Everything You Need to Know About Workplace Breastfeeding Law

July 12, 2017

Today’s Moderator

- Amelia Psmythe, Deputy Director
  U.S. Breastfeeding Committee
Webinar Materials

To find recording & handouts of this session:

- All participants will receive an email with a link to the materials
  
  OR

- www.usbreastfeeding.org/ws-const
  - This is a webpage for sharing information from the Workplace Support Constellation & related content

Q&A

- During today's sessions, all attendees will be in listen only mode.

- Q&A session after presentation. Questions may be submitted at any time during the webinar. Please type your questions into the Questions box on your webinar control panel.

- Out of respect for the federal partners presenting, we will not address advocacy or lobbying questions.
Webinar Control Panel

Audio problems? Other questions?
Please e-mail office@usbreastfeeding.org
Today’s Speakers

- Cheryl Lebedevitch, Workplace Program & Campaign Manager, U.S. Breastfeeding Committee
- Christine Schott, Senior Advisor, U.S. Department of Labor, Wage and Hour Division, FMLA and Other Labor Standards Branch
- Ashley Martin, Senior Attorney-Advisor, U.S. Equal Employment Opportunity Commission
- Jessica Lee, Staff Attorney, Center for WorkLife Law

Setting the Stage
Going Back to Work

- More than half of moms return to work before their child’s first birthday
- To maintain milk supply and have adequate milk for baby while she’s away, breastfeeding employees must pump breast milk during the work day, yet only 40% of women have access to both break time and private space

Workplace Support Has a Major Impact

- 4 out of 5 mothers start out breastfeeding, less than half are still breastfeeding at 6 months
- The lack of break time and a private place to pump in the workplace remains one of the main causes for the drop-off in breastfeeding rates
Challenges

- Many aren’t aware of federal and state protections for breastfeeding employees or are confused about the requirements
- Many don’t know how to implement workplace breastfeeding support or where to turn for support
Break Time for Nursing Mothers
Under the Fair Labor Standards Act

Reasonable Break Time

- “Reasonable break time”
- “Each time such employee has need to express the milk”
- For 1 year after the child’s birth.
Eligible Employees

- Employees who work for a covered employer
- Employees who are covered on an individual basis
- Employees who are covered by section 7 of the FLSA (generally, employees entitled to overtime pay)

Exemptions from Break Time for Nursing Mothers

The most common of the overtime pay exemptions that apply to the nursing mothers break time requirement is the “white collar” exemption, which applies to certain:

- Executive Employees
- Administrative Employees
- Professional Employees
Compensation for Break Time

Employers are not required to provide compensated break time. As with other breaks under the FLSA, the employee must be completely relieved from duty, or the break time must be compensated as work time.

If an employer already provides paid break time and if an employee chooses to use that time to express breast milk, she must be compensated for that time just as other employees would be compensated for break time.

Space Requirements

An employer shall provide:
- A place, other than a bathroom
- Shielded from view
- Free from intrusion from coworkers and the public
- That may be used by an employee to express breast milk.

An employer may temporarily designate a space or make a space available when needed by the employee; the location must be functional as a space for expressing milk.
**Undue Hardship Defense**

- An employer that employs fewer than 50 employees is not required to provide break time and space if it would pose an undue hardship.
- Number of employees is determined by counting employees at all worksites, regardless of location or part-time status.
- Undue hardship is 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.”

**Enforcement**

If employee is discharged or in any manner discriminated against because she has filed a complaint, the employee may file a retaliation complaint with the Department or may file a private right of action under the FLSA for retaliation seeking reinstatement, lost wages, and other appropriate remedies.

If employer does not comply, the Department could file suit to seek injunctive relief under the FLSA, including reinstatement and lost wages if appropriate.
Enforcement

The Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) administers and enforces the FLSA.

The WHD and information on the laws it enforces can be found on the internet at the following address: www.wagehour.dol.gov

*TDD Phone: 1-877-889-5627
Title VII & the Pregnancy Discrimination Act

Ashley Martin
Office of Legal Counsel
Equal Employment Opportunity Commission

Charge Data

Pregnancy Discrimination Charges

▶ FY 2010-2016:
  • Approx. 26,000 charges

▶ FY 2016:
  • 3,486 received
  • 3,762 resolved
  • $15.5 million in monetary relief
Title VII of the Civil Rights Act of 1964, as amended

- Title VII prohibits discrimination on the basis of sex.

- The Pregnancy Discrimination Act of 1978 (PDA) amended Title VII.
  “The PDA gives a woman the right . . . to be financially and legally protected before, during, and after her pregnancy.”
  *Leg. History of the PDA*

Fundamental PDA Requirements

1) An employer may not discriminate against an employee on the basis of:
   - Pregnancy,
   - Childbirth, or
   - Related medical conditions.

