necessary to breastfeed a child.¹⁹⁸ The immune system takes up to two years to reach full maturity.¹⁹⁹ The longer a child is breastfed then, the longer the child is exposed to breast milk's ability to fight viruses, bacteria, and parasites through secretory antibodies, leukocytes, and carbohydrates.²⁰⁰ Meanwhile, however, the leading cause of death to infants in the U.S. is sudden infant death syndrome (SIDS)²⁰¹ and while breastfed infants are less likely to die of

194. A. Ivarsson et al., *Epidemic of Coeliac Disease in Swedish Children*, 89 ACTA PAEDIATRICA 165, 169 (2000); L. Greco et al., *Case Control Study on Nutritional Risk Factors in Celiac Disease*, 7 J. PEDIATRIC GASTROENTEROLOGY & NUTRITION 395, 395 (1997); K. Falth-Magnusson et al., *Infant Feeding History Shows Distinct Differences Between Swedish Celiac and Reference Children*, 7 PEDIATRIC ALLERGY & IMMUNOLOGY 1, 1 (1996); A. K. Akobeng et al., *Effect of Breast Feeding on Risk of Coeliac Disease: A Systematic Review and Meta-Analysis of Observational Studies*, 91 Archives of Disease in Childhood 39, 39 (2006).

195. S. Kolezko et al., *Role of Infant Feeding Practices in Development of Crohn's Disease in Childhood*, 298 BRIT. MED. J. 1617, 1617 (1989); P. J. Whorwell et al., *Bottle Feeding, Early Gastroenteritis, and Inflammatory Bowel Disease*, 1 BRIT. MED. J. 382, 382 (1979); E. D. Acheson & S. C. Truelove, *Early Weaning in the Aetiology of Ulcerative Colitis: A Study of Feeding in Infancy in Cases and Controls*, 2 BRIT. MED. J. 929, 933 (1961).

196. Vladimir B. Smulevic et al., *Parental Occupation and Other Factors and Cancer Risk in Children*, 83 INT'L J. CANCER 712, 716 (1999); M. K. Davis et al., *Infant Feeding and Childhood Cancer*, 2 THE LANCET 365, 365, 367 (1988); Margaret K. Davis, *Review of the Evidence for an Association Between Infant Feeding and Childhood Cancer*, 11 INT'L J. CANCER 29, 29 (1998); Xiao O. Shu et al., *Breastfeeding and Risk of Childhood Acute Leukemia*, 91 J. NAT'L CANCER INST. 1765, 1765, 1770 (1999).

197. Tufts-New England Med. Ctr. Evidence-Based Practice Ctr., *supra* note 185, at 93-95.

198. Fentiman, *supra* note 9, at 47-49 (citing Aimin Chen & Walter J. Rogan, *Breastfeeding and the Risk of Postneonatal Death in the United States*, 113 PEDIATRICS e435, e438 (2004), available at <http://pediatrics.aappublications.org/content/113/5/e435.full.pdf+html>). This appears to be the main criticism of the medical case for breastfeeding overall, in that it is difficult to pin down causality, especially since most studies are observational, due to the difficulty in setting up a double-blind study where infant health and life-style choice are concerned. As the authors of one study finding positive health benefits noted, "[i]t may be that breastfeeding represents a package of skills, abilities, and emotional attachments that mark families whose infants survive and that it is these factors that produce the benefits seen, rather than breastfeeding or breast milk per se." *Id.*

199. Dep't of Health and Human Servs., Office on Women's Health, HHS Blueprint for Action on Breastfeeding 10 (2000).

200. *Id.*

201. James J. McKenna & Thomas McDade, *Why Babies Should Never Sleep Alone: A Review of the Co-Sleeping Controversy in Relation to SIDS, Bedsharing and Breast Feeding*, 6 PAEDIATRIC RESPIRATORY REVIEWS 134, 135 (2005).

SIDS,²⁰² research suggests that it is the behaviors associated with breastfeeding the infant from the breast, as opposed to the mere ingestion of human milk, which conveys the benefit.²⁰³ Nonetheless, even if a workplace lactation program only supports the expression of milk using a pump, the ability to do so is necessary to preserve the breastfeeding relationship while the nursing employee is off-duty.

No matter the source of the benefit, observational studies show that “[f]or every 1,000 babies not breastfed, there are an extra 2,033 physician visits, 212 days in the hospital and 609 prescriptions.”²⁰⁴ Overall then, the science related to health outcomes strongly suggests that employers benefit when they encourage a supportive breastfeeding environment because both breastfeeding mothers and children are healthier. Not only does this reduce healthcare costs, but it also has an impact on employee absenteeism.

2. Absenteeism

Mothers of breastfeed infants miss less work. In a comparison of employees at two corporations, one study concluded that women who breastfed were absent from work less often than their co-workers who used formula.²⁰⁵ The breastfeeding infants experienced fewer incidents of illness and these incidents were less severe, allowing their mothers to report to work.²⁰⁶ Employees who relied on formula feeding incurred one-day absences more than twice as often than did breastfeeding employees; and of the of the 28% of infants who never fell ill, 86% were breastfed.²⁰⁷ A breastfeeding-friendly culture even affects the attendance of male employees, who are absent less often from work if

202. J. H. Knopf, *Breastfeeding and Maternal Employment*, 352 THE LANCET 1704, 1704 (1998); E. A. Mitchell et al., *Results from the First Year of the New Zealand Cot Death Study*, 11 BREASTFEEDING REV. 106, 106 (1991); A. Kahn et al., *Sudden Infant Deaths: From Epidemiology to Physiology*, 130S FORENSIC SCI. INT’L S8, S8 (2002).

203. McKenna & McDade, *supra* note 197, at 135.

204. Nat’l Bus. Grp. On Health, *Investing in Workplace Breastfeeding Programs and Policies* 1.2 (2009). The National Business Group states that it represents over 300 member corporations, primarily Fortune 500 companies and large public-sector employers.

