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# Got Milk: The New Health Insurance Law and Its Requirements Securing a Mother's Right to Express Breast Milk in the Workplace

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Got Milk?: The New Health Insurance Law and Its Requirements Securing A Mother's Right to Express Breast Milk in the Workplace.

## I. INTRODUCTION

Most pediatricians and experts now recognize that breast milk is the best form of nutrition for infants. On January 20, 2011, Surgeon General Regina M. Benjamin released The Surgeon General's Call to Action to Support Breastfeeding.<sup>1</sup> Breastfeeding provides numerous health benefits for babies, including protection from illness and diseases such as diarrhea, ear infections, and pneumonia.<sup>2</sup> Mothers benefit from breastfeeding too. "Those who breastfeed have reduced risks of breast cancer, ovarian cancer, gestational diabetes, and after-birth bleeding."<sup>3</sup> "Breastfeeding has also been found to aid mothers in losing excess maternal body fat and in returning to their pre-pregnancy shape."<sup>4</sup>

A 2009 study, published in *The Journal of Pediatrics*, estimated the United States would save \$13 billion annually from reduced medical costs if 90 percent of mothers followed the Surgeon General's guidelines and breastfed exclusively<sup>5</sup> for the first six months.<sup>6</sup> Breastfeeding

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<sup>1</sup> Office of the Surgeon General, Call to Action to Support Breastfeeding, [surgeongeneral.gov/topics/breastfeeding/index.html](http://surgeongeneral.gov/topics/breastfeeding/index.html) (last visited December 20, 2011). This online resource provides an executive summary of the Surgeon General's Call to Action, as well as live links to numerous resources regarding breastfeeding and the benefits of breastfeeding.

<sup>2</sup> *Id.*

<sup>3</sup> Henry Wyatt Christrup, *Litigating a Breastfeeding and Employment Case in the New Millennium*, 12 *YALE J.L. & FEMINISM* 263, 264 (2000). Christrup's piece explores breastfeeding and employment law, an area with "remarkably little legal literature." *Id.* at 263. The author proposes that the courts – in their denial of virtually all breastfeeding claims – have been "nearly criticized and mostly unnoticed." *Id.* Christrup focuses his attention almost entirely on the judicial system.

<sup>4</sup> *Id.*

<sup>5</sup> A woman has two options when it comes to the expression of breast milk:

The first method, conventionally called breastfeeding, involves making the nipple of the breast directly available to the child for suckling. The second method, conventionally called breastpumping, involves using a simple mechanical device, or the mother's hand, to pump breastmilk from the breast. The breastmilk is then usually refrigerated in bottles until it is later bottled to the child.

Christrup, *supra* note 3, at 267-68.

benefits employers as well. Logic dictates that “better infant health means fewer health insurance claims, less employee time off to care for sick children, and higher productivity.”<sup>7</sup> Mutual of Omaha, for example, found healthcare costs for newborns are three times lower for babies whose mothers participate in their company’s employee maternity and lactation program.<sup>8</sup> Research shows that “[m]others who choose bottle-feeding upon returning to work are likely to be absent more frequently than breastfeeding mothers because bottle-fed babies are more likely to get sick.”<sup>9</sup> The result is a loss in productivity.<sup>10</sup>

While the solution seems simple, the problem is complex. “Despite the overwhelming agreement among pediatricians and health organizations . . . lauding the benefits of breastfeeding . . . , breastfeeding remains a secondary method of infant sustenance.”<sup>11</sup> The numbers are convincing. But, “[o]n a policy level, . . . to individual employers, there is little short-term incentive to accommodate nursing mothers by offering flexible breaks or providing a private space that can be used to express breast milk.”<sup>12</sup> Hence, despite the compelling statistics outlined above, one of the main challenges breastfeeding mothers have faced is “[l]ack of accommodation to breastfeed or express milk at the workplace.”<sup>13</sup>

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<sup>6</sup> Office of the Surgeon General, Call to Action to Support Breastfeeding, [surgeongeneral.gov/topics/breastfeeding/index.html](http://surgeongeneral.gov/topics/breastfeeding/index.html) (last visited December 20, 2011).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 149.

<sup>10</sup> *Id.*

<sup>11</sup> Elissa Aaronson Goodman, *Breastfeeding of Bust: The Need for Legislation to Protect a Mother’s Right to Express Breast Milk at Work*, 10 CARDOZO WOMEN’S L.J. 146, 174 (Fall 2003). Goodman’s piece discusses the benefits of breastfeeding and ponders whether workplace barriers have functionally eliminated a mother’s choice to breastfeed. Mostly focusing on what she considers the courts “unwillingness” to accommodate nursing moms, Goodman’s paper, like Christrup’s, places blame on the judicial system. In her final section, however, Goodman explores legislative initiatives of the time.

<sup>12</sup> *Id.*

<sup>13</sup> Office of the Surgeon General, Call to Action to Support Breastfeeding, [surgeongeneral.gov/topics/breastfeeding/index.html](http://surgeongeneral.gov/topics/breastfeeding/index.html) (last visited December 20, 2011).

Challenges in the workplace are not new to women. Over the past few decades, women have persevered, despite discrimination, and become an integral part of the workforce.

According to the United States Department of Labor, women comprised 47 percent of the total U.S. labor force in 2010 and accounted for 51.5 percent of all workers in the high-paying management, professional, and related occupations.<sup>14</sup> Although a wage discrepancy still exists between male workers and their female counterparts, strides have been made in this arena as well; “[w]hen comparing the median weekly earnings of persons aged 16 to 24, young women earned 95 percent of what young men earned (\$422 and \$443, respectively).”<sup>15</sup>

Women now have access to many of the jobs traditionally held by men and many receive relatively equivalent earnings. Yet, working mothers still face unique challenges in the workplace. One such challenge is the choice to breastfeed. While the law clearly encourages breastfeeding in public, it has failed to provide for meaningful protections regarding breastfeeding and expressing breast milk in the workplace.<sup>16</sup> This fragmented approach to breastfeeding ultimately limits a woman’s choices and excludes women from the workplace.<sup>17</sup> Such a discrepancy in the law forces women to make a choice: “Women can either conform to [current] breastfeeding policies and laws and breastfeed, or they can work. They cannot, however, do both.”<sup>18</sup>

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<sup>14</sup> United States Department of Labor, Women in the Labor Force in 2010, <http://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm> (last visited December 20, 2011).

