

Making Pumping Breaks Affordable for All Breastfeeding Workers

The Problem: Pumping Breaks Are Out of Reach for Too Many Breastfeeding Employees

Although federal and state laws¹ provide a right to break time and private space for expressing breast milk for most hourly and many salaried employees nationwide, in reality taking breaks is unaffordable for many low-wage workers and middle-income earners. When breaks are unpaid, breastfeeding parents must choose whether to go without essential wages or without regular pumping breaks. When a nursing parent cannot pump, her milk can dry up, and she may be unable to continue breastfeeding. Although highly compensated professionals can typically afford to take lactation breaks, for many others—particularly the millions of American workers who are living paycheck-to-paycheck—it’s simply unaffordable.

The reality is that the working poor and people of color are less likely to be able to afford to take unpaid breaks from work, even when they have a legal right to receive them. This disparity only serves to reinforce existing disparities in breastfeeding rates that break down along economic and racial lines, further compounding health disparities that break down along those same lines.

For more information about breastfeeding parents’ health needs at work and practical policy solutions, visit *Exposed: Discrimination Against Breastfeeding Workers*, available at <https://www.pregnantatwork.org/breastfeeding-report>.

Policy Solutions Exist

Adopting several of these policy options may be the most effective solution. Note that some of the solutions below are *already* required in some states. For more information about existing law or model policies, please contact the Center for WorkLife Law at info@worklifelaw.org.

Paid Lactation Breaks: This is the most effective means of ensuring low-wage workers are able to express milk or breastfeed during the workday. Model legislation requires employers to compensate employees paid by the hour for time spent on lactation breaks, and prohibits reducing the compensation of any employee for time spent in lactation breaks.

In 2018, the state of Illinois was the first in the country to require employers to provide paid lactation breaks ([Public Act 100-1003](#)), by amending an existing break time and space law to provide: “An employer may not reduce an employee’s compensation for time used for the purpose of expressing milk or nursing a baby.” A Republican governor signed the law. This groundbreaking legislation can serve as a model for what is possible around the country.

The Illinois law does not explicitly state whether hourly workers should be affirmatively paid for the time they spend expressing milk, but early indications suggest that the Illinois management-side employment bar has instructed businesses (at least publically, in blog postings and the like) that hourly workers must be paid for time spent in lactation breaks. Because there is no private

¹ Center for WorkLife Law, *Workplace Lactation Laws*, available at <https://www.pregnantatwork.org/state-workplace-lactation-laws/>.

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enforcement mechanism for this law, it is likely we will not receive guidance from the courts on this question.

Drafters of future paid-break policies should consider whether it is politically feasible to introduce legislation that does the following:

1. Explicitly provides that employees, whether paid on an hourly, salary, or other basis, shall not be docked pay for the time spent on lactation breaks;
2. Provides that paid time off (PTO, like vacation, sick, or personal days) and other benefits of employment shall not be reduced for time spent on breaks;
3. Clarifies that the compensable lactation break time includes all time necessary to express milk (e.g., traveling to and from the lactation space, storing milk, etc.); and
4. Ensures that there is an effective enforcement mechanism in place to recover wages that are wrongfully withheld in violation of the law.

Sample statutory language: “Employers shall not dock an employee’s compensation, including hourly wages, salary, and paid time off, for time spent on milk expression breaks.”

Fixed-Time Paid Lactation Breaks: An alternative to requiring compensation for *all* time spent during a lactation break is to require employers to provide a fixed amount of paid break time each workday for purposes of lactation (e.g., a 20-minute paid break for every three hours worked), in the same way that the laws of nine states² currently require employers to provide paid rest breaks of fixed duration. Unlike typical paid rest breaks, however, lactation breaks must continue for as long as is necessary to complete the milk expression - even if only a fixed portion of the break must be paid. Any necessary time that exceeds the fixed paid period may be unpaid.