205. Rona Cohen et al., *Comparison of Maternal Absenteeism and Infant Illness Rates Among Breast-Feeding and Formula-Feeding Women in Two Corporations*, 10 AM. J. HEALTH PROMOTION 148, 153 (1995). About 75% of mothers in these lactation programs continued breastfeeding at least six months, although at the time of the study only 10% of mothers employed full-time who initiated breastfeeding were still breastfeeding at six months. *See id.* at 149, 151.

206. *Id.* at 152.

207. *Id.* at 151-52.

they have breastfeeding partners.²⁰⁸

3. Turn Over and Employee Loyalty

Employees are loyal to employers that make policies that help employees integrate their home and work life. One study of multiple companies with lactation support programs found an average retention rate of 94.2%.²⁰⁹ A study of nine companies found that the institution of a lactation program resulted in an average return-to-work rate of 94%.²¹⁰ Lactation breaks allow employees who have young children to balance the needs of their employers with the needs of their families, and employees who are new parents place value on workplace accommodations that make it easier to both work and parent.

4. Case Studies

Employer case studies provide valuable insight into how some employers have capitalized on the potential for healthcare savings while increasing employee productivity and loyalty. For example, the Los Angeles Department of Water and Power initiated a workplace lactation program and reported that the program reduced absenteeism by 27% and health care claims by 35%.²¹¹ An independent economic study commissioned by the Department estimated that the return on its investment was between \$3.50 and \$5 for every \$1 spent.²¹² Further, the Department reported increased employee loyalty, improved productivity, better recruitment and an enhanced public image.²¹³

The healthcare services company CIGNA implemented a lactation program across all its offices which included private rooms that either contain, or are within close proximity to: a sink; a breast pump for all employees; permission to express milk during standard break times; education kits; consultations before and after birth; classes; a lactation consultant; and mother-to-mother support via postings in the nursing

208. Judith Galtry, *Lactation and the Labor Market: Breastfeeding, Labor Market Changes and Public Policy in the United States*, 18 HEALTH CARE WOMEN INT. 467-80 (1997).

209. Joan Ortiz et al., *Duration of Breast Milk Expression Among Working Mothers Enrolled in an Employer-Sponsored Lactation Program*, 30 PEDIATRIC NURSING 111, 116 (2004).

210. *Worksite Lactation Support*, THE BUSINESS CASE OF BREASTFEEDING, http://everymother.org/worksite_lactation_support.php (last visited Dec. 1, 2012).

211. Kathryn Tyler, *Got Milk?*, 44 HR Mag. 68, 70 (1999).

212. *Id.*

213. *Id.*

mother rooms.²¹⁴ Cigna employed approximately 26,000 employees at the time it implemented the program, 75% of which were women.²¹⁵ Three hundred to four hundred employees make use of the program annually.²¹⁶ The UCLA Centers for Healthy Children published a formal study of the program in 2000 finding that CIGNA reaped:

- Annual savings of \$240,000 in health care expenses;
- A 77% reduction in lost work time due to infant illness, which translated to annual savings of \$60,000;
- 62 % fewer prescriptions equating to lower pharmacy costs; and
- Increased breastfeeding rates of 72.5% at 6 months compared to the national average of 21.2% for employed mothers.²¹⁷

5. Ideas for Employers to Consider

Employers should analyze both their obligations under federal and state law and the potential benefits of implementing a comprehensive lactation program. Employers should consider:

- A written lactation policy distributed to all employees and/or included in an employee handbook that encourages open dialogue between the employer and any employee who anticipates the need for lactation breaks.²¹⁸ Employers should prepare to initiate these conversations before an employee goes out for a maternity leave,²¹⁹ or upon the adoption of a child,²²⁰ and upon making a new hire.²²¹

214. Nat'l Bus. Grp. On Health, *supra* note 204, at 4.1-4.2.

215. *Id.* at 4.1.

216. *Id.*

217. *Id.* at 4.2.

218. Of course, employee awareness of the program increases the likelihood that employees will not wean their infants before they return to work, and therefore be eligible and prepared to take lactation breaks. In making the decision to implement a formal policy, employers must balance the desirability of tapping into the potential benefits of encouraging breastfeeding with any downsides that may result from an increase in utilization of the program. However, a formal policy also has the benefit of encouraging advanced planning, which will make it far easier for employers to comply with the law if faced with an immediate request.

219. The DOL has stated that that an employer may ask an expectant mother if she intends to take breaks to express milk while at work. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80077 (Dec. 21, 2010), available at <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24540&Month=12&Year=2010>.

220. Although not a common practice, it is possible to induce lactation in order to support the nutritional and nurturing needs of an adopted child. See Karleen Gribble, *Adoptive Breastfeeding Beyond Infancy*, LA LECHE LEAGUE INT'L, <http://www.llli.org/llleaderweb/1v/lvvoctnov04p99.html>

- A lactation policy should communicate that the employer will meet all applicable legal obligations.
- Employers should communicate clearly with respect to the use of paid break time for lactation purposes, but that time taken for lactation purposes in excess of normal paid break time is unpaid time for non-exempt employees.
- Time spent working is compensable time. An employee must be completely relieved of duty in order to be on an unpaid break. However, an employee with a private office is likely to be able to continue working while expressing milk, if she has a hands-free pump. Employers should create a clear policy that compensates all employees for time spent on work, but makes explicit that time spent in set-up or clean-up is unpaid, unless it coincides with what would normally be paid break time. Employers should have a clear policy for recording work time during lactation breaks taken by non-exempt employees.
- Employers should determine whether it is beneficial to adopt flexible scheduling to allow employees to make up for lost time before or after the usual work schedule.
- A lactation space or spaces that minimize work disruption. Providing employees with a convenient location that includes access to electricity and is in close proximity to sink facilities to wash hands and pump parts will enable the employee to return to work more quickly.
- A place to safely store expressed milk, whether in a refrigerator provided by the employer, or in an insulated cooler provided by the employee.²²²

(last visited Nov. 23, 2012). The statutory language of 29 U.S.C. 207(r) refers to the employee's "nursing child for one year after the child's birth," thus the definition does not preclude a child that is not biologically related. 29 U.S.C. § 207(r) (2006); *see also* Michael P. McElroy, 2A HORNER PROBATE PRAC. & ESTATES, § 58:142 (noting that "[a]doption creates the relationship of parent and child.").

