



By Nicole Kamm and
Genevieve Thomas Colvin

BREASTFEEDING IN THE WORKPLACE:

A Mother's Rights, An Employer's Responsibilities

SINCE 2011, STUDIES HAVE shown nearly 80% of all newborn infants are breastfed.¹ Though many mothers question how long they will breastfeed, working mothers may be faced with an additional challenge: how will they continue to breastfeed after they return to work?

State and Federal Breastfeeding Laws

In recent years, several state and federal laws have been passed protecting the rights of nursing mothers in the workplace. The federal Fair Labor Standards Act (FLSA) was amended in 2010 with the passage of the Patient Protection and Affordable Care Act

(PPACA) mandating employers provide break time for hourly employees to express breast milk at work.²

The PPACA states employers must provide a reasonable amount of time and a private space other than a bathroom, where the employee is shielded from view from co-workers and the public and will not be interrupted. Breastfeeding mothers have the right to take such breaks for one year following the child's birth.

Employers with 50 or less employees in a 75 mile radius may apply for an undue hardship exemption. To receive an exemption, the employer must prove that providing accommodations would cause "significant difficulty or expense when considered in relation to the size,

financial resources, nature, or structure of the employer's business."³

Under state law, all California employers are required to provide lactation breaks, which may run concurrently with regular break time(s) already provided to workers, to the extent possible. Break time that does not run concurrently with the rest time authorized for the employee by the applicable Industrial Welfare Commission wage order need not be paid. Further, California Labor Code Section §1031 states:

The employer shall make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work



Nicole Kamm is an employment defense attorney at Lewitt Hackman in Encino and may be reached at nkamm@lewitthackman.com. **Genevieve Thomas Colvin** is a Program Manager at BreastfeedLA and may be reached at gcolvin@breastfeedla.org.

area, for the employee to express milk in private. The room or location may include the place where the employee normally works if it otherwise meets the requirements of this section.

While California's requirements apply to employers of all sizes, a California employer may be excused from providing lactation breaks if providing such breaks would seriously disrupt operations (as with federal law, this is a fairly high bar).

Prior to 2013, the California Fair Employment and Housing Act (FEHA), which prohibits employment discrimination based on various factors including race, marital status, and sex, defined "sex" to include gender, pregnancy, childbirth and medical conditions related to childbirth. Effective January 2013, Assembly Bill 2386 amended the statutory definition of "sex" to include breastfeeding and medical conditions related to breastfeeding, thus providing nursing mothers additional workplace protections with regard to harassment, discrimination and retaliation.

Additionally, the recently revised California pregnancy disability regulations include lactation and "lactation-related medical conditions" as a "related medical condition" requiring employers to engage in a good faith interactive process and reasonable accommodation analysis.⁴

The Department of Health and Human Services recommends women express milk for 10-15 minutes, two or three times during an eight hour work day.⁵ This is a very general guideline as many women will need at least 20 minutes, and others, particularly very new mothers, may need 30 or more. The duration of breast pumping breaks depends on the quality of the breast pump, experience, and a multitude of physiological factors.

EEOC Clarifies Obligations to Pregnancy and Nursing Employees

In July 2014, the U.S. Equal

Employment Opportunity Commission (EEOC) continued the trend of accommodating working mothers and issued new guidance regarding pregnancy discrimination. The EEOC states: "It is unlawful to harass a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth."⁶ The new guidelines also prohibit employers from forcing pregnant workers to take leave and cover lactation following childbirth as a pregnancy-related medical condition.

In 2011, the EEOC filed a complaint on behalf of Donnicia Venters, who alleged she was subjected to disparate treatment by her employer Houston

Funding II Ltd., because of her sex, specifically because of "pregnancy, childbirth, or related medical conditions."⁷ Venters claimed she was let go because she requested the use of a back room to breast pump when she returned to her office after maternity leave. Her claim to the EEOC came under Title VII sex discrimination prohibitions.