<sup>15</sup> *Id.*

<sup>16</sup> Emily F. Suski, *In One Place, but not Another: When the law Encourages Breastfeeding in Public while Simultaneously Discouraging it at Work*, 12 U.C.L.A. WOMEN’S L.J. 109, 113 (Fall/Winter 2001). Suski’s essay focuses on the act of breastfeeding – both in public and in the workplace. Although Suski does not touch on expression of breast milk in the workplace, she thoroughly sets forth the societal barriers mothers face when returning to work after giving birth.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

Section 4207 of the Patient Protection and Affordable Care Act (PPACA) recently amended section 7 of the Fair Labor Standards Act (FLSA), or the federal wage and hour law, requiring employers to provide nursing mothers reasonable break time and a private place other than a toilet stall to express breast milk during the work day for one year after the child's birth.<sup>19</sup> The controversial requirements became effective on March 23, 2010, when the PPACA was signed into law.<sup>20</sup> Subsequently, on December 21, 2010, the Wage and Hour Division of the United States Department of Labor issued a Request for Information containing the Department's preliminary interpretation of the new break time for nursing mothers law.<sup>21</sup>

While the new law and its corresponding interpretations are a step in the right direction, they may not do enough to provide practicable solutions and sufficient choices for breastfeeding mothers who wish to express milk during the work day. Even when there is a space available for expressing milk, cultural norms regarding breastfeeding and female sexuality often make the choice to express milk in the workplace a difficult decision. Nancy Delima's employment discrimination case illustrates some of the embarrassment nursing employees may face if they choose to express milk at work.<sup>22</sup>

When Delima returned from maternity leave, her male boss had arranged for her to take breaks in a training room in order to express milk for her baby.<sup>23</sup> On several occasions, Delima's boss, attempting a crude joke, used the intercom page system to inform other employees to report to the training room while Delima was expressing milk.<sup>24</sup> Delima's boss often rattled the door

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<sup>19</sup> 29 U.S.C. § 207.

<sup>20</sup> *Id.*

<sup>21</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 244 (Dec. 21, 2010).

<sup>22</sup> *Delmia v. Home Depot*, 616 F. Supp. 2d 1055 (D. Or. 2008).

<sup>23</sup> *Id.* at 1070.

<sup>24</sup> *Id.*

while Delima was in the training room expressing milk.<sup>25</sup> In addition, Delima's boss and co-workers made comments about "bringing cereal for the pumped milk that [Delima] stored in the manager's refrigerator."<sup>26</sup> One male superior told Delima he was frustrated by "women and all their issues."<sup>27</sup>

The sound of electronic breastpumps, the need to thoroughly clean pump attachments after use, and the need to store pumped milk in a cold place may add to a mother's hesitation to pump at work. Electric breastpumps are often boisterous, increasing the chance that a co-worker will hear the pumping if he or she walks by a lactation space. Sanitation is crucial when gathering and storing breast milk. After each use, a woman must clean all components of the breastpump – there are several separate pieces that must be detached and washed – in order to ensure hygienic pumping conditions and protect the nursing child from harmful bacteria. Breast milk can only be safely stored at room temperature for a few hours. Ideally, the milk will be refrigerated until used. A woman may feel embarrassed or uncomfortable cleaning her pump at a community sink in an office kitchen or storing her milk in a community refrigerator. These issues can lead to the decision not to pump breast milk during the workday. If a woman decides not to express breastmilk while at work, her milk supply will diminish and, eventually, dry up.

Production of breast milk is based on a supply-demand system. "Hence, women cannot work for eight-hour days during which they neither breastfeed nor breastpump and still continue to breastfeed their babies during the remaining sixteen hours of the day."<sup>28</sup> A breastfed newborn usually feeds eight to twelve times (or more) during a twenty-four hour period.<sup>29</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Christrup, *supra* note 3, at 266.

<sup>29</sup> American Academy of Pediatrics, <http://www.aap.org/breastfeeding/faqsBreastfeeding.html> (last visited December 20, 2011).

Typically, a woman returns from maternity leave when her infant is twelve weeks old. The American Academy of Pediatrics, however, recommends mothers breastfeed their children for at least one year and for “as long as both the mother and baby would like.”<sup>30</sup> Oftentimes, appropriate and practical accommodations such as sufficient break time and a clean place to express milk and wash bottle and pump equipment are not made readily available to breastfeeding employees – even those employees who fall under the protection of new federal laws.

In Part II, this article examines the history of the law concerning breastfeeding employees and the lack of meaningful remedies available for women who wished to express breast milk in the workplace. Part II concludes with an in-depth discussion of the current state of the law since the 2010 amendments became effective. This article will explore federal compliance efforts and available remedies to breastfeeding mothers whose employers have failed to comply with applicable laws. Part III analyzes strengths and weaknesses of the law and suggests how the law might be improved by the issuance of regulations requiring all employers to provide a written policy concerning breastfeeding employees and by new legislation mandating penalties for covered employers that fail to properly accommodate nursing employees.

## **II. A HISTORY OF THE LAW CONCERNING NURSING MOTHERS**

Breastfeeding employees who wished to express breast milk in the workplace have attempted to use a variety of legal frameworks to find a right to express milk in the law and assist them in bringing claims against employers. Until recently, however, these legal theories were generally unsuccessful and failed to provide meaningful redress.<sup>31</sup> Prior to 2010, female employees who felt they had experienced discrimination as a result of their choice to express

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<sup>30</sup> *Id.*

<sup>31</sup> Goodman *supra* note 6, at 154; Christrup, *supra* note 3, at 267.

milk in the workplace sought federal protection under Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act of 1978, the Americans with Disabilities Act of 1990, or the Family and Medical Leave Act. Review of the laws (below) illustrates a congressional shortcoming. Congress neglected to consider breastfeeding when drafting legislation until 2010. Claims brought under the aforementioned acts were futile attempts to insert into various employment laws something that did not fit given Congressional language and intent. The courts, of course, were required to take the law they were dealt, which helps explain why other scholars have viewed failed employment law claims as proof that “the courts have grown so accustomed to rubber-stamp denial of nursing mothers’ . . . claims.”<sup>32</sup> The need for sweeping federal legislation becomes clear.

*A. Title VII of the Civil Rights Act of 1964 and The Pregnancy Discrimination Act of 1978*

In the early sixties, Congress passed the Civil Rights Act of 1964.<sup>33</sup> Title VII of the Civil Rights Act of 1964 (Title VII) provides that “it shall be an unlawful employment practice for any employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”<sup>34</sup> Two principal frameworks have emerged for stating a claim under Title VII: the disparate treatment framework and the disparate impact framework.<sup>35</sup>

McDonnell Douglas Corp. v. Green sets forth the criteria needed to establish a prima facie disparate treatment case.<sup>36</sup> In this case, the United States Supreme Court established that a plaintiff must show: (1) she is a member of a protected class; (2) she was performing her duties

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<sup>32</sup> Christrup, *supra* note 3, at 267.