221. A new employee may be nursing a child previously born. Unlike the FMLA, FLSA protections begin immediately upon commencing employment. *Compare* 29 U.S.C. § 201 *et seq.* (2006), *with* 29 U.S.C. § 2611 (2006) (The FMLA requires employees to have been employed for at least 12 months and worked at least 1,250 hours in the previous 12 months.)

222. The Center for Disease Control Web site contains recommended guidelines for the safe preparation and storage of expressed breast milk. THE CENTER FOR DISEASE CONTROL,

The law does not apply to exempt employees. However, there are a number of reasons for employers to create a comprehensive lactation break policy that applies to all employees:

- The DOL is officially encouraging employers to provide break time for all nursing mothers, exempt or non-exempt, so a comprehensive lactation program sends a signal about a good faith intention to comply with the law.
- Creating different rules for exempt and non-exempt employees may create undue administrative difficulties, because, paradoxically, employees in exempt positions are already much more likely to have access to private spaces where they can pump milk.
- There is an advantage to rolling out a lactation support policy framed as a benefit of employment. Employee morale is improved, and satisfied employees pose a lower litigation risk. This approach also avoids educating employees about their legal entitlements.
- Employers must give lactation breaks to exempt employees under the laws of many states.²²³ Additionally, further federal legislation related to exempt employees has been proposed.²²⁴

A comprehensive lactation program must include education. Human Resources personnel and first-line supervisors will be better able to work with nursing employees to schedule breaks if they are sensitive to the value of breastfeeding for an employer's bottom line and are educated about the needs of breastfeeding women. Further, supervisors and nursing mothers should all feel comfortable discussing and scheduling lactation breaks. However, this is an area where many people are sensitive. Employers should recognize that in the U.S., there are deeply held cultural norms that center on the breast as a sexual object.²²⁵ These norms may leave employees who are unfamiliar with breastfeeding mothers at a loss concerning appropriate behavior when interacting with a nursing mother in the workplace.²²⁶ Congresswoman

http://www.cdc.gov/breastfeeding/recommendations/handling_breastmilk.htm (last visited Nov. 23, 2012).

223. See *supra* Part III; see also *infra* app. A.

224. See *infra* Part IV.A.7.

225. See Fentiman, *supra* note 9, at 56.

226. In Western cultures, particularly the United States, the breast is perceived as a sexual object to be covered and not as a means of feeding children. Isabelle Schallreuter Olson, *Out of the Mouths of Babes: No Mother's Milk for U.S. Children—The Law and Breastfeeding*, 19 HAMLINE L. REV. 269, 275 (1995).

Maloney has recounted the story of one employee whose male colleagues took to calling “moo” outside her office door when she expressed breast milk.²²⁷ Employers that anticipate this issue and educate their workforce will reduce litigation risks from employees who may feel that they have been sexually harassed if co-workers or supervisors act out related to socially-constructed notions of the sexualized breast.

In addition to workplace behavior that might be actionable at law, there may be resistance from non-nursing co-workers who are concerned about how lactation breaks will affect them.²²⁸ Co-workers may worry that they will be required to cover a nursing employee’s tasks. Supervisors should be prepared to plan for and address work flow issues. They may also remind non-nursing employees that breastfeeding can reduce the number of unplanned absences due to infant illness.

Employers should consider creating recordkeeping rules to track the usage of lactation spaces or track employee concerns. Employers can also chart absenteeism rates and solicit feedback about how lactation programs affect retention.

Employers should not use time taken for lactation breaks to reduce an employee’s entitlement under the Family Medical Leave Act (FMLA).²²⁹ “The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons.”²³⁰ The DOL has noted that none of the reasons for leave, including time to bond with a newborn child or leave associated with a serious health condition, cover lactation breaks.²³¹

227. Casserly, *supra* note 20. It would appear that bovine references are a popular means of harassing nursing mothers who express milk in the workplace. *Falk v. City of Glendale*, No. 12-CV-00925-JLK, 2012 WL 2390556 (D. Colo. June 25, 2012); *Powers v. Chase Bankcard Servs., Inc.*, 2:10-CV-332, 2012 WL 1021704 (S.D. Ohio Mar. 26, 2012).

228. Consider the case of *White v. Schafer*, 738 F. Supp. 2d 1121 (D. Colo. 2010), *aff’d* at 435 F. App’x 764 (10th Cir. 2011), in which the employees of a federal agency engaged in a protracted turf war over the private office accorded to a breastfeeding employee. The employer ultimately won summary judgment but had to litigate the case up to the circuit court. *White*, 435 F. App’x at 764.

229. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80078 (Dec. 21, 2010), *available* <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24540&Month=12&Year=2010>.

230. *Id.* (citing 29 U.S.C. § 2601 *et seq.* (2006)).

231. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073. The DOL states that time to express breast milk is not time spent caring for or bonding with a child. *Id.* (citing 29 C.F.R. 825.120 (2011)). Nor does it take the position that expressing milk will typically be associated with a serious health condition under the FMLA. *Id.* (citing 29 C.F.R. 825.113-15 (2011)).

