

# DOL gets serious about break time for nursing mothers law



The U.S. Department of Labor has issued one of its first milk-expression break citations on the Trump administration's watch. The action is another indication that the department is taking seriously some provisions in the Affordable Care Act even as it has stepped away from defending the law against challenges in federal court.

The ACA amended the Fair Labor Standards Act to require unlimited breaks for nursing mothers.

It requires all employers with 50 or more employees to provide private facilities to express milk. Smaller employers must comply, too, unless they can show it would be an economic hardship to do so.

**Recent case:** The DOL's Wage and Hour Division investigated the Yuma Regional Medical Center in Arizona. Investigators concluded that the facility "failed to provide adequate breaks and accommodations for nursing mothers attempting to express breast milk while on the job."

The allegations against the medical center included charges that new mothers who wanted to continue providing their infants with breast milk despite returning to work were not provided with a private place shielded from the public to express their milk. Without privacy, it can be difficult for mothers to physically manage the task.

As a result of the citation, the medical center has agreed to begin providing private areas in which to express milk and to allow as many lactation breaks as new mothers need. It also agreed to train all their supervisors at all locations and to provide all new mothers returning to work with information about their right to express milk.

**Note:** On Dec. 14, a federal judge in Texas ruled the ACA unconstitutional in its entirety. If that decision stands, the FLSA milk-expression break provision likely would also be invalid.

The case will almost certainly be appealed to the 5th Circuit Court of Appeals, and, if necessary, to the U.S. Supreme Court.

In the meantime, the White House went out of its way to emphasize that the administration would continue to enforce ACA requirements, including those concerning lactation breaks.

### **Are you starting 2019 without a proper space where nursing employees can pump breast milk?**

Chances are good that affected employees have noticed—and aren't pleased that you're ignoring a requirement that has been on the books for almost a decade.

Poor employee relations aside, you could be courting a lawsuit filed by an angry and frustrated employee—or even one who has been physically harmed by the lack of time and a place to safely express milk. Not pumping can lead to physical harm, including infections and extreme pain.

Those kinds of lawsuits are on the rise, alleging sex discrimination and pregnancy discrimination.

Incidents of employers shirking their responsibility to accommodate nursing mothers have been in the news. In December, the *New York Times* reported that nursing mothers working at a correctional facility in Virginia had to resort to smuggling breast pump parts into prison concealed in their undergarments. Then they secretly re-assembled the devices. The women had to hide while they expressed breast milk for their babies.

A new report from the Center for Workplace Law says there are still over nine million women of childbearing age who don't have the right to express milk at work, either through the Affordable Care Act's hourly employee expression break rules or state laws that expand that protection to all nursing mothers in the workplace.

The report's authors called discrimination against nursing mothers the next frontier in pregnancy discrimination.

**Note:** Under federal law, only nonexempt workers have the right to unpaid breaks as needed to express milk. Exempt employees aren't entitled to those protections. But remember: Exempt employees have freedom to arrange their time during the workday. Deducting pay for short breaks can destroy their exempt status.

**Physical requirements:** Employers must provide a functional space for expressing breast milk. A restroom is not sufficient. 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.

**Online resource** Find official DOL guidance on break time for nursing mothers at [www.dol.gov/whd/regs/compliance/whdfs73.htm](http://www.dol.gov/whd/regs/compliance/whdfs73.htm).