<sup>33</sup> 42 U.S.C. § 2000 et seq. (1964).

<sup>34</sup> § 2000e-2(a)(1).

<sup>35</sup> Christrup, *supra* note 3, at 267-68. For an in-depth discussion of disparate treatment and disparate impact, *see* Christrup, *supra* note 3, at §§ III(E)(1)-(2).

<sup>36</sup> McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).



satisfactorily; (3) she was subjected to an adverse employment decision; and (4) the adverse employment decision occurred in circumstances that give rise to an inference of discrimination based on her membership in a protected class.<sup>37</sup> Hence, in order to bring a disparate treatment case, a breastfeeding employee must establish that she is a member of a protected class. To date, the courts have refused to let a breastfeeding worker cross this threshold.<sup>38</sup> Women have been equally unsuccessful in attempting disparate impact claims.<sup>39</sup>

Soon after Title VII was signed into law, the United States Supreme Court, in General Electric v. Gilbert, held that discrimination on the basis of pregnancy was not discrimination on the basis of sex within the meaning of Title VII.<sup>40</sup> Two years later, Congress “expressed its disagreement with the Supreme Court's approach to the treatment of pregnant women”<sup>41</sup> when it

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<sup>37</sup> *Id.* at 802.

<sup>38</sup> Christrup, *supra* note 3, at 266.

Every court to consider a breastfeeding disparate treatment claim has concluded that breastfeeding workers are simply not protected by Title VII. Paradoxically, the courts have reasoned that because men do not breastfeed, discrimination against breastfeeding simply cannot be sex discrimination. Those readers who are familiar with Title VII litigation may sense that the courts' reasoning seems somewhat at odds with a category of Title VII claims that have come to be known as “sex-plus” discrimination.

*Id.* at 276-77.

<sup>39</sup> Women also attempted disparate impact claims. In order to raise a disparate impact claim, an employee had to allege that a “neutral” employment policy fell “more harshly on one group than another and [could not] be justified by business necessity.” *See, e.g., Int'l Bd. of Teamsters v. U.S.*, 431 U.S. 324, 355 n.15 (1977). A plaintiff alleging discrimination based on her status as a breastfeeding employee had to argue that she should be classified in a group encompassing all women because Title VII designated gender as a protected class. *See* Christrup, *supra* note 3, at 267-76. The problem with this form of redress is that protected classes, as enumerated under Title VII, are limited to race, color, religion, sex and national origin. § 2000e-2(a)(1). An employer policy regarding breastfeeding would affect a subclass of women, not all women. As a result, the courts have been extremely hostile to these sorts of disparate impact claims; no court has ever held that the plaintiff met her prima facie burden. *See* Goodman *supra* note 6, at 162.

<sup>40</sup> *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). Justice Rehnquist, writing for the majority, noted that:

Discrimination based on pregnancy is not sex discrimination because the two relevant classes are pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. Thus, in the absence of evidence that the classification is a mere pretext designed to effect an invidious discrimination against the members of one sex or the other, the Court reasoned that sex discrimination exists only where women are disadvantaged in favor of a group comprised exclusively of men.

Christrup, *supra* note 3, at 272.

<sup>41</sup> Goodman *supra* note 6, at 157.

passed the Pregnancy Discrimination Act of 1978 (PDA) as an amendment to Title VII and effectively overruled Gilbert.<sup>42</sup> Under the PDA, gender discrimination on the basis of “pregnancy, childbirth, or related medical conditions” is a per se violation of Title VII.<sup>43</sup>

The PDA states “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes.”<sup>44</sup> While the PDA makes it clear that discrimination on the basis of pregnancy is discrimination on the basis of sex,<sup>45</sup> it affords little protection to lactating women who wish to express breast milk in the workplace.<sup>46</sup> Some breastfeeding workers attempted to advance claims for discrimination under the PDA.<sup>47</sup> All requests were ultimately denied, and the courts hearing such cases “uniformly agreed with the legality of . . . employers' behavior.”<sup>48</sup> Moreover, the issue of whether the PDA applies to breastfeeding has never reached the Supreme Court.<sup>49</sup>

Initial breastfeeding claims brought under the PDA met unexplained resistance. For example, in Barrash v. Bowen, a female employee requested six months unpaid maternity leave “in order to breast-feed the baby.”<sup>50</sup> The request was accompanied by a note from a pediatrician

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<sup>42</sup> 42 U.S.C. § 2000e(k) (making discrimination on the basis of pregnancy unlawful); Chrstrup, *supra* note 3, at 272.

<sup>43</sup> § 2000e(k).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> “From the mid-1960s through the 1980s, legal and political debates raged over how to allocate the costs of reproduction.” Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harv. C.R.-C.L. L. Rev. 415, 417 (2011). The PDA sparked a protective-laws debate between those who believes in special treatment and those who believed in equal treatment. *Id.* at 444. Proponents of special treatment believed women should be accommodated in the workplace, while proponents of equal treatment believed the workplace should not be altered in any way. *Id.*

<sup>47</sup> See, e.g., Wallace v. Pyro Mining Co., 951 F.2d 351, 351 (6th Cir. 1991) (unpublished table decision); Barrash v. Bowen, 846 F.2d 927, 928-29 (4th Cir. 1988); Fejes v. Gilpin Ventures, 960 F. Supp. 1487, 1490 (D. Col. 1997); McNill v. New York City, 950 F. Supp. 564, 566 (S.D.N.Y. 1996).

<sup>48</sup> Chrstrup, *supra* note 3, at 273.

<sup>49</sup> Goodman *supra* note 6, at 157.

<sup>50</sup> Barrash, 846 F.2d at 928.

and was denied by the employer.<sup>51</sup> Nonetheless, the employee took her six month leave without approval, and then requested sick leave and transfer to another department.<sup>52</sup> The Fourth Circuit disposed of the PDA claim with a single sentence and no explanation for its decision: “Under the [PDA], pregnancy and related conditions must be treated as illnesses only when incapacitating.”<sup>53</sup> Breastfeeding, it appears, is not sufficiently incapacitating to warrant protection under the PDA.<sup>54</sup>

Even when serious complications existed, breastfeeding claims were denied under the PDA. In Wallace v. Pyro Mining Co., the second breastfeeding claim to be brought under the PDA, an accounting clerk took disability leave because of complications related to pregnancy.<sup>55</sup> Shortly after giving birth, Wallace's doctor released her to work.<sup>56</sup> Wallace's baby, however, refused to take bottles and would only breastfeed.<sup>57</sup> Concerned for her newborn's health, Wallace requested six weeks of unpaid leave.<sup>58</sup> The request was denied, and when Wallace failed to return to work immediately, she was fired.<sup>59</sup> The Sixth Circuit concluded that breastfeeding is not a medical condition related to pregnancy unless the plaintiff proves “breastfeeding her child was a medical necessity.”<sup>60</sup> Once again, the court failed to offer a rationale for its conclusion. The court also failed to specify who – mother or child – must medically require breastfeeding.