6. Special Issues

Taking into account business needs and available space, as well as state law that may already mandate it, employers should consider whether the most efficient way to manage lactation breaks is for the nursing employee to feed her infant directly. This is almost certainly the case if there is on-site childcare, but should also be considered if the employee has a childcare provider who can bring the infant to work, or if the employer would allow a nursing employee to bring her infant to work.²³²

Most nursing mothers can effectively express milk in fifteen to twenty minutes.²³³ The legal entitlement under the Nursing Mothers Amendment is for a “reasonable” break time.²³⁴ However the fact that an employee may take breaks “each time such employee has need to express the milk”²³⁵ means the standard is extremely subjective. Further, should an employee inform the employer that she has a low milk supply or needs a longer amount of time than the average due to a medical condition, this issue should be evaluated under the provisions of the Americans with Disabilities Act as Amended.²³⁶ The amended law covers impairments to an individual organ within the bodily system, such as the reproductive system.²³⁷ Diabetes, thyroid imbalance, anemia and previous breast surgery can all impact milk supply,²³⁸ and a cautious employer will consider engaging in a documented interactive process²³⁹ to determine how to accommodate the employee.²⁴⁰

Many employers, such as mall retailers with employees in small units or kiosks will have a difficult time finding an appropriate lactation

232. It has been this author’s observation that an astonishing amount of work (such as the drafting of law review articles) can be accomplished while wearing an infant in a wrap in which the infant can both sleep and nurse as needed.

233. See *supra* Part II.A.3.

234. 29 U.S.C. § 207(r) (2006).

235. *Id.*

236. See generally 42 U.S.C. § 12101, *et seq.* (2006) (providing legal safeguards for people with medical disabilities).

237. See 29 C.F.R. § 1630.2(h)(2)(ii) (2011).

238. Angie Cannon et al., *Living with Chronic Low Milk Supply: A Basic Guide*, MOBI MOTHERHOOD INT’L, <http://www.mobimotherhood.org/MM/article-LMS.aspx> (last visited Nov. 23, 2012).

239. See 29 C.F.R. § 1630.2(o)(3) (2011). “Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee’s disability.” *EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Number 915.002, U.S. Equal Emp’t Opportunity Comm’n (October 17, 2002), http://www.eeoc.gov/policy/docs/accommodation.html#N_48.

240. A similar process is also newly advisable in California. See *supra* note 158.

space. Employers with mobile or traveling employees will have similar concerns. Employers should consider how to approach this issue when leasing or constructing workspace.²⁴¹ For example, retailers might negotiate lease provisions requiring a mall to include lactation space that can be used by all employees in the mall. Employers building new workspaces should take both state and federal law into account, especially for stand-alone locations that may not have a great deal of space that can be co-opted for this purpose (such as a restaurant).

7. What is on the Horizon

The 2009 Nursing Mothers Amendment may not be the end of legislation in this area. On August 1, 2011, Senator Merkley and Congresswoman Maloney introduced the Breastfeeding Promotion Act of 2011 in both houses of Congress.²⁴² The law would amend the Pregnancy Discrimination Act to add “lactation,” defined as “a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast,” in order to “clarify that breastfeeding and expressing breast milk in the workplace are protected conduct.”²⁴³ The Bills would also modify the exemptions to overtime payments available under Section 213 of the FLSA to change the law such that the Nursing Mothers Amendment would apply to exempt as well as non-exempt employees.²⁴⁴ The Bills have been referred to the House Education and the Workforce Committee and the Senate Health, Education, Labor and Pensions Committee.²⁴⁵ Although these Bills remain in committee, the momentum that appears to be behind federal legislation supporting the breastfeeding mother is one more reason for employers to implement comprehensive lactation programs.

V. CONCLUSION

The Nursing Mothers Amendment represents a significant change in federal law that requires employers to provide both break time and

241. The DOL sought comments regarding how employers have dealt with these issues and stated that it would publish further guidance. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80074 (Dec. 21, 2010), available at <http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24540&Month=12&Year=2010>.

242. Breastfeeding Promotion Act of 2011, H.R. 2758, 112th Cong. (1st Sess. 2011); Breastfeeding Promotion Act of 2011, S. 1463, 112th Cong. (1st Sess. 2011).

243. *Id.*

244. *See id.*; see also 29 U.S.C. § 213 (2006).

245. H.R. 2758, *supra* note 242; S. 1463, *supra* note 242.

physical space appropriate for nursing employees to express breast milk. Employers are not wrong to be concerned that the requirements of the law will create an initial burden, especially to those employers with limited space to create lactation spaces. However, there is evidence that employers who initiate comprehensive lactation policies actually benefit in the end due to decreased healthcare costs, absenteeism and employee turnover.²⁴⁶ Further, employers alerted to the issue on the federal level may find that they have been out of compliance with state-law requirements. Therefore, the new federal law may help employers reduce their litigation and liability risks across the board.

246. U. S. Breastfeeding Comm., Workplace Accommodations to Support and Protect Breastfeeding 4 (2010).

APPENDIX A - STATES WITH LAW RELATED
TO LACTATION BREAKS IN THE WORKPLACE

ARK. CODE ANN. § 11-5-116 (Supp. 2012). Arkansas law generally parallels the federal requirement, except that Arkansas law applies to all employers, but also offers an undue hardship exception to all employers. Also requires the employee to make reasonable efforts to minimize disruption to the employer's operations. No penalties specific to the law are codified.

CAL. LAB. CODE § 1030 (West 2011); CAL. LAB. CODE § 1031 (West 2011); CAL. LAB. CODE § 1032 (West 2011); CAL. LAB. CODE § 1033 (West 2011). California law generally parallels the federal requirement, except that California law applies to all employers, but also offers an undue hardship exception to all employers. An employer who violates this rule is subject to a civil penalty in the amount of one hundred dollars (\$100) for each violation. Enforcement is under the jurisdiction of the Labor Commissioner, which may issue a citation, however, violations of the rule are not criminal.

