An Introduction to the PUMP Act

Center for WorkLife Law and ACLU in partnership with NELA

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Pre-PUMP Act (2010-2022): Break Time for Nursing Mothers/FLSA

- *Non-exempt* employees were entitled to as needed lactation break time and a private, non-bathroom space for one year post-birth

- Excluded *9 million workers*, including teachers, many nurses, farmworkers, attorneys and others. That’s *1 in 4 women workers of childbearing age*!

- No access to enforcement in court
Lactation breaks and workers’ health

Lactating parents produce milk constantly. It must be removed from the body regularly and on schedule. To do that, lactating workers need:

- **Time**
- **Private, clean space**
- **Other reasonable accommodations**
Lactating parents produce milk constantly. It must be removed from the body regularly.

If delayed (even briefly) health complications often occur:
- Painful engorgement
- Fever
- Infection (mastitis)
- Anxiety and stress
- Decrease in milk supply and inability to breastfeed/early weaning
Lactation breaks and workers’ health

❖ Lactating parents produce milk constantly. It must be removed from the body regularly.

❖ If delayed (even briefly) health complications often occur

❖ For more on health impacts of breastfeeding, consider:
  ❖ U.S. Surgeon General Call to Action on Breastfeeding
    https://www.cdc.gov/breastfeeding/resources/calltoaction.htm
  ❖ ACOG:
  ❖ AAP:
Lactation breaks and workers’ economic stability

- **Fired**: 43%
- **Forced Resignation**: 20%
- **No Monetary Loss Claimed**: 26%
- **Other $$$ Harm**: 11%

*Exposed: Discrimination Against Breastfeeding Workers.*
[https://www.pregnantatwork.org/breastfeeding-report](https://www.pregnantatwork.org/breastfeeding-report)
PUMP Act Overview

- Providing Urgent Maternal Protections ("PUMP") for Nursing Mothers Act
  - All genders covered
- Created Fair Labor Standards Act (FLSA) Section 218d (29 USC §218d)
PUMP Act Overview (con’t)

❖ Gives a right to break time and pumping space, and protection from retaliation, to all private and public workers covered by the FLSA, except airline crewmembers (flight attendants and pilots)
  ➢ Effective December 29, 2022
  ➢ 3-year delay for certain railway and motorcoach employees

❖ Gives employees a private right of action
  ➢ Effective April 28, 2023
PUMP Act Overview (con’t)

- Applies to employers of all sizes
- Does not preempt more protective state or local laws
An employer shall provide—

❖ a **reasonable break time** for an employee to **express** breast milk **for** such employee's nursing child **for 1 year** after the child's birth **each time** such employee has need to express the milk; and

❖ 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.
Break Time Requirements

❖ “Reasonable break time”
  ➢ Judged by the EE’s health needs, not the business’s operational needs

❖ “Each time” the EE “has need”
  ➢ Varies from person to person
  ➢ Typical 8-hour workday: 3-4 breaks of 15-20 minutes of pumping + time for traveling between workstation and pumping space, setting up, cleaning up, and storing milk.

❖ ER cannot require adherence to fixed schedule that doesn’t meet EE’s needs  (DOL WHD Field Assistance Bulletin 2023-02)
Compensation for pumping breaks?

Not required by PUMP Act, unless otherwise required by federal, state, local law

- **Compliance with FLSA minimum wage and overtime requirements**
  - **Non-exempt**: If not relieved of all duty, then the break counts as “hours worked”
  - **Exempt**: Cannot reduce pay of employees paid on a salary basis for pumping breaks

- **Compliance with state laws**
  - Laws requiring regular pay for every hour worked (e.g., California)
  - Paid pumping breaks! (Minnesota, Georgia, and Illinois)

➤ If EE uses regularly-paid break time to pump, the time must be paid as normal

➤ ER cannot require employee to make up work hours (DOL WHD Field Assist. Bulletin 2023-02)
Pumping Space Requirements

- Not a bathroom

- Shielded from view
  - Walls, doors, screens, pop-up shelters, curtains, partitions

- Free from intrusion
  - Posting a sign, using a lock, covering recording devices

- Available each time the employee needs it
  - Temporary and converted space is okay, *if* made available
Pumping Space Requirements (Con’t)