The district court in Texas disagreed with the EEOC, and granted summary judgment for the employer because, among other things, "lactation is not pregnancy, childbirth or a related medical condition," which according to the court, includes "cramping, dizziness and nausea while pregnant."

The Fifth Circuit Court of Appeals reversed in 2013, saying that when an employer intentionally discriminates based on a sex-specific function, the employer violates Title VII of the Civil Rights Act of 1964.

The new guidance, the first to address pregnancy discrimination since 1983, focuses in part on how the 2008 amendments to the Americans with Disabilities Act (ADA) apply to employees with pregnancy-related disabilities.

The guidance primarily addresses employee rights in terms of childbirth-related conditions and needs, including leaves of absence, for both parents of the newborn. However, it also states a nursing mother has the right to express milk at work and any practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is considered sex-based discrimination. As an example, the guidance states it would violate Title VII for an employer to freely permit employees to use break time

for personal reasons except to express breast milk.

While the new guidance is not necessarily binding law, the EEOC can internally enforce its guidance and courts generally give deference to the guidance.


What is the Penalty for Failure to Comply?

Employers who fail to comply with breastfeeding laws may be subject to civil penalties as well as claims for harassment or discrimination based on sex, a long-protected category in employment discrimination law. Employers may not refuse to hire or provide accommodations for breastfeeding employees, nor may they retaliate against an employee who lodges a complaint regarding her right to breastfeed at work.

How Employers Can Comply With These Laws?

- Do you have a policy and procedure in place to provide reasonable break

time and a private non-bathroom place for employees who are nursing? If not, update your policies and procedures as soon as possible.

- Are you providing a private place to express milk? A restroom or toilet stall is insufficient. The designated lactation room does not have to be a permanent space, but must be accessible by the employee as needed. Employers should also ensure such spaces can be locked and are not within view of security cameras.
- Consider state and federal laws. While federal law provides an undue hardship exclusion for employers with 50 or fewer employees, California does not. To the extent operations are not disrupted, all California employers must comply with lactation break accommodation requirements.
- Are your managers aware of applicable laws regarding lactation in the workplace? Train managers on the company's obligations and responsibilities regarding breastfeeding in the workplace.
- How have you handled requests for accommodation or complaints from employees? Review any requests for accommodation or complaints to ensure the Company's response was lawful and complete. 

¹ Division of Nutrition, Physical Activity, and Obesity, National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention, *Breastfeeding Report Card: United States* (2014), available at <http://www.cdc.gov/breastfeeding/pdf/2014breastfeedingreportcard.pdf>.

² Robert B. Fitzpatrick, "Lactation Provisions in the Patient Protection and Affordable Care Act," ABA Health eSource, Volume 7, Number 1, September 2010, available at http://www.americanbar.org/newsletter/publications/aba_health_esource_home/Volume7_01_fitzpatrick.html.

³ 29 U.S.C. 207(r)(3).

⁴ Tit. 2 CCR Sec. 7291.2.