COLO. REV. STAT. ANN. § 8-13.5-104 (West Supp. 2011); COLO. REV. STAT. ANN. § 8-13.5-103 (West Supp. 2011); COLO. REV. STAT. ANN. § 8-13.5-102 (West Supp. 2011). Colorado law generally parallels the federal requirement, except that breaks must be offered for up to two years following the birth of the child, and it applies to all employers, but also offers an undue hardship exception to all employers. Employees must engage in non-binding mediation before litigating against the employer for violations. No penalties specific to the law are codified.

CONN. GEN. STAT. ANN. § 31-40w (West 2011); CONN. GEN. STAT. ANN. § 46a-64 (West 2009); CONN. GEN. STAT. ANN. § 53a-43 (West 2007). In Connecticut, all employers must allow an employee to use her break or lunch periods to either express milk or breastfeed her child at her workplace at her discretion. Further, the law makes nursing mothers a protected class, forbidding the employer to discriminate against an employee who uses her breaks for lactation. The law does give a definition of undue hardship but does not state explicitly that the employer may assert it as a defense. Employers are also barred from discriminating against lactating employees.

D.C. CODE § 2-1402.82(d) (2001); D.C. CODE § 2-1402.82(b) (2001); D.C. CODE § 2-1401.05 (Supp. 2012). D.C. law generally parallels the federal requirement, except that it applies to all employers, but also offers an undue hardship exception to all employers. Further, the D.C. law makes it an unlawful discriminatory practice to deny a woman the right to lactation breaks. Breastfeeding is also included in the definition of discrimination on the basis of sex.

GA. CODE ANN. § 34-1-6 (West 1999). Georgia law generally parallels the federal requirement, except that Georgia law applies to all employers, but also offers an undue hardship exception to all employers. No penalties specific to the law are codified.

HAW. REV. STAT. § 378-10 (Supp. 2007); HAW. REV. STAT. § 378-5 (1993). Hawaii law prohibits all employers, without exception, from restricting employees from using their break or meal time to express milk and notes that liability for violations includes reinstatement, backpay, fees and costs and injunctive relief. Employers are also barred from discriminating against lactating employees.

820 ILL. COMP. STAT. ANN. 260/10 (Supp. 2011); 820 ILL. COMP. STAT. ANN. 260/15 (Supp. 2011); 820 ILL. COMP. STAT. ANN. 260/5 (Supp. 2011). Illinois law generally parallels the federal requirement, except that Illinois law applies to all employers with over 5 employees, but also offers an undue hardship exception to all employers. No penalties specific to the law are codified.

IND. CODE ANN. § 22-14-2 (West Supp. 2011); IND. CODE ANN. § 22-14-1 (West Supp. 2011). Indiana law generally parallels the federal requirement, except that Indiana law applies to all employers with over 25 employees, but also states that employers must comply “to the extent reasonably possible.” No penalties specific to the law are codified, but the law does include a provision stating that no liability attaches to the employer related to the expressing or storage of the milk absent willful misconduct, gross negligence, or bad faith.

ME. REV. STAT. ANN. tit. 26, § 604 (Supp. 2011); ME. REV. STAT. ANN. tit. 26, § 602 (2007).

Maine law generally parallels the federal requirement, except that Maine law applies to all employers and to children up to three years of age. It is a civil violation to refuse to grant lactation leaves or to discharge or discriminate against an employee who complains to the district attorney or Attorney General. Employers may not discriminate in any way against an employee who chooses to express milk in the workplace. Violators may incur civil penalties of between \$100-and 500. Injunctive relief is also available.

MINN. STAT. ANN. § 181.939 (West 2011).

Minnesota law generally parallels the federal requirement, except that Minnesota law applies to all employers but also offers an undue hardship exception to all employers. No penalties specific to the law are codified.

MISS. CODE ANN. § 71-1-55 (West 2009); MISS. CODE ANN. § 71-1-53 (West 2009).

Mississippi law prohibits all employers, without exception, from restricting employees from using their break or meal time to express milk and notes that liability includes criminal fines of between \$25 and \$250 upon conviction, which is a misdemeanor, and each day's violation shall constitute a separate offense.

N.M. STAT. ANN. § 28-20-2 (West 2011).

New Mexico law generally parallels the federal requirement, except that New Mexico law applies to all employers without exception. No penalties specific to the law are codified, but the law does state that employers are not liable for storage or refrigeration of breast milk.

N.Y. LAB. LAW § 206-c New York law generally parallels the federal (Consol. Supp. 2012); requirement, except that New York Law applies to N.Y. LAB. LAW § 215 all employers without exception and for three years (Consol. Supp. 2012).

after the birth of the child. The law includes whistleblowing and anti-discrimination provisions and civil remedies include injunctive relief, reinstatement with restoration of seniority or front pay in lieu of reinstatement, lost compensation, liquidated damages, costs and reasonable attorneys' fees. Courts are required to award liquidated damages capped at \$10,000.

N.D. Cent. Code § 23-12-17 (2012). If an employer adopts a workplace policy allowing for the expression of milk or breastfeeding of the child on site, it may use the designation "infant friendly" on its promotional materials. To meet this standard the employer must meet the mandates of federal law plus include a sink facility in the lactation space and refrigerated storage of the milk, as well as allow on-site breastfeeding.

OKLA. STAT. ANN. tit. 40, § 435 (West 1999); Oklahoma law generally parallels the federal requirement, except that Oklahoma law applies to all employers and requires both breaks to express milk and to breastfeed the child on site. The law does include an undue hardship exception to all employers. Violators will be enjoined and are guilty of a misdemeanor, but there is no private right of action.

