Nursing Mothers in the Workplace
Federal Law

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LORMAN EDUCATION SERVICES
November 2016

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Federal Law

A. Federal Statutes

1. Fair Labor Standards Act of 1938 (FLSA), Nursing Mothers Amendment, 29 U.S.C. § 207(r)

a. Summary. 29 U.S.C. § 207(r) requires employers to provide reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk.

b. Coverage.

i. Enterprise with minimum two employees with at least $500,000 of gross revenues, or being engaged in the activity of a public agency or in healthcare or school operation. 29 U.S.C. § 203(s)(1) (2006).

ii. Individual employees engaging in interstate commerce. 29 C.F.R. § 776.0a (2011).

c. Exemption. Only employees who are not exempt from Section 7 of FLSA, which includes the FLSA's overtime pay requirements, are entitled to take lactation breaks.

d. Exception. Employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with the provision would impose an undue hardship.

e. Legal text. FLSA was amended by Patient Protection and Affordable Care Act, § 4207 by adding the following:

> (r) Reasonable break time for nursing mothers
> (1) An employer shall provide—
> (A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and
> (B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.
> (2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.
> (3) An employer that employs less than 50 employees shall not be

subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

f. Explanations of the provisions.

- "Reasonable break time" to express breast milk (reasonable standard, case by case).
  - The duration and frequency of mandated break time is predicated on the employee's need to express milk. 29 U.S.C. § 207(r) (2006).
  - The Department of Labor (DOL) expects nursing mothers to need breaks to express milk two to three times during an eight hour shift. 75 Fed. Reg. 80073, 80075 (Dec. 2, 2010).
  - The DOL notes 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. 75 Fed. Reg. at 80075.
- A reasonable space requirement: "a place, other than a bathroom, that may be used to express milk."
  - 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. This room can be "private or with partitions for use by multiple nursing employees." 75 Fed. Reg. at 80075.
- "For up to one year after the child's birth."
- "Non-paid."
  - The lactation break time required under the Nursing Mothers Amendment need not be paid, although some states require paid breaks for this purpose. 29 U.S.C. §§ 207(r)(2), (4).
- Undue hardship exemption.
  - The statute requires a demonstration of "significant" difficulty or expense, 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. 75 Fed. Reg. at 80077.

g. History of Federal Legislation on Women's Breastfeeding Rights in the Workplace.

1990	The United States pledged to enact "imaginative legislation that protects the breastfeeding rights of working women and established means for its enforcement" as a party to the World Health Organization and United Nations Children's Fund joint policy statement.
1992	Congress enacted the Breastfeeding Promotion Program with the goals of promoting breastfeeding and distributing pumping equipment to breastfeeding women.
1998	The U.S. Department of Health and Human Services established the United States Breastfeeding Committee to support breastfeeding women.
2000	The U.S. Department of Health and Human Services began a "Blueprint for Breastfeeding" program.
2009	Congresswoman Carolyn B. Maloney (D-NY) introduced a bill in the House of Representatives called the Breastfeeding Promotion Act of 2009. The bill was not passed into law in its entirety, but a modified portion of the law amending the FLSA was incorporated into the Patient Protection and Affordable Care Act.
2010	The Patient Protection and Affordable Care Act was enacted.

For more information on the history of legislation affecting nursing mothers, see Sarah Andrews, *Lactation Breaks in the Workplace: What Employers Need to Know About the Nursing Mothers Amendment to the FLSA*, 30 HOFSTRA LAB. & EMP. L.J. 121 (2012).

2. Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2 and the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e-k

a. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.

b. The Pregnancy Discrimination Act (PDA), passed in 1978, amended Title VII of the Civil Rights Act of 1964. It states that discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII. Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees who are similar in their ability or inability to work.

c. The law generally applies to employers with 15 or more employees, including federal, state, and local governments. Title VII also applies to private and public colleges and universities, employment agencies, and labor organizations.

d. Until recently, plaintiffs unsuccessfully brought Title VII and PDA claims. In 2013, the Fifth Circuit held that lactation discrimination was covered under the PDA. *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013).

42 U.S.C. § 2000e-2
(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-
(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women 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 2000e–2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

3. Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601, *et seq*.

a. An eligible employee may take up to 12 workweeks of leave during any 12-month period for the birth and care of the employee's newborn child. 29 U.S.C. § 2612(1)(1)(A).

b. Generally, breastfeeding does not qualify for job-protected time off under the FMLA. *See, Erickson v. AMN Healthcare Serv.*, No. 09cv910 BTM (CAB), 2010 WL 2618850, at *3 (S.D. Cal. June 25, 2010).

c. To qualify for FMLA coverage, an employee must work for a covered employer at a location where the employer has 50 or more employees within 75 miles; have worked for the employer for at least 12 months (need not be consecutive); and have worked 1,250 hours during the 12 months before the start of leave. 29 U.S.C. § 2611(4)(A)(i); 29 C.F.R. 825.104(a); 29 C.F.R. 810(b).