2) Women affected by pregnancy, childbirth, or related medical conditions must be treated in the same manner as other applicants or employees who are similar in their ability or inability to work.
PDA: Adverse Employment Actions

Covers all aspects of employment, including:

- Failure to Transfer - Doe v. DOJ, U.S. Marshals Serv., EEOC Appeal No. 072009006
- Full Medical Clearance Requirement – EEOC v. Britthaven (NC 2012)
- Harassment – Harris v. Soc. Sec. Admin., EEOC Appeal No. 0120121157

PDA: Extent of Coverage

Employers may not discriminate against any employee on the basis of:

- Current Pregnancy
- Past Pregnancy
- Potential or Intended Pregnancy
- Childbirth
- Related Medical Condition
Employers may not discriminate against an employee because of a medical condition related to pregnancy or childbirth and must treat the employee the same as others who are similar in their ability or inability to work but are not affected by pregnancy, childbirth, or related medical conditions.

Examples of “related medical conditions”:
- Complications requiring bed rest
- Gestational diabetes
- After-effects of C-section
- Lactation – EEOC v. Houston Funding II, 717 F.3d 425 (5th Cir. 2013)

Lactation is a pregnancy-related medical condition.

An employee must have the same freedom to address lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions.

A practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is facially sex-based.
**EEOC v. Houston Funding, II (5th Cir. 2013)**

- **Facts:**
  - Employee claimed she was fired after giving birth once she asked her employer whether she would be able to pump breast milk when she returned to her job.
  - EEOC sued alleging that the employer engage in sex discrimination.

- District Court dismissed the lawsuit ruling that "lactation is not pregnancy, childbirth, or a related medical condition“ and thus determined that "firing someone because of lactation or breast-pumping is not sex discrimination."

- On appeal, the Fifth Circuit held that firing a woman because she is lactating or expressing milk is unlawful sex discrimination under Title VII.

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**PDA: Equal Access to Benefits**

- **Second Clause of the PDA:**
  
  "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise . . . ."

- **Examples of fringe benefits:**
  - Light duty
  - Leave
  - Health Insurance
An employer must treat women affected by pregnancy, childbirth, or related medical conditions the same as other employees who are similar in their ability or inability to work with respect to light duty, alternative assignments, disability leave, or unpaid leave.

An employer that provides light duty to other employees cannot justify denying it to a pregnant worker just because it would be more expensive or less convenient to do so.

An employer:

- May not single out an employee's pregnancy-related condition for medical clearance procedures that are not required of employees who are similar in their ability or inability to work;
- May not remove a pregnant employee from her job because of pregnancy as long as she is able to perform her job;
- May not place increased restrictions on pregnancy-related medical leave; and
- Must allow an employee to return to work following recovery from a pregnancy-related condition to the same extent that employees on sick and disability leave for other reasons are allowed to return.
PDA: Equal Access to Benefits

**Health Insurance**

- Employers who provide health insurance must include coverage of pregnancy, childbirth, and related medical conditions.

- An employer must provide the same terms and conditions for pregnancy-related benefits as it provides for benefits relating to other medical conditions. For example:
  - A plan must cover prescription contraceptives on the same basis as prescription drugs that are used to prevent the occurrence of medical conditions other than pregnancy.
  - If medical benefits are subject to a deductible, pregnancy-related medical costs may not be subject to a higher deductible.

EEOC’s Pregnancy Discrimination Guidance

- Enforcement Guidance: Pregnancy Discrimination And Related Issues

- Questions and Answers about the EEOC’s Enforcement Guidance on Pregnancy Discrimination and Related Issues

- Fact Sheet for Small Businesses: Pregnancy Discrimination
Understanding State Laws and the Interaction Between Workplace Breastfeeding Laws

Jessica Lee
Staff Attorney

Types of State Laws

General Anti-Discrimination Laws
Often similar to the Pregnancy Discrimination Act/Title VII

Pregnant Worker Fairness Acts
Typically include a standalone right to accommodation

Time and Space Laws
Often similar to the Federal Break Time for Nursing Mothers provision

Laws Addressing Certain Groups
Such as city laws, or laws protecting only public workers
General Non-Discrimination Laws

- Breastfeeding employees should have the same ability to address lactation-related needs (via schedule changes, break time, accommodations, etc.) that co-workers have to address other needs.

Pregnant Workers Fairness Acts

- Accommodation and non-discrimination protection specifically for pregnancy and related conditions.

Older anti-discrimination and accommodation laws often don’t explicitly include lactation.