OR. REV. STAT. ANN. § Oregon law generally parallels the federal 653.077 (West 2008); requirement, except that it applies to all employers OR. REV. STAT. ANN. with twenty-five or more employees for at least § 653.256 (West 2008); twenty workweeks in the current or previous OR. ADMIN. R. 839-020- calendar year and applies to exempt as well as non-exempt employees. The law does include an undue hardship exception to all employers. The employer is required to give notice to employees of their rights under the law, but employees are required to give reasonable notice of the need to take breaks. “When an employer’s contribution to an employee’s health insurance is influenced by the number of hours the employee works, the employer shall treat any unpaid” lactation breaks as “paid work time for the purpose of measuring the number of hours the employee works.” All school districts must publish policies in employee handbooks and make a list of lactation spaces readily available to employees in the central office of each facility. The regulations suggest that lactation spaces must be rooms with doors and window coverings. Violators can be assessed civil penalties up to \$1,000.

P.R. LAWS ANN. tit. 29, Lactation laws in Puerto Rico include the right to § 478 (2009); P.R. LAWS some periods of paid leave to express milk or ANN. tit. 29, § 478(a) breastfeed a biological or adopted child for one year (2009) (period to nurse from the time of returning to work, as well as or express breast milk); specified periods for additional unpaid leave. P.R. LAWS ANN. tit. 29, Employers who give these breaks can apply for § 478(f) (2009) special tax relief. There is a private right of action, (Obligation of which includes the ability to award liquidated Employer); P.R. LAWS damages and restitution. Violators can also be found ANN. tit. 29, § 478(d) guilty of a misdemeanor and fined no less than (2009); P.R. LAWS ANN. \$1000, but not more than \$5000. tit. 29, § 478(c) (2009) (requiring a medical certificate); P.R. LAWS ANN. tit. 29, § 478(g) (2009); P.R. LAWS ANN. tit. 29, § 478(h) (2009); P.R. LAWS ANN. tit. 29, § 478(b) (2009); P.R. LAWS ANN. tit. 3, § 1466 (2011); P.R. LAWS ANN. tit. 24, § 3518(a) (2011).

R.I. GEN. LAWS § 23- Rhode Island law generally parallels the federal 13.2-1 (2008). requirement, except that Rhode Island law applies to all employers and requires both breaks to express milk and to breastfeed the child on site. The law does include an undue hardship exception applicable to all employers. No penalties specific to the law are codified.

TENN. CODE ANN. § 50- Tennessee law generally parallels the federal 1-305 (2008); TENN. requirement, except that Tennessee law applies to all CODE ANN. § 50-1-304 employers but also offers an undue hardship exception to all employers. There is a private right of action for retaliatory discharge including attorney fees and costs after an employee complains of legal violations.

TEX. HEALTH & SAFETY CODE ANN. § 165.003 (West 2010); TEX. HEALTH & SAFETY CODE ANN. § 165.033 (West 2010). If an employer adopts a workplace policy approved by the Texas Health and Safety Department allowing for the expression of milk or breastfeeding of the child on site, it may use the designation “mother-friendly” on its promotional materials. To meet this standard the employer must meet the mandates of federal law plus include a sink facility in the lactation space and a hygienic place to store breast milk.

VT. STAT. ANN. tit. 21, § 305 (West Supp. 2011). Vermont law generally parallels the federal requirement, except that Vermont law applies to all employers but also offers an exception to all employers if breaks would “substantially disrupt the employer’s operations.” The law applies to mothers nursing children up to three years of age. Employers may not discriminate or retaliate against employees who exercise rights under the law. There is a private right of action, although “the attorney general or a state’s attorney may enforce the provisions of this section by bringing a civil action for temporary or permanent injunctive relief, economic damages, including prospective lost wages for a period not to exceed one year, investigative and court costs.”

WASH. REV. CODE ANN. § 43.70.640 (West 2006). If an employer adopts a workplace policy approved by the Washington Department of Health allowing for lactation breaks, it may use the designation “infant-friendly” on its promotional materials. To meet this standard the employer must meet the mandates of federal law plus include a sink facility in the lactation space and a hygienic, refrigerated place to store breast milk.

APPENDIX B - STATES WITH LAWS RELATED TO
WHERE A WOMAN HAS A RIGHT TO BREASTFEED HER CHILD

- States where women are privileged by statute to breastfeed in private places.
- States where a woman may breastfeed in public or places of public accommodation.
- Other state laws related to breastfeeding locations that are unlikely to affect most private employers.

ALA. CODE § 22-4-13 (2006). "A mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be present."

ALASKA STAT. § 29.25.080 (2010). "A municipality may not enact an ordinance that prohibits or restricts a woman breast-feeding a child in a public or private location where the woman and child are otherwise authorized to be."

ARIZ. REV. STAT. ANN. § 41-1443 (2011). "A mother is entitled to breast-feed in any area of a public place or a place of public accommodation where the mother is otherwise lawfully present."

ARK. CODE ANN. § 20-27-2001 (Supp. 2011). "A woman may breastfeed a child in a public place or any place where other individuals are present."
NOTE: Criminal penalties for violation of this section are expressly codified. See ARK. CODE ANN. § 20-7-101 (1997).

CAL. CIV. CODE § 43.1 (West 2007). "[A] mother may breastfeed her child in any location, public or private, except the private home or residence of another, where the mother and the child are otherwise authorized to be present."
NOTE: This rule is classified as a personal right in California. This rule is tempered by the requirement that the presence of the child also be authorized.

COLO. REV. STAT. ANN. § 25-6-302 (West 2008). "A mother may breastfeed any place she has a right to be."

CONN. GEN. STAT. ANN. § 46a-64(a)(3) (West 2009). It is a crime to "restrict or limit the right of a mother to breast-feed her child." *NOTE: This rule is (regarding places of classified as a personal right in Connecticut public accommodation). Criminal penalties for violation of this section are expressly codified. See CONN. GEN. STAT. ANN. § 53a-43 (West 2007).*

DEL. CODE ANN. tit 31, § 310 (West 2006). "[A] mother shall be entitled to breast-feed her child in any location of a place of public accommodation wherein the mother is otherwise permitted."