> 29 U.S.C. § 2612
> (a) In general
> (1) Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.
> (E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

4. Americans with Disabilities Act of 1990 (ADA), ADA Amendments Act of 2008, 42 U.S.C. § 12101, *et. seq*.

a. Although courts do not consider pregnancy or lactation alone to be a disability, the ADA provides protection for workers with pregnancy-related impairments, such as gestational diabetes or preeclampsia (a condition characterized by pregnancy-induced high blood pressure).

b. An employer may have to provide a reasonable accommodation for a disability related to pregnancy, absent undue hardship such as significant difficulty or expense.

c. The ADA's employment provisions apply to private employers, state and local governments, employment agencies, and labor unions. Employers with 15 or more employees are covered.

> 42 U.S.C. § 12102
> (1) Disability. The term "disability" means, with respect to an individual-
>
> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> 42 U.S.C. § 12182
> (a) General rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

B. Federal Regulations

1. FLSA. The DOL stated that it would not develop regulations implementing 29 U.S.C. § 207(r). 75 Fed. Reg. at 80073.

2. Federal Management Regulations.

> 41 C.F.R. § 102–74.426. May a woman breastfeed her child in a Federal building or on Federal property?
>
> Yes. Public Law 108–199, Section 629, Division F, Title VI (January 23, 2004), provides 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.

C. Federal Case Law

1. FLSA, 29 U.S.C. § 207(r)

- *Hicks v. City of Tuscaloosa*, No. 7:13-CV-02063-TMP, 2015 WL 6123209, at *30 n.14 (N.D. Ala. Oct. 19, 2015) ("Break time and a nursing room are all that is required under the FLSA, and even if those are denied, the only remedy is for unpaid minimum wage or overtime pay. Of course, protection against such a termination may be found under the Pregnancy Discrimination Act…which provides a much broader and more robust remedy.").

- *E.E.O.C. v. Vamco Sheet Metals, Inc.*, No. 13 Civ. 6088(JPO), 2014 WL 2619812, at *3 (S.D.N.Y. June 5, 2014) ("Even if there were a private cause of action to enforce § 207(r), [plaintiff] does not allege any lost compensation resulting from [defendant's] conduct. Private litigants seeking relief for violations of the FLSA's wage and overtime provisions are limited to recovery of unpaid minimum wages, overtime compensation, and an equal amount in liquidated damages."); *see also Lico v. TD Bank*, No. 14-CV-4729 JFB AKT, 2015 WL 3467159, at *4 (E.D.N.Y. June 1, 2015).

- *Salz v. Casey's Mktg. Co.*, No. 11-CV-3055-DEO, 2012 WL 2952998, (N.D. Iowa July 19, 2012) (holding that an employee may have a private right of action against an employer who retaliates against them for complaining about the employer's failure to implement breastfeeding accommodations in compliance with FLSA; however, an employee has no private right of action for the outright denial of statutory lactation rights.)

2. Title VII & PDA

Earlier cases centered on the issue of an employee's desire to breastfeed her child:

- *Fejes v. Gilpin Ventures, Inc.*, 960 F.Supp. 1487, 1492 (D. Colo. 1997) (holding that while lactation is not per se excluded, Title VII does not extend to breast-feeding as a child care concern because it is not a covered medical condition)

- *Wallace v. Pyro Mining Co.*, 789 F.Supp. 867, 869 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (6th Cir. 1991) (holding that where a company fired an employee who would not return to work at the end of her maternity leave, claiming she needed additional leave to continue

breastfeeding her baby did not constitute a termination due to a condition related to pregnancy or childbirth in violation of the PDA).

- *McNill v. N.Y.C. Dep't of Corr.*, 950 F.Supp. 564, 569-71 (S.D.N.Y. 1996) (holding that employer's refusal to grant employee leave to nurse her infant with a cleft palate is not governed by PDA).

More recent cases dealt directly with lactation and breast-pumping:

- *Pitts-Baad v. Valvoline Instant Oil Change*, No. 2012 CA 00028, 2012 WL 4946433, at *6 (Ohio Ct. App. Oct. 15 2012) (rejecting a sex-plus theory based on the failure to accommodate expression because it "would elevate breast milk pumping—alone—to a protected status").

- *Puente v. Ridge*, 324 F. App'x 423, 428 (5th Cir. 2009) (concluding that a breast-feeding mother who asked for additional break time never "received less than the status quo" received by all other employees).