This is changing! In the meanwhile, do your research and be prepared to offer an explanation of how/why breastfeeding accommodations fall into the “pregnancy related” category.
State Time and Space Laws

Time for expressing milk

Private, sanitary location

Examples: Arkansas, Colorado, California, Delaware, Hawaii, Illinois, Minnesota, New York, Oregon

Be on the lookout:

How is it enforced?

How can you respond to challenges interpreting “reasonable efforts” and “undue hardship”? 

3
Which Law Do You Use?

**Step 1:** Determine which laws apply. (Consider federal and state)
**Step 2:** Ask, do they each fit the mother’s needs?
**Step 3:** Whatever is the strongest level of protection governs.

**Advocacy Tip:** If several apply, decide which to focus on by doing the math:

**Clarity + Enforceability = Success!**

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**Clarity:**
Which law is easiest for an employer to understand?
Does this require a lot of interpretation?
Is there a law specific to the employee (teachers, public workers, etc.)?

**Enforceability:**
Who will I go to for help? Is there an enforcement agency?
Do I understand the process? Will I need a lawyer?
What are the fines or penalties?
**Which Law Do You Use?**

**General Principle:**
Focus on whatever is the strongest and most specific...but don’t forget to use all of the tools available.

- Break Time and Space Laws for Certain Types of Employees
- Specific Break Time and Space Laws
- Pregnant Workers Fairness Acts
- General Anti-Discrimination Laws

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**For More Information**

Contact the Center for WorkLife Law for information and support:
(415)703-8276
hotline@worklifelaw.org
Building Our Toolbox

Guides to the Rights of Breastfeeding Employees

- The USBC’s Online Guide: *What You Need to Know About the “Break Time for Nursing Mothers” Law* was developed as a tool to help identify the rights of breastfeeding employees and obligations of employers under the federal “Break Time” law
  
  [www.usbreastfeeding.org/workplace-law](http://www.usbreastfeeding.org/workplace-law)

- State Guides to the Rights of Breastfeeding Employees live in the Online Guide section “What if your state already has a law?”
  
  [www.usbreastfeeding.org/workplace-guide](http://www.usbreastfeeding.org/workplace-guide)
Examples of simple, cost-effective time and space solutions have been found in every industry.

HHS Office on Women’s Health hosts Supporting Nursing Moms at Work: Employer Solutions, a comprehensive online resource that provides businesses with tips and simple solutions (with photos and videos!) from businesses across the country.

Template Note for Doctors

- Center for WorkLife Law’s Pregnant@Work website is packed with information for health care professionals, employers, pregnant women, and attorneys
- Guide for doctors on writing an effective work note to help their patient get the accommodations she needs
  
  www.pregnantatwork.org/healthcare-professionals/breastfeeding/

Business Case for Breastfeeding

- Increased productivity and loyalty to the company
- Enhanced public image
- Decreased absenteeism, health care costs, and employee turnover
  
  www.womenshealth.gov/breastfeeding/business-case-for-breastfeeding.html
WKKF First Food Message Guide

KEY MESSAGES
- A majority of women with babies work outside the home, and must return to work shortly after giving birth.
- This can be a major obstacle for mothers who want to breastfeed, so much so that many don’t start or only do so for a short period of time.
- Helping breastfeeding mothers succeed can be as simple for employers as providing break time and a private space to pump breast milk at work, which is required under the Affordable Care Act (ACA).
- The ACA requires health insurance companies to cover breast pumps and lactation support. Many WIC programs also provide breast pumps.
- Workplaces should create breastfeeding policies; ensure all staff are aware of their policies and talk with expectant mothers about accommodating their breastfeeding needs when they return to work.
- Studies show that breastfeeding mothers who are supported in the workplace take fewer sick days and have higher retention rates, which is good for employees’ morale and businesses’ bottom line.
- Working mothers and families also need paid family leave. Breastfeeding rates are higher among employed women who have access to longer maternity leave, which contributes to improved infant and maternal health.

See March 2015 Power Tools webinar: Let’s Talk Breastfeeding
www.usbreastfeeding.org/power-tools

Resource and Referral Guide

- Many organizations are working to support compliance with workplace breastfeeding law
- “Resource and Referral Guide for Breastfeeding Employees and their Employers” outlines types of support provided and contact information of key orgs

Download Here:
www.usbreastfeeding.org/workplace-help
**Workplace Support Learning Community**

- Share information and resources, ask questions, and surface opportunities for collaborative action
- To join, log in or create a profile at [www.usbreastfeeding.org](http://www.usbreastfeeding.org)
- Go to link and click “Join Community”

[www.usbreastfeeding.org/p/co/ly/gid=237](http://www.usbreastfeeding.org/p/co/ly/gid=237)

Welcome! This Learning Community is a place to connect with others interested in this Action area, share information and resources, and surface opportunities for collaborative action. Click the “Join Community” button to the right to ensure updates appear on your internal home page.

