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## Supporting Employee Lactation: Do U.S. Workplace Lactation Benefit Mandates Align with Evidence-Based Practice?

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**SUPPORTING EMPLOYEE LACTATION: DO U.S. WORKPLACE  
LACTATION BENEFIT MANDATES ALIGN WITH EVIDENCE-  
BASED PRACTICE?**

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ABSTRACT

*Within the United States, there are governmental benefits and policies in place to support breastfeeding mothers as they return to work. However, the effectiveness and inclusiveness of these policies is not always clear. Because of this, breastfeeding at work, in general, and governmental workplace mandates, specifically, often receive negative press and social media attention as women struggle to reconcile their workplace and lactation demands. To provide evidence-based recommendations for how to best support breastfeeding employees, we use an organizational science perspective to review the existing research for evidence on the (1) effectiveness of the existing legal benefits and supports within the US, and (2) barriers or facilitators that impact benefit success. Through this, we identify areas for improvement and provide suggestions for policy.*

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## I. INTRODUCTION

Feeding infants breastmilk (both directly and via pumping) is a pro-health behavior that has well-documented benefits for the mother and child.<sup>1</sup> Although there are many factors that impact a mother's decision to initiate and continue breastfeeding (e.g., family norms or health constraints), barriers to lactation at work in the postpartum period consistently predict breastfeeding discontinuation.<sup>2</sup> In efforts to support women's return to work postpartum and their lactation decisions, there are many mandates in the United States across the federal and state levels that provide protection and benefits for working women who are lactating.<sup>3</sup> However, it is currently unclear how these mandates align with best practices of providing support to working mothers identified via organizational research. This Article reviews the federal and state mandates available to understand (1) what benefits/protections are offered, (2) how these benefits align with evidence-based recommendations for supporting lactating women, and (3) where lactating employees are being successfully supported or require additional support.

## II. UNDERSTANDING EMPLOYEE LACTATION

Medical research suggests that breastmilk feeding may be associated with positive health and developmental outcomes for the mother and child.<sup>4</sup> These health advantages are significant, and have downstream impacts on health care costs and the economic success of organizations (through implications for employee absenteeism and return-to-work decisions).<sup>5</sup> Due to these health and

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1. Melissa Bartick & Arnold Reinhold, *The Burden of Suboptimal Breastfeeding in the United States: A Pediatric Cost Analysis*, 125 PEDIATRICS e1048, e1051 (2010); Cesar G. Victora et al., *Breastfeeding in the 21st Century: Epidemiology, Mechanisms, and Lifelong Effect*, 387 LANCET 475, 475 (2016).

2. Sylvania Guendelman et al., *Juggling Work and Breastfeeding: Effects of Maternity Leave and Occupational Characteristics*, 123 PEDIATRICS e38, e45 (2009). See also Bidisha Mandal et al., *The Differential Effects of Full-Time and Part-Time Work Status on Breastfeeding*, 97 HEALTH POL'Y 79, 85 (2010); Christiane Spitzmueller et al., *Got Milk? Workplace Factors Related to Breastfeeding Among Working Mothers*, 37 J. ORG. BEHAV. 692, 692 (2016) [hereinafter *Got Milk?*]; Jane A. Johnston Balkam et al., *Effects of Components of a Workplace Lactation Program on Breastfeeding Duration Among Employees of a Public Sector Employer*, 15 MATERNAL & CHILD HEALTH J. 677, 677 (2011) (discussing the United States Department of Health and Human Services Blueprint for Action on Breastfeeding, which found the workplace to be a major barrier to extended breastfeeding for American women).

3. Compare *infra* Table 1 (listing federal laws regarding breastfeeding at work), with *infra* Table 2 (listing state laws regarding breastfeeding at work).

4. Bartick & Reinhold, *supra* note 1; Victora et al., *supra* note 1.

5. See Christiane Spitzmueller et al., *Identifying Job Characteristics Related to Employed Women's Breastfeeding Behaviors*, 23 J. OCCUPATIONAL HEALTH PSYCH. 457, 458 (2018) [hereinafter *Identifying Job Characteristics*] (discussing how mothers of formula-fed infants miss

economic implications, human lactation is viewed as a public health concern that is supported by governmental recommendations and labor market regulations.<sup>6</sup> To support postpartum health, the American Academy of Pediatrics (AAP) recommends that mothers exclusively feed their infants breastmilk for the first six months postpartum and then continue providing breastmilk, with supplemental solid foods, through the child's first year (lactating for twelve months total).<sup>7</sup>

Within the United States, most first time mothers return to work within the first twelve months postpartum, with many returning within the first three months postpartum.<sup>8</sup> Maternity leave norms within the United States, where leave is often short and unpaid, mean that for most working women to follow the recommended AAP lactation guidelines, they likely have to negotiate how to pump or breastfeed while at work.<sup>9</sup>