Subsequent case law establishes that disability of the child makes no difference under the PDA. A PDA claim would only prevail if the mother had a medical condition necessitating

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 931.

<sup>54</sup> Christrup, *supra* note 3, at 274.

<sup>55</sup> Wallace, 951 F.2d 351, \*1.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at \*2.

breastfeeding.<sup>61</sup> In McNeill, a corrections officer gave birth to a baby with a cleft palate; the condition prevented the baby from being able to bottle feed.<sup>62</sup> The baby’s survival, therefore, literally depended on his mother breastfeeding him.<sup>63</sup> While the federal district court did recognize that breastfeeding was “a medical necessity” given the particular set of facts, it concluded that “[a]n infant's malformed palate . . . does not directly affect the condition of the mother. . . . The PDA only provides protection based on the condition of the mother.”<sup>64</sup> Although the PDA extends protection to “pregnancy, childbirth, or related medical conditions,” the Act fails to protect a woman’s right to express breast milk or breastfeed at work.<sup>65</sup> Congress did not address breastfeeding or expression of breast milk at work when it drafted the PDA, and it clearly intended to limit the PDA's application. As such, the PDA fails to extend protection to any type of condition based on childcare obligations occurring after pregnancy.<sup>66</sup>

The circuit courts that have considered the PDA's application to breastfeeding have upheld an employer's prerogative to terminate, demote or otherwise sanction women who have

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<sup>61</sup> Of note, there are certain medical situations that may make breastfeeding a medical necessity for the mother. Mastitis, for example, is an infection of the breast that can be prevented and treated with breastfeeding. See Ask Doctor Sears, Breastfeeding Common Problems: Mastitis, [askdoctorsears.com/topics/breastfeeding/common-problems/mastitis](http://askdoctorsears.com/topics/breastfeeding/common-problems/mastitis) (last visited January 13, 2012). Left untreated, mastitis can result in a breast abscess requiring surgical intervention. *Id.*

<sup>62</sup> Wallace, 951 F.2d at 566.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 570-71.

<sup>65</sup> Brit Mohler, *Is the Breast Best for Business?: The Implications of the Breastfeeding Promotion Act*, 2 WM. & MARY BUS. L. REV. 155, 174-75 (2011) (citing *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004)) (concluding on the basis of a Title VII analysis that “breastfeeding discrimination . . . is not discrimination on the basis of sex under the law”); *Wallace v. Pyro Min. Co.*, 789 F. Supp 867, 869 (W.D. Ky. 1990) (breastfeeding “simply does not entitle plaintiff to the protections of the Pregnancy Discrimination Act”).

<sup>66</sup> Goodman *supra* note 6, at 157 (citing H. R. Rep. No., 95-948, at 5 (1978), reprinted in 1978 U.S.C.C.A.N 4749, 4753). “Congress confined the coverage of the PDA, stating that: The only time the employer will be required to allow pregnant workers to use this leave is during the time they are medically unable to work, . . . For example, if a woman wants to stay home to take care of the child, no benefits must be paid because this is not a medically determined condition related to pregnancy.” *Id.*

expressed breast milk at work.<sup>67</sup> Lower courts, too, have been reluctant to expand the PDA to cover breastfeeding, following the same logic the Supreme Court used when it denied Title VII protection to pregnant women.<sup>68</sup> While the PDA had theoretical potential to afford some limited protection to women who wished to express breast milk in the workplace, the circuit court decisions outlined above ultimately preclude a vast majority of women from bringing breastfeeding claims under the PDA.

### *B. The Americans with Disabilities Act of 1990*

The Americans with Disabilities Act of 1990 (ADA) seeks to prohibit discrimination on the basis of disability.<sup>69</sup> Pursuant to Title I of the ADA, employers must make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . .”<sup>70</sup> Women who have sought accommodations for breastfeeding have argued their condition is a disability and, therefore, is protected under the ADA.<sup>71</sup> ADA claims, however, have been wholly unsuccessful. In fact, the courts “have been uniform in their rejection of breastfeeding as a physical impairment within the meaning of the ADA.”<sup>72</sup>

The ADA defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”<sup>73</sup> Major life activities are enumerated in the ADA; they include, but are not limited to: “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing,

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<sup>67</sup> *Id.* at 158.

<sup>68</sup> *Id.*

<sup>69</sup> 42 U.S.C. § 12101(b) (1994).

<sup>70</sup> *Id.*

<sup>71</sup> Goodman *supra* note 6, at 162.

<sup>72</sup> Christrup, *supra* note 3, at 269. In the background section of his article, Christrup explores and discusses numerous ADA cases that have failed to prevail in the courts. For an in-depth review of the case law in this area, *see* Christrup, *supra* note 3, at § III(B).

<sup>73</sup> § 12102(1)(a).

learning, reading, concentrating, thinking, communicating, and working.”<sup>74</sup> While a major life activity can be limited by impairment of the operation of a “major bodily function” such as “reproductive functions,”<sup>75</sup> the impairment of having milk in one’s breasts does not rise to the substantial limitation requirement set forth in the ADA.

In *Fjellestad v. Pizza Hut of America, Inc.*, the court explained that “[a]n impairment is ‘substantially limiting’ if it renders an individual unable to perform a major life activity that the average person in the general population can perform, or if it significantly restricts the condition, manner, or duration under which an individual can perform a particular major life activity as compared to an average person in the general population.”<sup>76</sup> In the case of breastfeeding, breastfeeding itself is an activity; it is the condition of having milk in the breasts that, one must argue, is a physical impairment worthy of ADA protection. The purpose of the ADA is to protect those persons with very serious and debilitating physical ailments. Simply, the impairment of having milk in the breasts, although it may cause great discomfort and inconvenience at times, does not rise to the level of disability Congress contemplated when drafting the ADA.

### *C. The Family and Medical Leave Act*

Women wishing to express breast milk at work have also turned to the Family and Medical Leave Act (FMLA),<sup>77</sup> seeking accommodations for their modified work schedules.<sup>78</sup> Under the FMLA, both men and women are allotted up to twelve weeks of unpaid leave within one year of a birth or adoption.<sup>79</sup> “This legislation is extraordinary for recognizing that

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<sup>74</sup> § 12102(2)(a).