D.C. CODE §§ 2-1402.82(b), (c) (Supp. 2012). It is an unlawful discriminatory practice to deny a woman "the right to breastfeed her child in any location, public or private, where she has the right to be with her child, without respect to whether the mother's breast or any part of it is uncovered during or incidental to the breastfeeding of her child." *NOTE: This rule is classified as a personal right in the District of Columbia. This rule is tempered by the requirement that the presence of the child also be authorized. The District of Columbia Department of Health is instructed to monitor violations of laws related to breastfeeding and lactations breaks. D.C. CODE § 2-1402.83 (Supp. 2012). Notice and reporting rules apply. See D.C. CODE § 2-1402.51 (2001); see also D.C. CODE § 2-1402.52 (Supp. 2012).*

FLA. STAT. ANN. § 383.015(1) (West 2007). "A mother may breastfeed her baby in any location, public or private, where the mother is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breastfeeding."

GA. CODE ANN. § 31-1-9 (2012). "A mother may breastfeed her baby in any location where the mother and baby are otherwise authorized to be." *NOTE: This rule is tempered by the requirement that the presence of the child also be authorized.*

HAW. REV. STAT. § 489-21 (Supp. 2007).	"It is a discriminatory practice to deny, or attempt to deny, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodations to a woman because she is breastfeeding a child." <i>NOTE: Civil penalties and fees for violation of this section are expressly codified. See HAW. REV. STAT. §§ 489-22, 489-23 (Supp. 2007).</i>
740 ILL. COMP. STAT. ANN. 137/10 (West 2010).	"A mother may breastfeed her baby in any location, public or private, where the mother is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breastfeeding." <i>NOTE: Injunctive relief, fees and expenses for violation of this section are expressly codified. See 740 ILL. COMP. STAT. ANN. 137/15 (West 2010).</i>
IND. CODE ANN. § 16-35-6-1 (West 2007).	"Notwithstanding any other law, a woman may breastfeed her child anywhere the woman has a right to be."
IOWA CODE ANN. § 135.30A (West 2007).	"Notwithstanding any other provision of law to the contrary, a woman may breastfeed the woman's own child in any public place where the woman's presence is otherwise authorized." <i>NOTE: Criminal penalties for violation of this section are expressly codified. See IOWA CODE ANN. § 135.38 (West 2007).</i>
KAN. STAT. ANN. § 65-1,248 (West 2008).	"A mother may breastfeed in any place she has a right to be." "[I]t is therefore the public policy of Kansas that a mother's choice to breastfeed should be supported and encouraged to the greatest extent possible." <i>NOTE: The codification of support of breastfeeding as a public policy might have implications with respect to common law wrongful discharges suits.</i>

KY. REV. STAT. ANN. § 211.755 (2007). "Notwithstanding any other provision of the law, a mother may breastfeed her baby or express breast milk in any location, public or private, where the mother is otherwise authorized to be." *NOTE: The law prohibits any person from interfering with a mother breastfeeding her child, but does not codify a penalty specific to this law.*

LA. REV. STAT. ANN. §§ 51:2247(B)-(C) (2011); "Notwithstanding any other provision of law to the contrary, a mother may breastfeed her baby in any place of public accommodation, resort, or amusement." Denying this right is a discriminatory practice. *NOTE: This law provides for conciliation and injunctive relief, but also for a private right of action in court. See LA. REV. STAT. ANN. § 51:2257 (2011).*

ME. REV. STAT. ANN. tit. 5, § 4634 (2002). "Notwithstanding any other provision of law, a mother may breastfeed her baby in any location, public or private, where the mother is otherwise authorized to be." *NOTE: There is a private right of action for violations of this law. See ME. REV. STAT. ANN. tit. 5, § 4621 (2002). Interference, coercion, intimidation discrimination or retaliation for engaging in the rights protected by the law are expressly prohibited. See ME. REV. STAT. ANN. tit. 5, § 4633 (2002).*

MD. CODE ANN. HEALTH GEN. § 20-801 (West 2009). "A mother may breastfeed her child in any public or private location in which the mother and child are authorized to be." "A person may not restrict or limit the right of a mother to breast-feed her child." *NOTE: This rule is tempered by the requirement that the presence of the child also be authorized.*

MASS. GEN. LAWS. ANN. ch. 111 §§ 221(a), (c), (e) (West Supp. 2012)

"A mother may breastfeed her child in any public place or establishment or place which is open to and accepts or solicits the patronage of the general public and where the mother and her child may otherwise lawfully be present." "No person or entity, including a governmental entity, shall, with the intent to violate a mother's right under subsection (a), restrict, harass or penalize a mother who is breastfeeding her child." *NOTE: The law includes a private right of action.*

MINN. STAT. ANN. § 145.905 (West 2011).

"A mother may breastfeed in any location, public or private, where the mother and child are otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breast-feeding."

MISS. CODE ANN. § 17-25-9 (West Supp. 2011).

"A mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be, without respect to whether the mother's breast or any part of it is covered during or incidental to the breast-feeding."

MO. ANN. STAT. § 191.918 (West 2011).

"Notwithstanding any other provision of law to the contrary, a mother may, with as much discretion as possible, breast-feed her child in any public or private location where the mother is otherwise authorized to be."

MONT. CODE ANN. § 50-19-501(1) (2011).

