

# 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

# 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:
  - ❖ Painful engorgement
  - ❖ Fever
  - ❖ Infection (mastitis)
  - ❖ Anxiety and stress
  - ❖ Decrease in milk supply and inability to breastfeed/early weaning

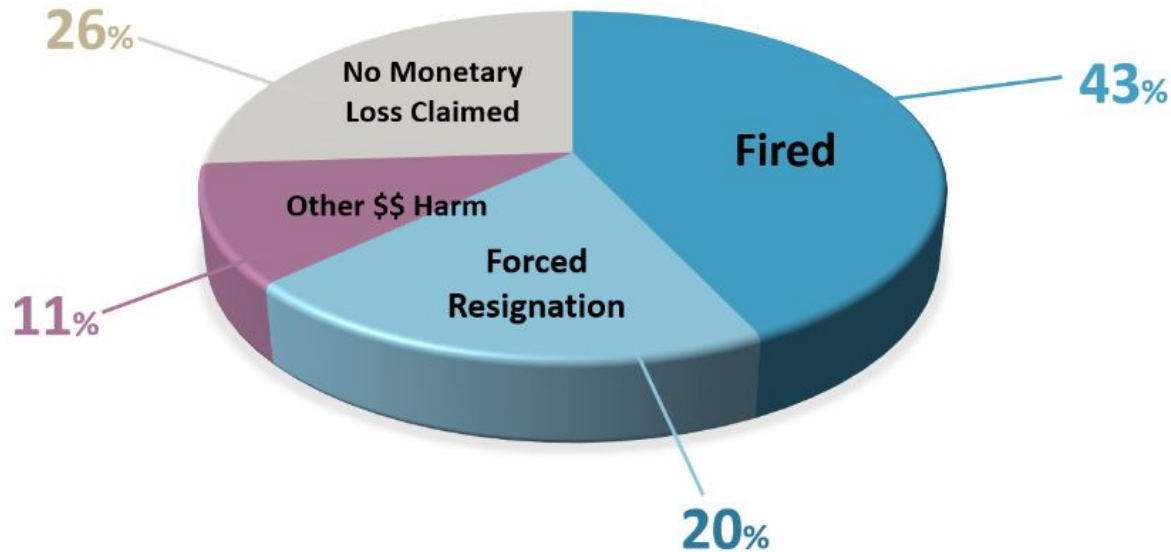


# Lactation breaks and workers' health

- ❖ 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:  
<https://www.acog.org/clinical/clinical-guidance/practice-advisory/articles/2023/02/duration-of-breastfeeding-update>
  - ❖ AAP:  
<https://www.aap.org/en/news-room/news-releases/aap/2022/american-academy-of-pediatrics-calls-for-more-support-for-breastfeeding-mothers-within-updated-policy-recommendations/>



# Lactation breaks and workers' economic stability



*Exposed: Discrimination Against Breastfeeding Workers.*  
<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

# PUMP Act Text

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 or 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





# 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:
    - ❖ <https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries>
  - ❖ WHD Field Assistance Bulletin No. 2023-02:
    - ❖ <https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-2.pdf>

## 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](mailto:Hotline@worklifelaw.org) OR 415-703-8276 (leave message)



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