<sup>75</sup> § 12102(2)(b).

<sup>76</sup> 188 F.3d 944, 948-49 (8th Cir. 1999) (citing 29 C.F.R. § 1630.2(j)(1)(i)-(ii)).

<sup>77</sup> 29 U.S.C. § 2601 *et seq.* (2009).

<sup>78</sup> Christrup, *supra* note 3, at 268.

<sup>79</sup> *See* 29 U.S.C. § 2612(a)(1)(A)-(D). To qualify for leave under this section, an employee must work for an employer with at least fifty employees at that worksite or fifty employees within a seventy-five mile radius. The

employees have responsibilities beyond the workplace and that those responsibilities may not always be predictable and neatly scheduled ahead of time.”<sup>80</sup> Although the twelve week leave provided for under the FMLA adequately allows a breastfeeding mother to introduce breastfeeding to her child and establish her initial milk supply, the FMLA's effect has been “far from revolutionary” in assisting women who need to express breast milk at work.<sup>81</sup>

To begin, many women are precluded from receiving FMLA protections because of the Act’s employer eligibility restrictions.<sup>82</sup> Most significant is that “the FMLA does not provide paid leave.”<sup>83</sup> As a result, highly educated employees are likely to negotiate leave without the FMLA while poorer employees cannot afford to take advantage of the government's offer of unpaid leave.<sup>84</sup>

Even if a woman overcomes the aforementioned challenges associated with the FMLA, a twelve week leave fails to accommodate a mother who wishes to express breast milk at work so that she can continue nursing beyond her maternity leave.

The FMLA requires that “leave [for the birth of a baby] shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and employer of the employee agree otherwise.” This means that a woman does not have the flexibility to arrange her four hundred and eighty hours of family and medical leave in a way that optimally accommodates her breastfeeding or pumping needs. For instance, without agreement from her employer, she cannot designate a period of time as FMLA time each day to use to express milk. The

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employee must have been working for that employer for twelve months and for at least 1,250 hours in that year. § 2611(2).

<sup>80</sup> Christrup, *supra* note 3, at 268.

<sup>81</sup> *Id.*

<sup>82</sup> 29 U.S.C. § 2601 *et seq.*

<sup>83</sup> Christrup, *supra* note 3, at 268 (citing 29 U.S.C. § 2612(a)(1)(A)-(D) (1994)).

<sup>84</sup> *Id.* at 269.

issue of specific accommodation for breastfeeding under the FMLA has not been litigated.<sup>85</sup>

While the FMLA succeeds in recognizing the conflicting demands of work and family, it, like its predecessors, fails to protect breastfeeding mothers from workplace discrimination or accommodate their physical need to express breast milk periodically throughout the work day. In 2000, “not a single breastfeeding plaintiff had won a case against her employer.”<sup>86</sup> Thus, although several options for litigation existed prior to 2010, none proved to be successful for breastfeeding employees.

#### *D. The Current State of the Law*

On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act (PPACA) into law.<sup>87</sup> Section 4207 of this law amends the Fair Labor Standards Act of 1938<sup>88</sup> (FLSA) to require employers to provide reasonable break time for covered<sup>89</sup> employees to express breast milk and accommodations for expression of milk.<sup>90</sup>

The Department of Labor administers and enforces the FLSA through its labor and hour division.<sup>91</sup> In December 2010, the Wage and Hour Division of the Department of Labor submitted a request for information from the public.<sup>92</sup> The request contains the Department's

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<sup>85</sup> *Id.* at 279-80.

<sup>86</sup> *Id.* at 278.

<sup>87</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>88</sup> 29 U.S.C. § 201 *et seq.* (2010).

<sup>89</sup> The FLSA applies to "employees engaged in interstate commerce or in the production of goods for commerce, or . . . employed in an enterprise engaged in commerce or in the production of goods for commerce," unless the employer can claim an exemption from coverage. § 206. The FLSA applies to "any individual employed by an employer" but not to independent contractors or volunteers because they are not considered "employees" under the FLSA. § 203.

<sup>90</sup> § 207.

<sup>91</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 244 (Dec. 21, 2010).

<sup>92</sup> *Id.*



preliminary interpretations of the new break time for nursing mothers requirement.<sup>93</sup> Given the unique nature of each individual breastfeeding case and employment situation, the Department states that it does not plan to issue regulations implementing this provision unless administration and enforcement efforts, along with responses to the Request for Information, dictate regulations are necessary.<sup>94</sup> The following sub-sections, which examine the new law and the Department’s interpretation of the new law, illustrate why administrative action in the form of regulations is necessary.

### 1. The break time requirement

Section 7 of the FLSA, as amended, requires that employers provide non-exempt employees with “reasonable break time . . . to express breast milk for [a] nursing child for up to 1 year after the child's birth each time such employee has need to express the milk.”<sup>95</sup> Under the law, employers are not required to compensate employees for break time, but those employers that do provide paid break time to employees must allow nursing mothers to use the time to express milk, if so desired.<sup>96</sup>

In making a determination of reasonableness, the Department advises employers to consider “both the frequency and number of breaks a nursing mother might need and the length of time she will need to express milk.”<sup>97</sup> Because “[t]he frequency of breaks needed to express breast milk varies depending on factors such as the age of the baby, the number of breast feedings in the baby's normal schedule, whether the baby is eating solid food, and other factors,” and because “the length of time necessary to express milk also varies from woman to woman,”

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> 29 U.S.C. § 207(r)(1)(A).

<sup>96</sup> *Id.*

<sup>97</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 244(II)(b).

the Department concluded that a reasonableness standard was more appropriate than a bright-line rule dictating length and frequency of breaks for milk expression.<sup>98</sup>

While the Department opted not to set forth a rigid rule, it noted “nursing mothers typically will need breaks to express milk two to three times during an eight hour shift.”<sup>99</sup> Additionally, the Department states that “[t]he act of expressing breast milk alone typically takes about 15 to 20 minutes, but there are many other factors that will determine a reasonable break time.”<sup>100</sup> The Department sets forth several factors employers are encouraged to consider in making a reasonableness determination. Factors include, but are not limited to: the time it takes to walk to the lactation space; whether the employee has to retrieve a breast pump from another location; whether the employee needs to unpack and set up her own pump or whether a pump is provided for her; the efficiency of the pump used; whether there is a sink or running water nearby for the employee to wash her hands before pumping and to clean the pump attachments when she is finished; the time it takes for the employee to store her milk.<sup>101</sup>

Although the expressed wording of the law does not provide much guidance for employers considering how often and how long milk expression breaks should be, the Department's Request for Information is quite helpful in this arena. Based on the language set forth above, it appears employers who offer two or three 20 minute breaks per eight hour shift are likely complying with the new law, assuming no extenuating circumstances exist.

