



Commentary

Breastfeeding: The Illusion of Choice

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ABSTRACT

Background: Breastfeeding is frequently described as a woman's decision, yet this choice is often illusory owing to suboptimal social and structural supports. Despite passage of the Patient Protection and Affordable Care Act (2010) that requires all qualifying employers to provide mothers "reasonable" break time and a private, non-bathroom space to express breast milk, the majority of women in the United States still do not have access to both accommodations.

The Problem: At least three issues may be influencing this suboptimal implementation at workplaces: 1) federal law does not address lactation space functionality and accessibility, 2) federal law only protects a subset of employees, and 3) enforcement of the federal law requires women to file a complaint with the United States Department of Labor.

Recommendations: To address each of these issues, we recommend the following modifications to current law: 1) additional requirements surrounding lactation space and functionality, 2) mandated coverage of exempt employees, and 3) requirement that employers develop company-specific lactation policies.

Conclusions: If the goal is to give women a real choice of whether to continue breastfeeding after returning to work, we must provide the proper social and structural supports that will allow for a truly personal decision. No mother should have to choose between breastfeeding her child and earning a paycheck.

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Research suggests that breast milk is superior to infant formula, protecting infants from a long list of infectious and chronic conditions (Ip, Chung, Raman, Trikalinos, & Lau, 2009). The act of breastfeeding also promotes bonding and security between a mother and her infant, along with reducing a mother's risk of several diseases (Dieterich, Felice, O' Sullivan, & Rasmussen, 2013; Ip, et al., 2009). Still, upon returning to work, many mothers prefer not to breastfeed for a variety of reasons: convenience, time, and functional issues leading to poor milk production or poor latching, to name a few (Payne & Nicholls, 2010).

Although breastfeeding is frequently described as a woman's choice, this choice is often illusory owing to suboptimal social and structural supports. For example, women who breastfeed have been scolded or shamed while nursing in public (Acker, 2009) and/or face numerous obstacles to expressing breast milk when at work (Raju, 2006). Although the United States has made

strides toward improving breastfeeding rates through state and federal legislation (U.S. Department of Labor [DOL], 2010), it remains much more difficult to breastfeed in the United States than it is to provide infant formula, meaning that women may be driven to formula feed despite their breastfeeding intentions.

Federal Legislation to Support Breastfeeding in the Workplace

Signed on March 23, 2010, the Patient Protection and Affordable Care Act (PPACA) of 2010 (2010; P.L. 111–148, 2010) amended section 7 of the Fair Labor Standards Act (FLSA, 29 U.S.C. 207(r)) requiring all qualifying employers to provide "reasonable" break time for mothers to express breast milk. The break can be unpaid, but must be provided any time an employee needs to express breast milk during the nursing child's first year of life. Additionally, the employer must provide a lactation space in the workplace that is not a bathroom and is "shielded from view and free from intrusion by coworkers and the public" (Break Time for Nursing Mothers Provision, 2010). The U.S. DOL (2010) has published guidelines to inform the public about the law, but has stated that it will not make specific rules for employers because of the "variety of workplace environments, work

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schedules, and individual factors that will impact the number and length of breaks required by a nursing mother.” The DOL does, however, implement and enforce the break time requirement, and may consider developing formal regulations in the future if necessary (U.S. DOL, 2010).

Issues with the Fair Labor Standards Act Amendment

Following the 2010 FLSA amendment (*Break Time for Nursing Mothers Provision, 2010*), 33 state organizations, 36 state public universities, and 13 private universities revised their lactation policies or developed new ones to match the federal requirements (Abdulloeva & Eyler, 2013). Yet the amendment's influence on breastfeeding rates among working women is not currently evident and may take years to show meaningful impact (Abdulloeva & Eyler, 2013). For example, research suggests suboptimal implementation of the *Break Time for Nursing Mothers Provision (2010)* 3 years after enactment (Kozhimannil, Jou, Gjerdingen, & McGovern, 2016). Of note, only 40% of employed women with infants had access to both break time and a private space to express breast milk in 2013, and single mothers and low-income women were significantly less likely to have access to either accommodation, reflecting systematic disparities in the workplace. This is significant, given that women with both adequate break time and a private space to express breast milk are 2.3 times more likely to exclusively breastfeed at 6 months after giving birth (Kozhimannil et al., 2016).