**Functional** for pumping milk for human consumption:

- Place for employee to sit
- Flat surface, other than floor, to place the pump
- Employees must be able to safely store milk (fridge or cooler)
- Likely other conditions too (e.g., hazards, temperature, safety, distance)

*See DOL WHD Field Assistance Bulletin 2023-02*
Not protected by PUMP:

- Longer than 1 year after birth
- Direct breastfeeding/chestfeeding
- Surrogates (possibly)
- Loss of a child

👉 But the Pregnant Workers Fairness Act and state laws may help
Private Right of Action: Effective April 28, 2023

❖ **No administrative exhaustion required**
   (DOL’s Wage and Hour Division accepts and investigates complaints)

❖ **ER notification required** *prior* to filing an action for *space* violations:
   ➢ EE must notify ER of failure to provide space and allow 10 days to comply

❖ **No ER notification required:**
   ➢ If ER indicates it has no intent to provide space
   ➢ When EE is fired for exercising break time/space rights
   ➢ For any violation of the *break time* requirement
Undue Hardship Exemption (Affirmative Defense)

- Available only to employers with fewer than 50 employees
- Certain rail carrier and motorcoach employers have an affirmative defense, regardless of size, for a limited subset of employees
- Employer’s burden to show significant difficulty or expense
  - Related to an individual employee, in each specific instance

DOL Wage & Hour Division Field Assistance Bulletin No. 2023-02

“Because the law requires only space and time for unpaid breaks for one year after a child’s birth, and the employer must be able to demonstrate ‘significant’ difficulty or expense, employers will be exempt only in limited circumstances.”
Available Remedies

- Employment, reinstatement, or promotion
- Lost wages (back pay and front pay)
- Liquidated damages (2x amount of lost wages, unless acted in good faith)
- Economic losses (e.g., medical care costs)
- Emotional distress
- Punitive damages, as appropriate
- Attorneys fees and costs
Types of Claims: Failure to Accommodate

- Break time + functional space
- Break time: frequency, duration, and timing
- Functional space: private, free from intrusion, available, place to sit, place to put pump, place to store milk
- Accommodation needs can change
Types of Claims: Failure to Accommodate

Examples of Break Time:

- ER refuses to provide breaks and requires EE to work while pumping.
- ER limits breaks to 10 minutes when EE needs 20 minutes.
- ER and EE agree on pumping schedule. One month later, EE needs new schedule, but ER refuses to change.

Examples of Space:

- ER tells EE to use the bathroom to pump.
- ER provides EE with a room that doesn’t have a place to sit.
- ER allows EE to use the staff room ONLY IF no one else is using it.
- ER provides EE with a room that has a window and no curtain.
Atkinson case

- Didn’t provide a room for 3 weeks
- Room had cockroaches and trash
- No chair
- No lock from the inside
Types of Claims: Retaliation

- Prohibits an ER from firing or taking another type of adverse action against an EE for engaging in a protected activity

- Protected activity:
  - Requesting break time or space to pump
  - Requesting payment of wages
  - Making a complaint to a manager, employer, or DOL (oral or written)
  - Cooperating in a DOL investigation
  - Testifying at trial

- Adverse actions:
  - Firing, refusing to hire
  - Demoting, taking away responsibilities, taking away opportunities
  - Reducing hours, changing schedule
  - Reducing pay or benefits
  - Requiring EE to make up missed work hours
  - Harassment
Types of Claims: Retaliation

- EE pumps at work. ER tells them they can’t take any more time to pump. When EE asks for another pump break, ER sends them home without pay.
- EE takes a total of 3 hours/week to pump, so ER requires EE to work an additional 3 hours on the weekend.
- EE requests to change a meeting with an important client so they can pump. Instead of changing the meeting, ER takes EE off the client.
- ER believes that pumping is slowing down EE’s job productivity, so ER demotes EE to a lower paying job.
Enforcement of the PUMP Act

- Eligibility: all EEs (except crewmembers on aircraft)
  - No ER size requirement
  - Part-time EEs
  - Undocumented EEs
- Exception: Undue hardship
  - Under 50 employees
  - ER burden
  - Specific circumstance
- SOL
  - Ordinary: 2 years
  - Willful: 3 years
Enforcement of the PUMP Act

- File a complaint with DOL WHD
- File a lawsuit
- No administrative exhaustion
- Waiting period
  - Break time: no
  - Retaliation: no
  - Space: 10-days waiting period for lawsuit