An employer need not offer paid break time to a nursing mother who wishes to express milk; unpaid break time is sufficient to satisfy the FLSA.<sup>102</sup> While an employer is not obligated

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 29 U.S.C. § 207(r)(2). If an employer does, however, permit short breaks for expressing milk, “the time must be counted as hours worked when determining if the FLSA requirements for payment of minimum wage and/or

to provide paid breaks for nursing employees, an employer that provides compensated breaks to its other employees must allow female employees to use compensated break time to express milk.<sup>103</sup> If this is the case, “additional time used beyond that authorized paid break time could be uncompensated.”<sup>104</sup> The Department provides an example of how this might work: “[I]f an employer provides a 20 minute paid break and a nursing employee uses that time to express milk and takes a total of 25 minutes for this purpose, the five minutes in excess of the paid break time do not have to be compensated.”<sup>105</sup>

An employee must be completely relieved from work duties in order for the FLSA requirement to be satisfied.<sup>106</sup> Hence, “if a nursing employee is not completely relieved from duty during a break to express breast milk, the time must be compensated as work time.”<sup>107</sup> Although flexible scheduling is not required, the Department “strongly encourages” employers to allow employees to extend the work day to make up for unpaid break time used to express milk.<sup>108</sup>

The Department also encourages open communications between employer and employee. Nursing mothers are encouraged to be forthcoming with employers about their needs in terms of frequency and timing of breaks, and employers are encouraged to discuss the location and availability of space offered for expressing milk.<sup>109</sup> The Department trusts candid discussion will “help employers and employees to develop shared expectations . . . .”<sup>110</sup> It believes “a simple

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overtime have been satisfied.” Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 244(II)(a).

<sup>103</sup> § 207(r)(2).

<sup>104</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 244(II)(a).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* See also WHD Fact Sheet #22, Hours Worked Under the FLSA, available at: <http://www.dol.gov/whd/regs/compliance/whdfs22.htm>.

<sup>108</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 244(II)(a).

<sup>109</sup> *Id.* at 244(II)(b).

<sup>110</sup> *Id.*

conversation” between the lactating employee and a supervisor or human resources representative regarding the employee's intent to take breaks to express milk “would facilitate an employer's ability to make arrangements to comply with the law before the nursing mother returns to work.”<sup>111</sup>

## 2. The space requirement

In addition to reasonable break time, employers are also required to provide space accommodations for the expression of milk. Employers must provide a place, other than a bathroom, that is shielded from view, free from intrusion, and functional for expressing milk.<sup>112</sup>

A bathroom, even if private, is not a permissible location under the Act.<sup>113</sup> An anteroom or lounge connected to a bathroom, however, “may be sufficient” under the law.<sup>114</sup> A locker room, too, may be acceptable if there is “sufficient differentiation between the toilet area and the space reserved for expressing breast milk.”<sup>115</sup> The Department's interpretations make clear that the driving force behind the non-bathroom requirement is sanitation, not privacy. Providing a location that is a reasonable distance from toilet stalls and any other bathroom amenities with heavy concentrations of bacteria will likely – but not surely – satisfy the law.

A permanent space is not required. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided the space is shielded from view and free from any intrusion from co-workers and the public.<sup>116</sup> If the space is not dedicated to the nursing mother's use, it must be available when needed in order

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<sup>111</sup> *Id.* at (II)(d).

<sup>112</sup> 29 U.S.C. § 201(r)(1)(B).

<sup>113</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 244(II)(c).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> WHD Fact Sheet #73, Break Time for Nursing Mothers under the FLSA, *available at*: <http://www.dol.gov/whd/regs/compliance/whdfs73.htm>.

to meet the statutory requirement, and the employer must ensure the employee's privacy “through means such as signs . . . or a lock on the door.”<sup>117</sup>

The Department's preliminary interpretation of the requirement that the space be shielded from view and free from intrusion “is that it requires employers where practicable to make a room (either private or with partitions for use by multiple nursing employees) available for use by employees taking breaks to express milk.”<sup>118</sup> If providing a separate room is impracticable, “the requirement can be met by creating a space with partitions or curtains.”<sup>119</sup> The latter portion of the Department's interpretation – that a space made private with curtains would be sufficient – is particularly alarming given the fact that breast pumps are loud and thin curtains hardly grant privacy.

The location provided for expressing milk must be “functional” as a space for expressing breast milk.<sup>120</sup> In order to be a functional space, “at a minimum, a space must contain a place for the nursing mother to sit, a flat surface, other than the floor, on which to place the pump.”<sup>121</sup> The Department adds that, ideally, the space will have access to electricity.<sup>122</sup> Features such as a sink for washing hands and pump attachments are not required under the law.<sup>123</sup> While it may not be necessary to include such features in the actual pumping location, it is important to note that running water and soap are needed to ensure healthy preparation of breast milk.

Although not required by the law, the Department “interprets an employee's right to express milk for a nursing child to include the ability to safely store the milk for her child.”<sup>124</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 244(II)(c).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

Employers are not required to provide refrigeration options for milk storage.<sup>125</sup> All that is required under the law is that an employer allows a nursing mother to bring a pump and insulated food container to work and ensures there is a place to store the pump and insulated food container.

The Department notes that non-office work settings, such as retail stores, restaurants, and construction sites, may make it more challenging to comply with the law.<sup>126</sup> In its Request for Information, the Department asks the public for comments regarding the adequacy of spaces designated for other purposes, including managers' offices, storage spaces, and utility closets.<sup>127</sup> The Department also asks for "creative solutions" that address break time for nursing mothers who work in non-fixed places, such as bus drivers, law enforcement officers, emergency medical technicians, and postal workers.<sup>128</sup> The Department's request illustrates the thorny nature of the situation. Certain employers are going to have a very hard time complying with the break time for nursing mothers requirement. The fact that many non-office positions cannot fit neatly into the law indicates regulations will be necessary.