Lactation is demanding. To maintain adequate milk supply, women must express milk approximately every three hours, with each session requiring time to express; space to express; space to store the milk (if pumping); and adequate hydration, nutrition, and energy to support milk development.<sup>10</sup> Fitting lactation into a work schedule and work environment presents a significant challenge for many lactating employees.<sup>11</sup>

Public health governing bodies provide specific recommendations for lactation behaviors that best promote health, such as exclusively breastfeeding for the first six months and then supplementing with food for up to two years of age.<sup>12</sup> Although there is some research evidence that there are unique challenges and needs for different lactation behaviors (e.g., pumping vs. exclusive breastfeeding), the discourse of laws, mandates, and organizational benefits is

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more work and have higher health care costs than mothers of breastfed infants, which ultimately decreases work productivity and increases employer costs).

6. See Lindsey Murtagh & Anthony D. Moulton, *Working Mothers, Breastfeeding, and the Law*, 101 AM. J. PUB. HEALTH 217, 217, 220 tbl.3 (2011) (addressing breastfeeding recommendations from the American Academy of Pediatrics, the United States Surgeon General's Office, and the American Academy of Family Physicians, along with state statutes that protect lactating mothers at work).

7. Balkam et al., *supra* note 2.

8. *Got Milk?*, *supra* note 2, at 694; *Identifying Job Characteristics*, *supra* note 5, at 457.

9. Balkam et al., *supra* note 2. See also Guendelman et al., *supra* note 2, at e39 (explaining that the Federal Family and Medical Leave Program permits parents to take three months of non-paid leave).

10. See *Got Milk?*, *supra* note 2, at 694, 696 (discussing the median frequency of feedings each day and the resources a mother needs to express at work). See also *Identifying Job Characteristics*, *supra* note 5, at 460 (discussing how working mothers require nutritious food intake that is conducive to breastfeeding).

11. See Mandal et al., *supra* note 2 (discussing how full-time employment is negatively correlated with breastfeeding initiation and duration).

12. See Murtagh & Moulton, *supra* note 6, at 217 (addressing governmental breastfeeding recommendations that encourage exclusive breastfeeding for six months postpartum).

generalized to all lactation behaviors as opposed to specific lactation behaviors.<sup>13</sup> Therefore, this Article uses the term “employee lactation” as an umbrella term to denote any lactation behavior that occurs at work, including direct feeding from the breast, milk expression via pumping, and both exclusive and non-exclusive breastmilk feeding behaviors.

### III. SUMMARY OF LAWS THAT SUPPORT EMPLOYEE LACTATION

#### A. Federal

At the federal level, there are four federal mandates that help protect employees who are lactating at work.<sup>14</sup> Two of these directly address lactation: the Fair Labor Standards Act of 1938 (FLSA)<sup>15</sup> and the Fairness for Breastfeeding Mothers Act of 2019.<sup>16</sup> Indirectly, the Pregnancy Discrimination Act of 1978<sup>17</sup> and the Family Medical Leave Act of 1993 (FMLA)<sup>18</sup> also support lactation continuation in employees.

The Pregnancy Discrimination Act of 1978 amended Title VII of the Civil Rights Act of 1964 to ban employment discrimination based on pregnancy, childbirth, or related medical conditions.<sup>19</sup> The term “medical conditions” is ambiguous; however, several cases argue that employee lactation can be viewed as a medical condition. For example, in *Equal Employment Opportunity Commission v. Houston Funding II, Ltd.*, the court stated that the expression of breastmilk would fall under “related medical conditions” since lactation only occurs among individuals who have had a pregnancy.<sup>20</sup> Additionally, *Clark v. City of Tucson* illustrates the possible repercussions of FLSA and Title VII violations when, as there, an employer fails to provide lactation space and to protect an employee from retaliation in lactation support matters.<sup>21</sup>

The FLSA, as amended by the Patient Protection and Affordable Care Act of 2010,<sup>22</sup> provides accommodations and protections for three lactation-related factors: time to express milk, reasonable space for lactation, and protection against retaliation for the use of these benefits.<sup>23</sup> First, employers must allow

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13. *Got Milk?*, *supra* note 2, at 694.

14. *See infra* Table 1.

15. 29 U.S.C. § 207(r).

16. 40 U.S.C. § 3318.

17. 42 U.S.C. § 2000e(k).

18. 29 U.S.C. § 2612(a)(1)(A).

19. *See* 42 U.S.C. § 2000e(k).

20. *Equal Opportunity Emp. Comm’n v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 n.4, 430 (5th Cir. 2013).