You can post to the discussion forums or share in the file library set up below.

SGCTA Action 14: Ensure that employers establish and maintain comprehensive, high-quality lactation support programs for their employees.
Practical Applications:  
Common Scenarios and Strategies

Key Strategies

- **Determine what law(s) apply:**
  - Is the employee eligible for overtime protections?
  - How many employees does the employer have?
  - What state is she in? Are there applicable state laws?

- **Understand the employee’s and employer’s needs:**
  - Does she need time and space, or something more?  
    - Has she had breastfeeding complications?
    - Are there special work conditions that threaten lactation?
  - What seems to be the employer’s barrier to providing what she needs?  
    - Are there others who have similar conditions accommodated?
    - Does the employer know the law?

- **Identify key points of contact:**
  - Who is ultimately responsible for making the change?
  - Who is a potential ally or resource—either in or outside the workplace?
  - What resources are available for more help?
Scenario 1

Sharon requests break time and a location to pump breast milk. Her boss informs her that she can only use her regular 30 minute lunch break and that they just don’t have any spare rooms they can use for a private lactation room. Sharon’s boss suggests she use a building down the street, or the (non-private) staff lounge. Sharon needs to pump at least twice during her workday.

*How do you respond?*
**Scenario 1: Your Response**

- Determine what law(s) apply
- Understand the employee’s and employer’s needs
- Identify key points of contact

**Scenario 1, cont.**

In your discussion with Sharon you learn that she is a public school teacher. Also, she knows that some of her colleagues have been able to arrange break time for addressing other medical needs during the workday.
Scenario 1: Your Response

✅ Determine what law(s) apply
  • Title VII may be a good fit
  • There may be state law and/or public employee protections

✅ Understand the employee’s and employer’s needs
  • If other teachers receive accommodations, we know it is possible for Sharon, too!

✅ Identify key points of contact
  • Human resources
  • Other teachers
  • Title IX coordinator

Scenario 2
Scenario 2

After returning to work, Lisa, a police officer, realizes that she needs to be reassigned to desk duty while she is pumping breast milk so that she can take breaks to pump as needed, and so that she doesn’t have to wear a tight bulletproof vest which Lisa worries will hurt her milk production. While on patrol, all of the officers wear vests and are unable to take breaks.

How do you respond?

Scenario 2: Your Response

✓ Determine what law(s) apply
  • Title VII may be a good fit
  • There may be state law and/or public employee protections

✓ Understand the employee’s and employer’s needs
  • Are other employees allowed to have desk duty?

✓ Identify key points of contact
  • Because of milk supply issue, seek physician assistance
Scenario 2, cont.

Lisa spoke with her doctor who wrote her a note stating her medical opinion that wearing the vest could impede milk production and cause infection. But when Lisa submitted this note and asked for desk duty, she was denied. The employer, however, did provide desk-duty accommodations to other officers on a temporary basis and those who were injured-on-the-job.

How do you respond?

Scenario 3
Scenario 3

Jennifer is ready to return to work following maternity leave and asks supervisor whether it might be possible for her to use a breast pump in the back room to pump milk when she returns. Her supervisor relays the request to HR which states “no” and that perhaps employee should stay home longer.

How do you respond?

Scenario 3: Your Response

- Identified which laws protect her
- Identified key points of contact
- Identified potential comparators
- Informed employee and employer of the law on workplace pumping accommodations
- Provided employer with resources to understand the business case and make finding a space easier
- Documented what was happening
You have not been able to help Jennifer reach a resolution with her employer, and she has not returned to work because she won’t have a space to pump. HR contacted Jennifer and informed her that her spot had been filled.

*How do you respond?*
*How has your advocacy helped?*
Scenario 4

Alana works at a small clothing shop on Main Street. When she returned to work, she asked her boss where she should pump. Alana’s boss told her that he couldn’t afford to make a lactation room, but she is welcome to use her regular lunch and 15 minute breaks to pump in her car or the bathroom. Alana mentioned she thought there was a law requiring space and break time as-needed, but her boss replied “that doesn’t apply because we’re a small business.”

*How do you respond?*

**Scenario 4: Your Response**

- **Determine what law(s) apply**
  - Break Time for Nursing Mothers may be a good fit—even for this small employer
  - There may be state law protections

- **Understand the employee’s and employer’s needs**
  - Employer needs education
  - Employer may need creative solutions re: space and time

- **Identify key points of contact**
QUESTIONS?

For More Information

Contact the Center for WorkLife Law:
(415)703-8276
hotline@worklifelaw.org

Contact the U.S. Breastfeeding Committee:
(775)359-1549 x21
clebedev@usbreastfeeding.org