

The Precarious Position of the Working and Breastfeeding Mother

By **Jayme Jonat** | July 27, 2020

While the Pregnancy Discrimination Act has been in place since 1978, it has by no means stopped such discrimination from occurring.

The women's workforce participation rate in the United States is the same now as it was three decades ago, in contrast to the participation growth seen in many other industrialized nations. There are myriad reasons for this trend, including workplace sexual harassment, unequal pay, and gender discrimination. But another contributing factor that has received less public attention despite its considerable impact is lactation discrimination.

In the United States, the vast majority of mothers breastfeed their infants following childbirth. In 2015, the most recent year for which data is available, the percentage of mothers that started out breastfeeding was over 83%. A broad consensus exists among medical and public health experts that breastfeeding infants is optimal for at least one year following birth because of its developmental, psychological, social, economic, and environmental benefits. However, in 2015, less than 50% of infants were exclusively breastfed through three months and only about 25% were exclusively breastfed through six months. These rates suggest that breastfeeding mothers may be facing challenges when they return to work. Indeed, nearly 50% of all women in one national survey reported that their postpartum employment affected their breastfeeding-related decisions, and one-third indicated that employment posed a challenge to their breastfeeding. Katy B. Kozhimannil et al., *Access to Workplace Accommodations to Support Breastfeeding after Passage of the Affordable Care Act*, 26 *Women's Health Issues*, 6 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4690749/pdf/nihms715360.pdf>.

Lactation discrimination can take many forms, such as denying employee requests to take breaks to pump breastmilk, terminating them for making such requests, or refusing to provide a private, safe, and sanitary environment in which to pump. As a legal

matter, if an employee who has recently given birth wishes to pump breast milk at work, the question of whether her employer has to accommodate her request is far from clear.

At the federal level, there is no law, on its face, that expressly bars employment discrimination on the basis of an employee's lactation status. The Pregnancy Discrimination Act, Pub. L. No. 95-598, 92 Stat. 2679 (1978) (codified as amended at 42 U.S.C. § 000e(k) (2012)) (PDA), which has been in place since 1978, makes it unlawful for an employer "to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment" because of "pregnancy, childbirth, or related medical conditions." While the PDA leaves no doubt that pregnancy-related discrimination is sex discrimination barred by Title VII, the statute does not define "related medical conditions" and courts have taken divergent stances on whether it includes lactation. Compare *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1491 (D. Colo. 1997) ("Based on the language of the PDA, its legislative history, and decisions from other courts interpreting the Act, I hold that breast-feeding or childrearing are not conditions within the scope of the PDA.") and *Ames v. Nationwide Mutual Ins. Co.*, No. 4:11-cv-00359 RP-RAW, 2012 WL 12861597, at *6 n.28 (S.D. Iowa Oct. 16, 2012) (finding that lactation was not a medical condition related to pregnancy, in part because "it is a scientific fact that even men have milk ducts and the hormones responsible for milk production") with *Hicks v. City of Tuscaloosa, Alabama*, 870 F.3d 1253, 1259 (11th Cir. 2013) ("lactation is a related medical condition and therefore covered under the PDA") and *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) ("Lactation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth."). Although a few district courts in New York have held that lactation is a condition related to pregnancy under the PDA (see *Paulson v. Tidal*, No. 16-CV-09049-LTS-OTW, 2018 WL 3432166, at *2 (S.D.N.Y. July 16, 2018); *Wilson v. Ontario Cnty. Sheriff's Dep't*, No. 12-cv-06706 EAW, 2014

WL 3894493, at *8-9 (W.D.N.Y. Aug. 8, 2014); and EEOC v. Vamco Sheet Metals, Inc., No. 13 Civ. 6088(JPO), 2014 WL 2619812, at *6 (S.D.N.Y. June 5, 2014)), the Second Circuit has yet to rule on the subject and thus it remains an open question in New York, and elsewhere.

Even if lactation is covered under Title VII (and that is certainly the trend), the statute is not a silver bullet because it does not grant the full range of legal protections needed for breastfeeding workers. In particular, the PDA only requires of employers that “women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment-related purposes...*as other persons* not so affected but *similar in their ability or inability to work...*” 42 U.S.C. § 2000(e) (k). This comparative approach can make it difficult for an employee to establish a Title VII violation if no other employees receive accommodations comparable to those needed for lactation. In short, if an employer treats all employees poorly by refusing to accommodate health or personal needs, then a breastfeeding employee may be out of luck.

At the state level, about half of all states have enacted laws to help fill the gap and provide additional rights to breastfeeding workers. In New York, all public and private employers, regardless of the size or nature of their business, must provide break time to allow

an employee to express breast milk for her nursing child for up to three years following child birth. N.Y. Lab. Law § 206-c. However, this break time need not be paid, and hourly employees, particularly low-wage workers, may struggle to take pumping breaks when doing so results in economic loss. And while under New York law employers are required to provide employees with a private room or other location close to the employee’s work area where they can pump breast milk, they do not have to when “it would be extremely difficult for an employer to do so.” NYS DOL, Employer of Nursing Mothers: Frequently Asked Questions, <https://labor.ny.gov/workerprotection/laborstandards/nursing-mothers-employer-faq.shtm>.

Ultimately, while the state-by-state patchwork is a critical step to prevent working mothers from lactation discrimination, it has its limitations, even in New York State. A clear and comprehensive federal standard is needed to establish the right to workplace accommodations for pumping workers.



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