“Freedom of Expression”: Legal Protections for Nursing Mothers at Work

USBC Webinar
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ACLU

Because Freedom Can’t Protect Itself

Goals … and disclaimer

- **Goal**: To provide information about legal protections for women related to pumping at work, so you can support them in exercising their rights.

- **Disclaimer**: This webinar is provided for educational purposes only. It does not constitute legal advice. Anybody seeking legal advice needs to consult an attorney familiar with their specific circumstances.
Overview

- Introduction to ACLU WRP & work on breastfeeding rights
- Legal framework protecting breastfeeding rights at work
- When employers don’t comply: enforcement options
- Strategies and resources to support nursing mothers returning to work
Introduction to ACLU-WRP

- Workplace Rights
- Ending Gender-based violence
- Equal rights in education

How the ACLU works

- Advocacy & public education
- Legislation and policy
- Litigation
WRP’s employment work

- Equal pay
- Women in non-trad jobs
- Pregnancy discrimination
  - Accommodations
  - Caregiver discrimination and sex stereotypes
  - Return to work

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Legal protections for BF @ work

- **“Right to pump” laws**: Affirmative obligations on employers
  - Affordable Care Act: “Reasonable Break Time for Nursing Mothers Act,” part of Fair Labor Standards Act (“FLSA”)
  - State laws requiring accommodation for pumping at work

- **Antidiscrimination protections**:
  - **Title VII**—Federal law prohibiting employment discrimination on the basis of sex/pregnancy
  - State analogues to Title VII

The “Nursing Mothers Act”

- Covered employers must provide “reasonable break time” and a “private location other than a restroom.”
- Requirement for break **each time** such employee has need to express the milk
- Applies for **1 year after birth**
- Pay **not required**, but employees can use paid breaks
- Breaks must be **breaks** (can’t be forced to work while pumping)
- Break time should not count against FMLA
“Nursing Moms Act” coverage

- “Non-Exempt” employees = Employees protected by FLSA's wages & hour protections
- Who is NOT covered? Generally, salaried workers.
  - Executive employees
  - Administrative employees
  - Professional employees
  - Employees in certain industries: e.g. “Common carriers” (railway/bus/airline employees), agricultural workers, etc.


Establishing FLSA Coverage

- Two ways of establishing coverage:
  1. "Enterprise" coverage:
     - At least 2 employees, and
     - At least $50,000 in revenue
     - If these are met, every non-exempt employee is covered.
  2. Individual coverage: individual non-exempt employees who “engage in interstate commerce” are covered. E.g.:
     - placing calls or mailing letters to other states,
     - processing credit card transactions, or
     - handling goods manufactured in interstate commerce.
“Reasonable” breaks

- Employers must provide breaks “each time” employee has need to pump
  - Typically 2-3 x during an 8 hr work day
  - DOL recognizes that frequency and duration will vary for individual women based on a host of factors
  - Employers should take into account time for entire process, including, e.g.
    - Time to set up/break down/clean equipment
    - Proximity to work station, running water, & place to store milk

Requirements for pumping location

- Cannot be a bathroom (but attached rooms maybe ok)
- Must be “shielded from view”
- Free from intrusion by coworkers and the public, but shared/multipurpose spaces may be permitted
- Can be a temporary space, only needs to be made available when needed
- Recommended but not required:
  - Electrical outlet
  - Chair, running water
Defense of “Undue hardship”

- Available only to employers with fewer than 50 employees—defined broadly (covers all worksites, applies to PT employees)
- Defined as “causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business”
- Determined at the time of the request—cannot be applied prospectively

State “right to pump” laws

- Over 20 state laws protect breastfeeding rights at work
- Many apply more broadly and cover more employers/workers
- Federal law does not “preempt”

ACLU “Delivering Fairness” map
Protection from sex discrimination

- **Title VII & state laws prohibit sex discrimination at work**
  - Title VII covers businesses with 15 or more employees
  - Many state laws cover smaller workplaces (e.g. NY covers employers with 4 or more employees)
  - State anti-discrimination laws are generally interpreted in the same way as Title VII, though they may differ in scope.

Sex includes pregnancy

- Supreme Court originally said pregnancy discrimination not included (*General Electric v. Gilbert*).
- Congress responded by passing the Pregnancy Discrimination Act (PDA).
- PDA defines sex as including pregnancy & related medical conditions.
- Pregnant workers must be treated the same as others “similar in their ability or inability to work.”
Sex discrimination and lactation

- Some court cases said “sex” did not include lactation—lactation is not a “medical condition” that’s “related” to pregnancy and childbirth
  - *Wallace v. Pyro Mining*: breastfeeding not medically necessary
  - *Martinez v. NBC*: not all women are breastfeeding—and no comparable men—so this is not sex discrimination
- More recent cases recognize that it is covered — *EEOC v. Houston Funding* (Fifth Circuit Court of Appeals)
- EEOC enforcement guidance states that it is covered

Disparate treatment

- **Disparate treatment**: You can’t be fired or otherwise penalized “because of sex.” May be shown through:
  - Direct evidence: e.g. employer’s statement that employee is fired because of pregnancy.
  - Indirect evidence: If employers give accommodations (like extra breaks) to a large number of other employees, but not to breastfeeding women, this may be discriminatory if it creates a significant burden on women. Look to people with disabilities or off-the-job injuries as comparators.
- **Sexual harassment** (hostile environment)
Disparate impact

- Business practices that are neutral as to pregnancy/breastfeeding but have a *disparate impact* on women can still be challenged as discriminatory.
- Will only be upheld if there is a “business necessity” and no feasible alternative that is less discriminatory.
- Examples:
  - construction work sites with no restroom facilities
  - Workplaces with no place to pump(?)