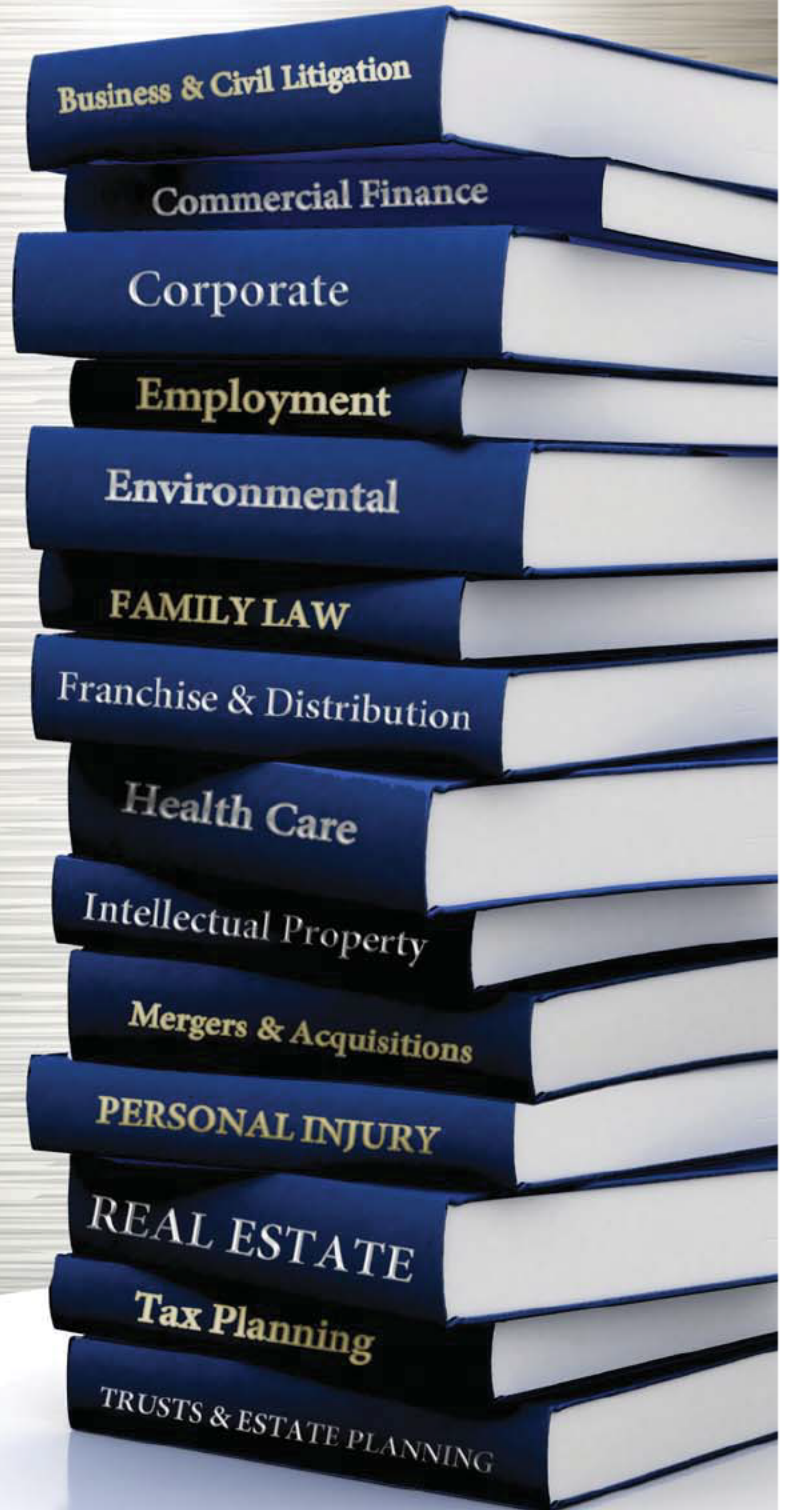
⁵ U.S. Department of Health and Human Services, Health Resources and Services Administration (HRSA), Maternal and Child Health Bureau, *The Business Case for Breastfeeding, Steps for Creating a Breastfeeding Friendly Worksite: Easy Steps to Supporting Breastfeeding Employees*, 2008, available at <http://mchb.hrsa.gov/pregnancyandbeyond/breastfeeding/easysteps.pdf>.

⁶ U.S. Equal Employment Opportunity Commission, "Pregnancy Discrimination," <http://www.eeoc.gov/laws/types/pregnancy.cfm> (last visited November 10, 2014).

⁷ *EEOC v. Houston Funding II LLC*, No. 12-20220, available at <http://www.eeoc.gov/eeoc/litigation/briefs/houston.txt>.

LH LEWITT HACKMAN

LEWITT, HACKMAN, SHAPIRO, MARSHALL & HARLAN
A LAW CORPORATION



16633 Ventura Boulevard, 11th Floor
Encino, California 91436
www.lewitthackman.com • 818.990.2120