- *Vachon v. R.M. Davis, Inc.*, No. 03-234-P-H, 2004 WL 1146630, at *8 (D. Me. Apr. 13, 2004) (holding that the plaintiff failed to allege an adverse employment action when she asserted only that her employer did not provide sufficient accommodations for breastfeeding under the PDA).

- *Derungs v. Wal-Mart Stores Inc.*, 374 F.3d 428, 439 (6th Cir. 2003) (rejecting the plaintiffs' argument that a policy that prohibited breastfeeding in public would have a disparate impact because the policy differentiated between breastfeeding women and non-breastfeeding women, two subgroups of the larger protected group of women).

- Martinez *v. N.B.C., Inc.*, 49 F. Supp. 2d 305 (S.D.N.Y. 1999) (finding that a female employee seeking to pump breast milk at work was not similarly situated to male employees, as required for prima facie case of sex-plus discrimination, since male employees were physiologically incapable of pumping breast milk).

  Martinez relied heavily on *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), which was overruled by the PDA. The Supreme Court subsequently recognized the PDA as a repudiation of the Gilbert decision in *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 676 (1983).

More recently, courts found that the PDA protection covers lactation concerns:

- *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013) (holding that adverse employment action against a female employee because she was lactating or expressing milk constituted sex discrimination in violation of Title VII; and as a matter of first impression, finding that lactation is a "related medical condition" of pregnancy that is protected from employment discrimination by the PDA).

- *Martin v. Canon Business Solutions*, No. 11 C 2565-WJM-KMT, 2013 WL 4838913 at *8 n.4 (D.Colo. Sept. 10, 2013) (finding for the employee and stating that "access to facilities to express breast milk is relevant to whether Defendant discriminated against her based on her pregnancy").

- *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (holding that an employee in a PDA action can create a genuine issue of material fact as to whether an employer's policies impose a significant burden on pregnant employees by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers, abrogating *Urbano v. Continental Airlines*, Inc., 138 F.3d 204, *Reeves v. Swift Transp. Co.*, 446 F.3d 637, and *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540).

3. FMLA

- *Erickson v. AMN Healthcare Serv.*, No. 09cv910 BTM (CAB), 2010 WL 2618850, at *3 (S.D. Cal. June 25, 2010) (holding that "pumping breast milk is not protected by the FMLA").

4. ADA

- *Bond v. Sterling, Inc.*, 997 F. Supp. 306 (N.D.N.Y. 1998)(using the ADA's definition of disability to determine that breastfeeding is not a disability under state law and stating that "[i]t is simply preposterous to contend a woman's body is functioning abnormally because she is lactating").

- *Martinez v. N.B.C., Inc.*, 49 F. Supp.2d 305 (S.D.N.Y. 1999) (holding that breastfeeding is not a disability covered by the ADA).

- *Appel v. Inspire Pharm., Inc.*, 428 Fed. App'x 279 (5th Cir. 2011) (holding that pregnancy is not a disability under the ADA, but where a plaintiff contends that she has a physical impairment that significantly limits her reproductive ability to carry a normal pregnancy, such a condition could meet the legal definition of "disability" under the ADA).

D. EEOC Guidance No. 915.003, Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015).

1. Discrimination Based on Lactation and Breastfeeding

a. The EEOC has also adopted the position that lactation is protected by the PDA in its enforcement guidance: "[l]actation… is a physiological process triggered by hormones. Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination. For example, a manager's statement that an employee was demoted because of her breastfeeding schedule would raise an inference that the demotion was unlawfully based on the pregnancy-related medical condition of lactation."

b. "To continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk, a nursing mother will typically need to breastfeed or express breast milk using a pump two or three times over the duration of an eight-hour workday."

c. Because only women lactate, a practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is facially sex-based, violating Title VII.

d. Female employees who are breastfeeding also have rights under other laws, including a provision of the Patient Protection and Affordable Care Act that requires employers to provide reasonable break time and a private place for hourly employees who are breastfeeding to express milk.

2. ADA and Pregnancy Related Issues.

a. Although pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA.

b. Some impairments of the reproductive system may make a pregnancy more difficult and thus necessitate certain physical restrictions to enable a full term pregnancy, or may result in limitations following childbirth. Disorders of the uterus and cervix may be causes of these complications.

c. Other potential impairments related to pregnancy: pregnancy-related anemia, pregnancy-related sciatica; pregnancy-related carpal tunnel syndrome; and gestational diabetes.

d. A pregnant employee may be entitled to reasonable accommodation under the ADA. An employer may only deny a reasonable accommodation to an employee with a disability if it would result in an undue hardship.

3. Separate **FMLA** guidance at *https://www.eeoc.gov/policy/docs/fmlaada.html*.

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