Why Title VII protection matters

- “Nursing Mothers Act” does not protect all workers/workplaces.
- “Nursing Mothers Act” does not include a strong enforcement mechanism (absent wage loss/retaliation).
- “Nursing Mothers Act” does not protect against straight up discrimination: the “I am breastfeeding” → “You’re fired” scenario.
- Title VII has stronger enforcement mechanism and allows for higher damages.
- Title VII includes employer liability for sexual harassment.
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Examples of non-compliance / discrimination

- Provino v. Muster: refusing breaks, cutting hours, & ultimately firing plaintiff
- EEOC v. Houston Funding: “Your position has been filled”
- Ames v. Nationwide: “Maybe you should just go home and be with your babies”
- Sexual harassment: banging on the door to room for pumping, vandalizing the door, name-calling
- Retaliation: assignment to less desirable shift
Enforcement: “right to pump” laws

- “Nursing Mothers Act”
  - Employees can bring claims only in cases of lost wages/overtime, or retaliation.
  - DOL has authority to enforce violations—mechanism is filing an administrative complaint with the agency.
- State law enforcement mechanisms unclear
  - Many laws do not clearly state whether individuals can go to court to enforce violations.
  - Possible state tort claims: “Wrongful discharge in violation of public policy”

What is retaliation?

- Employers may not take adverse action against covered employees who complain about conditions at work.
  - Applies to internal complaints as well as complaints to another agency.
  - Adverse action = Anything that would dissuade a reasonable person in a similar position from making or supporting a complaint.
- Victims of retaliation may file either an administrative complaint or a private lawsuit seeking relief (including compliance with law, reinstatement, lost pay, and policy changes).
Enforcement: antidiscrimination laws

- Title VII: employees can sue & get broad relief in court (backpay, compensatory, punitive damages, injunction).
- Before going to court, the employee must file a “charge of discrimination” with the Equal Employment Opportunities Commission within 180 or 300 days.
  - Investigation → Determination Letter → Conciliation, or → Lawsuit
  - Suit may be initiated by EEOC itself, or agency issues a “right to Sue” letter.
- State agencies often have similar requirements and processes—many “cross file.”

Enforcement options summary

- Filing a complaint with state or federal agencies
  - Department of Labor, Wage and Hour Division
  - State department of labor, if state “right to pump” law
  - EEOC and state antidiscrimination agencies
- Filing a lawsuit may or may not be an option
- Contact your local BF coalition or Consult an employment lawyer
  - Local ACLU affiliate, www.aclu.org
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When seeking accommodations:

- Be prepared: women should ask concrete questions about how the company will accommodate them well before they plan to return to work.
- Ask clearly for accommodations needed & be prepared to provide documentation & negotiate alternatives.
- Ask for a meeting with supervisor/HR to make sure parameters are clear.
- Bring information: print out a copy of the law & helpful materials, like “the Business Case for Breastfeeding.”
- Create (and keep) a paper trail, including detailed notes.
Medical documentation

- Employees covered by “Nursing Mothers Act”: no doctor’s note should be required
- Everyone else: employers should only ask for a doctor’s note if they require the same of others seeking accommodations for medical issues/disability.
- Note should:
  - Confirm “diagnosis” of breastfeeding
  - State medical necessity to pump & consequences
  - State frequency & duration of breaks needed
  - Specify any other accommodations needed (e.g. removal/modification of specific duties)

“Know your rights”

This FAQ provides an overview of federal laws protecting pregnant, post-partum, and breastfeeding women. The applicability of these laws depends on the size of your workplace and nature of your work. Because your state or local government may provide additional protections, you should also check the laws where you work. You can also consult an overview of your rights when pregnant or breastfeeding on the job.
“Know your rights”

- Department of Labor: [http://www.dol.gov/whd/nursingmothers/faqBTNM.htm](http://www.dol.gov/whd/nursingmothers/faqBTNM.htm)

State law resources

- ACLU Delivering Fairness map: [www.aclu.org/maps/delivering-fairness-ending-discrimination-against-pregnant-women-and-moms-work](http://www.aclu.org/maps/delivering-fairness-ending-discrimination-against-pregnant-women-and-moms-work)
- U.S. Department of Labor map: [http://www/dol.gov/wb/map/index.htm](http://www/dol.gov/wb/map/index.htm)
- [Breastfeedinglaw.com](http://breastfeedinglaw.com)
State specific materials

**California:** http://www.banpac.org/pdfs/2012/ca_breastfeeding_law_brochure_7_27_12.pdf

**Illinois:** http://www.illinoislegalaid.org/index.cfm?fuseaction=home.dsp_content&contentid=9180


Additional resources & references

- U.S. Breastfeeding Committee Coalitions Directory: www.usbreastfeeding.org/coalitions-directory
- U.S. Department of Labor www.dol.gov/whd/nursingmothers/
- Job Accommodation Network: https://askjan.org/
- EEOC: www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm
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