### 3. Enforcement

Because the aforementioned amendments are very new, the courts have yet to see claims for violations of the reasonable break time for nursing mothers requirement. Interestingly, a Florida district court noted in its severability analysis that certain provisions of the PPACA, such as the provision concerning break time for expressing breast milk, "are already in effect and functioning."<sup>129</sup>

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Florida ex rel. Bondi v. U.S. Dept. of Health & Human Serv., 780 F. Supp. 2d 1256, 1300 (N.D. Fla. 2011). The court examined severability and constitutionality of the PPACA. Two months later, the decision was affirmed in part

Employers with 50 or more employees must comply with the law without exception.<sup>130</sup> The Department's Wage and Hour Division (WHD) has been charged with enforcing the FLSA and its new break time provisions for nursing mothers.<sup>131</sup> Enforcement of the new law will be based on statutory language and the guidance provided in WHD Fact Sheet #73 and its accompanying FAQ page.<sup>132</sup>

An employee who believes her employer has violated the new law may call a toll-free WHD phone number.<sup>133</sup> From here, she will be directed to the nearest WHD office.<sup>134</sup> Basic information about how to file a complaint is also available on the WHD website.<sup>135</sup> WHD investigators will then determine compliance with the law by conducting interviews and gathering data on wages, hours, and other employment conditions.<sup>136</sup> If violations are found, the WHD might “recommend changes in employment practices to bring an employer into compliance.”<sup>137</sup> “To the extent possible,” the WHD will give milk expression break time and place violations priority consideration in order to allow expeditious resolution of the problem while preserving the employee's ability to continue breastfeeding.<sup>138</sup>

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and reversed in part. *See Florida ex rel. Atty. Gen. v. U.S. Dept. of Health and Human Serv.*, 648 F.3d 1235, 108 A.F.T.R.2d 2011-5728, 2011-2 USTC P 50,573, 23 Fla. L. Weekly Fed. C 214 (11th Cir. Fla.) (Aug 12, 2011) (NO. 11-11021, 11-11067).

<sup>130</sup> 29 U.S.C. § 207(r)(3). Employers with fewer than 50 employees may claim an undue hardship exception if they meet certain conditions. Such employers are not subject to the requirements if compliance 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.” *Id.* Further discussion of this issue is beyond the scope of this paper.

<sup>131</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 244(II)(g).

<sup>132</sup> *Id.* at 244.

<sup>133</sup> *Id.* at 244(II)(g).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> 29 U.S.C. § 211.

<sup>137</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 244(II)(g).

<sup>138</sup> *Id.*

Section 7 of the FLSA does not provide for any penalties if an employer is found to be in violation of the break time for nursing mothers requirement.<sup>139</sup> In the majority of situations, an employee will only be able to bring an action for unpaid minimum wages or unpaid overtime compensation and an additional equal amount in liquidated damages.<sup>140</sup> Because the law does not require employers to compensate nursing employees for break time to express milk, “in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks.”<sup>141</sup> Damages, therefore, are unlikely. Hence, as far as individual claims are concerned, the new law does not provide any more redress than Title VII, the PDA, the ADA, or the FMLA.

While it is unlikely that an individual employee will prevail in court, “the Department may seek injunctive relief in federal district court, and may obtain reinstatement and lost wages for the employee.”<sup>142</sup> It seems unlikely, however, that injunctive relief will adequately assist nursing mothers. Even though injunctive relief is available on a more expedited basis than typical litigation, it won’t be quick enough. Getting the Department of Labor mobilized will take time. Due to the extremely time-sensitive nature of breastfeeding and the physiological production of breast milk discussed in the introduction to this paper, failure to ensure quick resolution will usually result in a mother's milk drying up and the cessation of breastfeeding. Hence, injunctive relief will only help future mothers in the particular workplace, not the mother who is currently affected by an employer’s noncompliance.

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<sup>139</sup> *Id.*

<sup>140</sup> § 216(b).

<sup>141</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 244(II)(g).

<sup>142</sup> *Id.* (citing 29 U.S.C. § 217). The Department provides an example: “[I]f an employer terminates a nursing mother employee because she takes breaks to express milk that she is entitled to under the FLSA, or because she informed her employer that she intends to take breaks to express milk, this would be considered a violation of 29 U.S.C. 15(a)(2) . . . .” *Id.*



Ironically, the Department briefly notes in its Request for Information: “If an employer treats employees who take breaks to express breast milk differently than employees who take breaks for other personal reasons, the nursing employee may have a claim for disparate treatment under Title VII of the Civil Rights Act of 1964.<sup>143</sup> As discussed above in section II(A), disparate treatment claims under Title VII have been unsuccessful. It is not clear why the Department believes these claims are likely to be viable in the future.

#### 4. Compliance Assistance

In order to assist employers in complying with the new law, the Department created a website “that provides a compilation of resources that employers, employees, lactation consultants, and other interested stakeholders might find useful . . . .”<sup>144</sup> Available on the website is Wage and Hour Fact Sheet #73.<sup>145</sup> The Department also posted a Frequently Asked Questions (FAQ) page on its website. The FAQ page reiterates the information in the Fact Sheet in a different format and is intended to further assist employers in understanding the new law and complying with it. The Department encourages, but does not require, employers to develop workplace lactation programs.<sup>146</sup>

### **III. ANALYSIS RECOMENDING FURTHER IMPROVEMENT**

In many ways, the new amendments to the FLSA are progressive and forward-thinking. The mere fact that legislation exists in this area demonstrates the importance of accommodating women in the workplace. While the new law illustrates that many advancements are being made for women in the workplace, it fails to fully recognize that working mothers face special

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<sup>143</sup> *Id.*

<sup>144</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 244(II)(h).

<sup>145</sup> Wage and Hour Fact Sheet #73, Break Time for Nursing Mothers under the FLSA *available at* <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf>.

<sup>146</sup> Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 244(II)(h).

challenges upon returning to work. Major problems include broader societal views and legal frameworks, the Department's failure to issue regulations, and lack of meaningful penalties for employers failing to comply with the law.

Overarching societal views of women, sexuality, and breastfeeding help to explain the law's historically narrow conception of pregnancy and its unwillingness to acknowledge the importance and naturalness of breastfeeding one's child. This cultural bias was evident when examining the PDA and FMLA, and we see it again now, permeating section 7 of the FLSA. A narrow definition of pregnancy as “a biological process that begins with conception and ends with delivery . . . [is often] . . . used to make it appear as if women have chosen against the workplace.”<sup>147</sup> Any mother knows, however, that medical ailments and conditions associated with pregnancy do not immediately end upon delivery. Recovering from pregnancy and delivery is often slow and painful, and creating a healthy supply of breast milk usually takes time, patience, and dedication. Unfortunately, Congress has treated lactation “as a child-care decision entirely separate from the choice to have a child.”<sup>148</sup> Although biologically based, breastfeeding is still considered a “choice” by many.<sup>149</sup> Hence, legal protections have been, and continue to be, narrow and weak.