10-day Waiting Period

- EE must notify the ER of the need for space
- ER has 10 days to provide compliant space

EXCEPTIONS
  - EE has been fired for requesting break time or space
  - ER has expressed refusal to comply

- Not a bar to filing a lawsuit
Interaction with Other Statutes

- Pregnant Workers Fairness Act (PWFA)
- Pregnancy Discrimination Act (PDA)
- Americans with Disabilities Act (ADA)
- Family and Medical Leave Act (FMLA)
- State and Local PWFA laws
Pregnant Workers Fairness Act (PWFA)

- Requires ER to make reasonable accommodations for an EE’s known limitations related to pregnancy, childbirth, or related medical conditions
- “Related medical conditions” includes lactation
- Interactive process
- Exceptions
  - Undue hardship
  - Less than 15 employees
- In effect: June 27, 2023

Examples
- Receive appropriately sized uniform
- Ability to drink water
- Access to electric outlet for electric pump
- Work from home
The Pregnancy Discrimination Act (PDA)

- Anti-discrimination: Clarifies that Title VII’s ban on “sex” discrimination includes discrimination because of “pregnancy, childbirth, and related medical conditions”

- Accommodation: Requires ER to treat lactating workers the “same as others similar in the ability or inability to work”
The Americans with Disabilities Act (ADA)

- Anti-discrimination: prohibits discrimination against people who are disabled
- Accommodation: requires an ER to provide reasonable accommodations to individuals with disabilities
- Lactation is not a disability, but may have a qualifying disability related to lactation
The Family and Medical Leave Act (FMLA)

❖ Provides 12 weeks of unpaid, job-protected leave in any 12-month period
❖ Eligibility
  ➢ EE worked for ER for 12 months and 1,250 hours
  ➢ ER has 50+ employees
❖ Time off for:
  ➢ Birth or care of newborn
  ➢ Placement of a child through adoption of foster care
  ➢ EE’s own serious medical condition
  ➢ Serious medical condition of a spouse, child, or parent
❖ States with Paid Family Leave: California, Colorado, Connecticut, Delaware, DC, Massachusetts, Maryland, New Jersey, New York, Oregon, Rhode Island, and Washington
State Laws

- Some states require breaks to be paid: Illinois, Georgia, Minnesota

- Some states require the protections to last for more than one year:
  - 18 months: Oregon
  - 2 years: Colorado, Washington
  - 3 years: Maine, New York
  - No specified time: Arkansas, California, DC, Kentucky, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, Tennessee, Utah, Vermont

- Other provisions
  - Free from dirt or pollution: Nevada
  - Break should be no less than 20 minutes: New York
  - Access to sink, fridge, and electric outlet: California

- State-level PWFAs: 30 states + localities
  - Some apply to more employers
  - Some don’t have an undue hardship defense
  - Some have longer SOLs
Tips for counselling lactating workers: Common Issues

- Employer believes they are exempt from the law or “it’s just too hard”
- Remember: creative solutions exist in every industry

Photos courtesy Office of Women’s Health, HHS
Tips for counselling lactating workers:

**Common Issues**

- Challenges ensuring coverage for pumping breaks—or employer refusal to provide coverage
- Lactation space is provided but is inaccessible in practice
- Disputes over what is a reasonable amount of pumping time
- Outdated policies
Tips for counselling lactating workers:

*Common Issues—Bias and Retaliation*

- Over scrutinizing lactating workers
- Refusal to accommodate lactation is often the tip of the iceberg
  - Ask about pregnancy accommodations, ability to take FMLA/maternity leave
  - Were there negative comments during pregnancy or on return?
Tips for counselling lactating workers

❖ Remember!
❖ Be informed about lactation and steer clear of assumptions
❖ Ask about employee’s mental and physical health, including what care they have sought.
❖ Speedy resolution is critical
❖ Employers are often uninformed
❖ Lactation bias is rarely the only issue—look for other violations
❖ Creative solutions exist in every industry

❖ For more information:
❖ Office on Women’s Health Industry Guides:
❖ WHD Field Assistance Bulletin No. 2023-02:
Center for WorkLife Law Hotline

- Helps workers, particularly low-wage workers
  - Legal rights info
  - Practice advice
  - Negotiation suggestions
  - Strategies for handling denials
  - Services in English and Spanish; other languages on request

Hotline@worklifelaw.org  OR 415-703-8276 (leave message)
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