No Deductions for Travel Time: Although prohibiting employers from docking employee pay for time spent expressing milk is the most effective way to make lactation breaks economically realistic for all workers, a more moderate solution is to allow unpaid breaks, but require that the time spent traveling between the employee’s workstation and the pumping location and milk-storage location be compensable. Because these locations are within the employer’s control, this may be more politically feasible, and will incentivize employers to provide lactation spaces nearby to the employee’s workstation. The rules interpreting San Francisco’s Lactation in the Workplace Ordinance provide model language: “The time that it takes an Employee to get to and from the Employer’s designated Lactation Location and, if at a separate location, to and from a refrigerator and a sink with running water, shall not be included as part of the Employee’s break time.”³

² U.S. Department of Labor, Minimum Paid Rest Period Requirements Under State Law for Adult Employees in Private Sector (Jan. 1, 2019), available at <https://www.dol.gov/whd/state/rest.htm>.

³ City and County of San Francisco, Office of Labor Standards Enforcement, Rules Implementing the Lactation in the Workplace Ordinance, Rule 1.2, available at <https://sfgov.org/olse/sites/default/files/Final%20Lactation%20in%20the%20Workplace%20Rules%20-%20July%2025%202018.pdf>.

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Overlapping Breaks: Employers must allow nursing employees to take their pumping breaks during and/or as an extension of another already-existing rest or lunch break, to minimize the amount of time away from work duties for which the employee is not paid. Additionally, the legislation should allow employees to reschedule their existing breaks to create a break schedule that satisfies their pumping needs.

Option to Use Paid Time Off: Employers must give lactating employees the *option* of choosing to use sick days, vacation, or other paid time off (PTO) in small, incremental amounts for milk expression. Employers cannot *require* the employee to use her PTO for this purpose. Business groups may insist that this legislation specify the increments in which leave must be tracked, to avoid recordkeeping challenges. To address this concern, the statute might provide, for example: “The employer must track the leave in the smallest increment of time it uses to track leave for non-lactation purposes.”

Clarification of Work Time: Any legislation that allows employers to reduce compensation for time spent on lactation breaks should make clear that any lactation break during which the employee is not completely relieved of all work duties must be paid as normal work time. For example, if an employee is still required to answer phones when she is expressing milk, even if she is allowed to do so from a private space and without attending to her other work duties, the time must be paid. The law should have an effective enforcement mechanism for collecting wages that are wrongfully withheld.

The federal Fair Labor Standards Act already requires employers to pay employees for all time when they are not relieved of all work duties, for purposes of calculating minimum wage and overtime.⁴ Compensating employees for all hours worked is also already required by the laws of those states that prohibit wage theft.

Option to Continue Working While Expressing Milk: Some employees wish to continue working while expressing milk as a way to avoid losing wages during an unpaid break or to avoid staying late at work to make up the missed work and time. Many breastfeeding parents work jobs that can be done while expressing milk, particularly with the use of a hand-free device to hold the pump parts in place. Whether this option is feasible depends on the unique physical needs of the breastfeeding parent and the nature of her work, but it may be realistic and preferable for some employees.

Not all breastfeeding parents can express milk while working, for example because they need to relax to let down milk, or because they are physically unable to engage in hands-free pumping. Therefore the key is that employees be given the *option* of continuing to perform work during milk expression periods, if possible without imposing an undue hardship on the business operations. Employees should not be *required* to continue working if they prefer to be relieved of their duties.

⁴ U.S. Department of Labor, Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA), available at <https://www.dol.gov/whd/regs/compliance/whdfs22.pdf>.

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Note that employees who work in states that provide a right to accommodation for pregnancy and breastfeeding should *already* be entitled to express milk while continuing to do their job duties as a reasonable accommodation (assuming the other requirements of the statute are satisfied, which could include having to obtain a doctor's note). Similarly, an argument can be made that employees must be allowed to pump milk while performing their work duties under the federal Pregnancy Discrimination Act, when the employer allows other employees to attend to their own personal needs while working (e.g., eating food or drinking, listening to the radio, continuously monitoring their blood sugar, or wearing other personal health devices).

For more information about policies that support breastfeeding workers or existing law, please contact the Center for WorkLife Law at info@worklifelaw.org or 415-565-4640.