Changing societal views, of course, is a job for activist groups, not Congress. Making perceptions of breastfeeding a high activism priority is ultimately necessary in order to drive more forward-thinking legislation; there must be a debate that sparks Congress to act further and the Department to issue regulations that will color the current law.

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<sup>147</sup> Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 230 n.29 (1998).

<sup>148</sup> *Id.*

<sup>149</sup> Goodman *supra* note 6, at 159.

The Department makes clear that it does not intend to issue regulations at this time. Failure to issue regulations is a mistake. Regulations requiring that (1) all non-exempt employers create a written policy regarding the break time for nursing mothers requirement, and (2) all non-exempt employers provide the written policy to mothers before and after maternity leave would make the break time for nursing mothers requirement more meaningful.

While the Department's goal of opening the lines of communication is laudable, the Department fails to recognize the realities of the workplace. Open communication between employer and employee depends largely on the relationship between the employer and employee. Cultural norms regarding breastfeeding play a role in forging communication barriers. In American society, breastfeeding is generally viewed as a taboo subject. The topic of breastfeeding causes embarrassment for both men and women, which results in hesitation to discuss the issue. Society, however, is not the sole offender.

Labor laws protecting women from sexual harassment, while positive in so many respects, have had the impact of chilling conversation between males and females in the workplace.<sup>150</sup> Any topic associated with female sexuality is generally considered off limits; the result is a feeling that men and women are better off ignoring sexuality altogether, no matter the cost or circumstance. A woman's breasts, of course, are typically considered sexual by nature. Hence, with the passage of sexual harassment employment laws, the subject of breastfeeding one's child has not only become socially taboo, but legally taboo as well.

Oftentimes, it will be easier for a female employee to discuss breastfeeding and the expression of breast milk with a female supervisor. Employers can alleviate some of the aforementioned cultural and legal frustrations by allowing female superiors to supervise lactation

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<sup>150</sup> Stifling conversation, of course, was not the goal of legislation protecting women from sexual harassment. Rather, this has been an unfortunate, unforeseen result.

aspects of the workday. Female supervision will not always be possible or practicable. And, even when possible and practicable, there is no guarantee that female-female communication will cure the problem. Employers, therefore, must explore other ways of opening the line of communication between employer and employee.

The law does not explicitly require employers to have a written policy explaining employees' rights. The Department, however, has the power to explicitly require this through issuance of regulations. The Department should issue regulations mandating that all employers subject to the break time for nursing mothers requirement create a written policy regarding the right to express breast milk during the workday. Having a written policy in place will make the current laws more meaningful by ensuring working mothers understand their legal rights. A written policy would provide the foundation for the open and frank communications the Department encourages. In order to assist employers with obligations and minimize difficulties they may face, the Department should issue a model notice or model policy that employers can adapt to fit their own needs. This sort of agency assistance will help effectuate the law in a way that is least intrusive to employers.

Before a mother-to-be takes her maternity leave, a human resources representative or a supervisor or manager should be required to provide the employee a written or electronic copy of the employer's policy regarding break time for nursing mothers. The human resources representative, supervisor, or manager should be obligated to take a few moments to verbally explain the policy and ask if the employee understands her rights. A lot happens between the time a woman gives birth and the time she returns to work, and it is not unforeseeable that conversations occurring before a baby was born may be forgotten once the baby arrives. Thus, when the employee returns from maternity leave, a human resources representative, supervisor,

or manager should be required to, once again, provide the employee with a written or electronic copy of the employer's policy regarding the break time for nursing mothers requirement. At this time, the human resources representative, supervisor, or manager should also give verbal instruction regarding the policy and ask if the employee has questions about the policy. Before ending the conversation, the human resources representative, supervisor, or manager should make available his or her contact information so the employee may ask further questions as they arise.

While a written policy and mandated communications regarding the policy will help, the biggest hurdle to be overcome is the lack of a meaningful penalty. Disinterested employers will not be motivated to comply with the new law if they know they won't face consequences for violations. A more stringent penalty would likely motivate employers to comply with the break time for nursing mothers regulations. While the rationale behind limiting individual damages makes sense, it is unreasonable to think that the answer is no penalty at all. Rather, Congress should adopt legislation which provides for a flat fee or sliding scale fee to be paid to an individual employee who prevails in court. Such a penalty would not undermine the fact that employers need not provide paid break time in the first place, and it would create an incentive for employers to comply with the law.

#### **IV. CONCLUSION**

There are numerous benefits to breastfeeding, and most doctors and pediatricians agree that breast milk is the ideal form of nutrition for infants. Despite the overwhelming evidence that breast is best, breastfeeding remains a secondary source of infant nutrition. One major obstacle many mothers face is sustaining their breast milk supply upon returning to work. Historically, the available laws have offered little protection for mothers who wished to express breast milk at

work and little remedy for mothers who wished to bring an action against an employer who would not allow break time for expressing milk.

New federal legislation sought to change all this. Amendments to section 7 of the FLSA require employers to provide covered employees with reasonable break time and a private place other than a toilet stall to express breast milk during the work day for one year after a child's birth. While the requirement has been in effect since March 23, 2010, it is unlikely the new law, alone, does enough to provide practicable solutions and sufficient choices for breastfeeding mothers who wish to express milk during the work day. Regulations and further legislation are needed to address serious issues with communication barriers and penalties for noncompliance. Ultimately, regulations requiring that all non-exempt employers create a written policy and communicate the policy to pre- and postnatal employees are essential to ensuring the law is understood by covered employees. Additionally, a monetary penalty should be put into place so that employers will have a stronger incentive to comply with the new law.

Congress faced a difficult task in passing the break time for nursing mothers requirement. Congress was forced to balance nursing mothers' needs against cost to employers. The critical task was to encourage an important public policy in a way that is workable for employers. While Congress may have succeeded in this balancing act in some regards, societal norms and sexual harassment laws continue to have an adverse impact on a woman's decision to express milk in the workplace.

Employers may feel frustrated by the new requirement because allowing female employees to express milk during the work day has little short-term benefit for employers. However, medical research and statistics make it clear that a law encouraging mothers to express breast milk at work and continue breastfeeding at home is good for society in the long run.

Educating employers on the long-term benefits of breastfeeding may help with compliance efforts. At the end of the day, the new law is fairly unobtrusive; Congress could have gone much further by requiring paid breaks or a permanent space for expressing milk. Instead, Congress balanced employee interests against employer needs. The result was not flawless. Agency regulations and further legislation will help clarify confusion and create positive incentives for employers and employees. The Department and Congress are confronted with the opportunity to expand on a progressive law and make it much more meaningful for women in the workplace.