"A mother has a right to breastfeed the mother's child in any location, public or private, where the mother and child are otherwise authorized to be present, irrespective of whether or not the mother's breast is covered during or incidental to the breastfeeding." *NOTE: This rule is tempered by the requirement that the presence of the child also be authorized.*

NEB. REV. STAT. ANN. § 20-170 (LexisNexis Supp. 2011). "Notwithstanding any other provision of law, a mother may breast-feed her child in any public or private location where the mother is otherwise authorized to be." *NOTE: There is a private right of action for violation. See NEB. REV. STAT. ANN. § 20-148(1) (LexisNexis 2008).*

NEV. REV. STAT. ANN. § 201.232 (West 2008). "Notwithstanding any other provision of law, a mother may breast feed her child in any public or private location where the mother is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breast feeding." *NOTE: Violation is a criminal misdemeanor. NEV. REV. STAT. ANN. § 193.170 (West 2008).*

N.J. STAT. ANN. § 26:4B-4 (West 2009). "Notwithstanding any provision of law to the contrary, a mother shall be entitled to breast feed her baby in any location of a place of public accommodation, resort or amusement wherein the mother is otherwise permitted." *NOTE: There is no private right of action under this law. N.J. STAT. ANN. § 26:4B-5 (West 2009).*

N.M. STAT. ANN. § 28-20-1 (West 2011). "A mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be present."

N.Y. CIV. RIGHTS LAW § 79-e (McKinney 2009). "Notwithstanding any other provision of law, a mother may breast feed her baby in any location, public or private, where the mother is otherwise authorized to be, irrespective of whether or not the nipple of the mother's breast is covered during or incidental to the breastfeeding."

N.C. GEN. STAT. § 14-190.9 (2011). "Notwithstanding any other provision of law, a woman may breast feed in any public or private location where she is otherwise authorized to be, irrespective of whether the nipple of the mother's breast is uncovered during or incidental to the breastfeeding."

N.C. CENT. CODE § 23-12-16 (2012).	"If the woman acts in a discreet and modest manner, a woman may breastfeed her child in any location, public or private, where the woman and child are otherwise authorized to be." <i>NOTE: This rule is tempered by the requirement that the presence of the child also be authorized.</i>
OHIO REV. CODE ANN. § 3781.55 (West 2006).	"A mother is entitled to breast-feed her baby in any location of a place of public accommodation wherein the mother otherwise is permitted."
OKLA. STAT. ANN. tit. 63, § 1-234.1 (West Supp. 2012).	"The Legislature hereby declares that breast-feeding a baby constitutes a basic act of nurturing to which every baby has a right and which should be encouraged in the interests of maternal and child health. In furtherance of this right, a mother may breast-feed her baby in any location where the mother is otherwise authorized to be." <i>NOTE: This rule is tempered by the requirement that the presence of the child also be authorized.</i>
OR. REV. STAT. ANN. § 109.001 (West 2007).	"A woman may breast-feed her child in a public place."
35 PA. CONS. STAT. ANN. § 636.3 (West Supp. 2012).	"A mother shall be permitted to breastfeed her child in any location, public or private, where the mother and child are otherwise authorized to be present, irrespective of whether or not the mother's breast is covered during or incidental to the breastfeeding." <i>NOTE: This rule is tempered by the requirement that the presence of the child also be authorized. Pennsylvania law declares that "breastfeeding a baby is an important and basic act of nurturing that must be protected in the interests of maternal and child health and family values" as a matter of public policy.</i> 35 PA. CONS. STAT. ANN. § 636.2 (West Supp. 2012). <i>This may have implications in wrongful discharge cases.</i>
P.R. LAWS ANN. tit. 24, § 3518(b) (2011).	"Notwithstanding any contrary precept of law, a mother may breastfeed her child in any public or private recreational place."

R.I. GEN. LAWS § 23-13.5-1 (2009). "A woman may feed her child by bottle or breast in any place open to the public." *NOTE: Injunctive relief as well as compensatory damages and attorneys' fees are codified. See R.I. GEN. LAWS § 23-13.5-2 (2009).*

S.C. CODE ANN. § 63-5-40 (2008). "A woman may breastfeed her child in any location where the mother and her child are authorized to be." *NOTE: This rule is tempered by the requirement that the presence of the child also be authorized.*

TENN. CODE ANN. § 68-58-101 (2011). "A mother has a right to breastfeed her child in any location, public or private, where the mother and child are otherwise authorized to be present." *NOTE: This rule is tempered by the requirement that the presence of the child also be authorized.*

TEX. HEALTH & SAFETY CODE ANN. § 165.002 (West 2010). "A mother is entitled to breast-feed her baby in any location in which the mother is authorized to be."

UTAH CODE ANN. § 76-10-1229.5 (LexisNexis 2008). "The county legislative body may not prohibit a woman's breast feeding in any location where she otherwise may rightfully be, irrespective of whether the breast is uncovered during or incidental to the breast feeding."

VT. STAT. ANN. tit. 9, § 4502(j) (West Supp. 2011). "Notwithstanding any other provision of law, a mother may breastfeed her child in any place of public accommodation in which the mother and child would otherwise have a legal right to be." *NOTE: This rule is tempered by the requirement that the presence of the child also be authorized. Both civil remedies including punitive damages and criminal penalties are codified. See VT. STAT. ANN. tit. 9, § 4506 (West 2007); see also VT. STAT. ANN. tit. 9, § 4502 (West 2007).*

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VA. CODE ANN. § 2.2-1147.1 (Supp. 2012). “Notwithstanding any other provision of law, a woman may breast-feed her child at any location where that woman would otherwise be allowed on property that is owned, leased or controlled by the Commonwealth as defined in § 2.2-1147.”

WASH. REV. CODE ANN. § 49.60.215 (West Supp. 2012). The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement is recognized as a civil right. *NOTE: Civil remedies including attorneys’ fees are codified.* WASH. REV. CODE ANN. § 49.60.250(9) (West Supp. 2012).

WIS. STAT. ANN. § 253.165 (West Supp. 2011). “A mother may breast-feed her child in any public or private location where the mother and child are otherwise authorized to be. In such a location, no person may prohibit a mother from breastfeeding her child, direct a mother to move to a different location to breast-feed her child, direct a mother to cover her child or breast while breast-feeding, or otherwise restrict a mother from breast-feeding her child as provided in this section.” *NOTE: This rule is tempered by the requirement that the presence of the child also be authorized.*