Although the *Break Time for Nursing Mothers Provision (2010)* is a step in the right direction, the majority of women (60%) still do not have access to both break time and a private space to express breast milk (Kozhimannil et al., 2016). At least three issues may be influencing this suboptimal implementation at workplaces:

1. Although the PPACA states that workplace lactation spaces must be private and may not be bathrooms, *the law does not address lactation space functionality and accessibility*. The lack of such standards may mean that not all women are provided adequate or nearby locations to express breast milk at work, potentially leading to unsafe or unhygienic practices and/or premature weaning. Without specific guidelines, many workplaces offer a room that is simply a space. For example, in a New Jersey-based study completed soon after enactment of the *Break Time for Nursing Mothers Provision (2010)*, about 50% of employers provided no amenities such as a refrigerator, sink, or access to a breast pump (Bai, Gait, & Wunderlich, 2015). The lack of such amenities decreases the usefulness of the room.
2. Currently, *federal law only protects employees who are not exempt from the FLSA's overtime pay requirements (Table 1)*. Thus, exempt employees are not covered. Additionally, small companies (<50 employees) may apply for exemption from the requirements if compliance would impose an undue hardship. Because 37.5% of employers in the United States fall into this small-business category (Abdulloeva & Eyler, 2013), these exemptions can affect millions of women.
3. *Enforcement of the federal law requires women to file a complaint with the DOL*. Employees are recommended to communicate their lactation needs with their employers to learn about the employer's level of support (U.S. Department of Health and Human Services, 2008). Yet many women are afraid of expressing their needs, worrying about the potential for negative workplace dynamics partially owing to the

Table 1

Employee Groups Exempt from the Fair Labor Standards Act (FLSA) Overtime Pay Requirements

- Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and certain skilled computer professionals (as defined in the Department of Labor's regulations).
- Employees of certain seasonal amusement or recreational establishments.
- Employees of certain small newspapers and switchboard operators of small telephone companies.
- Employees engaged in fishing operations.
- Employees engaged in newspaper delivery.
- Casual babysitters and persons employed as companions to the elderly or infirm.
- Certain commissioned employees of retail or service establishments.
- Auto, truck, trailer, farm implement, boat, or aircraft salespersons employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers.
- Auto, truck, or farm implement parts-clerks and mechanics employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers.
- Railroad and air carrier employees, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans.
- Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations.
- Domestic service workers who reside in their employers' residences.
- Employees of motion picture theaters.
- Farmworkers.

Source: U.S. Department of Labor, Office of the Assistant Secretary for Policy. (2009). Wages and hours worked: Minimum wage and overtime pay. Retrieved from <http://www.dol.gov/compliance/guide/minwage.htm#ftn1>. Accessed: May 18, 2016.

notion of ‘special treatment’ (Bai, Wunderlich, & Weinstock, 2012). Likewise, although the DOL keeps complaints and complainants confidential (*Wage and Hour Division, nd*), a woman fearing employer retaliation and job loss may be hesitant to initiate an investigation.

Recommendations

To address each of these issues in turn, we recommend the following modifications to current law.

1. *Additional requirements surrounding lactation space and functionality*. Although milk expression is not a high-maintenance activity, there are several basic needs—beyond privacy and a non-bathroom space—that should be required by law. For example, the definition of “a place, other than a bathroom” needs further clarity and uniformity. As supported by both the DOL and U.S. Department of Health and Human Services, each lactation space should, at a minimum, include a locking door, comfortable chair, small table or shelf for a breast pump, and electrical outlet. Spaces should be located near both the employee's workspace and a source of hot and cold water where the employee can wash hands and pump parts (Andrews, 2012; U.S. Department of Health and Human Services, 2008). Such policies are already in place in 12 states, with Indiana's policy also requiring that employers provide a refrigerator for nursing mothers to store breast milk (Abdulloeva & Eyler, 2013).
2. *Mandated coverage of exempt employees*. All employees deserve the right to express breast milk for their babies while at work, and thus current law should cover all working women. In fact, if passed, the *Supporting Working Moms Act*

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