21. *Clark v. City of Tucson*, No. CV 14-02543-TUC-CKJ, 2018 WL 1942771, at \*1 (D. Ariz. Apr. 25, 2018).

22. 29 U.S.C. § 207.

23. *Id.* § 207(r)(1)(A)–(B); *Id.* § 218c(a)(5).

their employees sufficient breaks, both in terms of frequency and length, to allow them to express milk.<sup>24</sup> Wide variability exists in the time-based needs of lactating employees, so employers need to make reasonable accommodations for those needs.<sup>25</sup> However, the FLSA only requires that lactation breaks be provided; it does not require employers to pay employees during these breaks.<sup>26</sup> Further, employers with fewer than fifty employees do not need to meet the FLSA time requirements for lactation breaks if it would result in undue hardship.<sup>27</sup> Second, in addition to time accommodations, the employer must provide either a dedicated lactation room or space available for milk expression, and bathrooms cannot be used as the designated lactation space.<sup>28</sup> Temporary lactation spaces are permissible; however, the space must be secured from view and protected from intrusions by others.<sup>29</sup> Third, the FLSA protects employees from retaliation if they file a complaint about employee lactation time and space provision violations.<sup>30</sup>

The Fairness for Breastfeeding Mothers Act of 2019 provides the additional requirement that certain public federal buildings offer a non-bathroom lactation room.<sup>31</sup> Thus, the lactation room must be private (i.e., not visible to the public); allow for uninterrupted lactation time; and contain several logistical provisions such as a chair, work surface, and electrical outlet.<sup>32</sup> However, as with the other federal supports, the bill provides for exceptions criteria. For example, a provision states that the requirements do not need to be met if repurposing a space or creating a new lactation room cannot be done at a reasonable cost.<sup>33</sup>

While the FMLA does not specifically address lactation accommodations, the unpaid leave it provides can facilitate breastfeeding continuation. The FMLA provides twelve weeks of unpaid leave for the birth and care of a newborn child.<sup>34</sup> FMLA eligibility requirements include working at a public agency or a company with at least 50 employees in a 75-mile radius, working at the employer for at least 12 months, and worked at least 1250 hours during the last 12 months.<sup>35</sup> Unfortunately, these stringent qualifications mean not all lactating employees will qualify.

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24. *Id.* § 207(r)(1)(A).

25. *Got Milk?*, *supra* note 2, at 693; 29 U.S.C. § 207(r)(1)(A).

26. *Id.* § 207(r)(2).

27. *Id.* § 207(r)(3).

28. *Id.* § 207(r)(1)(B).

29. *Id.*

30. 29 U.S.C. § 215(a)(3).

31. Fairness for Breastfeeding Mothers Act of 2019, Pub. L. No. 116-30, § 2(a), 133 Stat. 1032, 1032-33 (2019).

32. *Id.*

33. *Id.*

34. 29 U.S.C. § 2612(1)(A).

35. *Id.* § 2613(a).

### B. State

Many states and territories include additional mandates that supplement federal mandates supporting breastfeeding.<sup>36</sup> Consistent across states, women can now breastfeed in any public or private location.<sup>37</sup> Additionally, thirty-one states, the District of Columbia, and the United States territories provide an exemption from indecent exposure for breastfeeding in public.<sup>38</sup> However, state-level supports pertaining to the workplace are more variable in their availability and their protection of lactating employees.<sup>39</sup> This Article's review of state- and territory-level support for lactating employees identifies several general categories of protection, including unpaid and paid break time for lactation, general lactation room availability, tools in lactation space, prohibition of discrimination against breastfeeding, accessible data and information for employers and mothers, and the promotion of infant- or mother-friendly workplaces.<sup>40</sup>

Regarding state provisions, a high level of variability exists between what is mandated and what level of detail is provided in the laws and recommendations to adequately support the state mandates.<sup>41</sup> For example, several states note that it is discriminatory to not provide accommodations for lactation, but the explicit mention of a room or break provision is missing from their statutes (e.g., Massachusetts, Michigan, Oregon, and South Carolina).<sup>42</sup> The Wyoming Legislature's joint resolution goes even further by praising employers for their efforts to accommodate mothers—yet fails to provide any legal directives for the types of support that must be in place.<sup>43</sup>

Of the various supports offered, the two most common types of state-level lactation support focus on providing time and space for workplace lactation.<sup>44</sup> In addition to time and space requirements, a frequent but less common theme for breastfeeding laws involves providing data and online resources for both mothers and employers.<sup>45</sup> Finally, a few states offer the ability to designate one's organization as "infant-friendly" or "mother-friendly" on promotional materials, which may indirectly encourage employers to offer lactation support.<sup>46</sup>

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36. *Breastfeeding State Laws*, NAT'L CONF. STATE LEGISLATURES (July 9, 2020), <https://www.ncsl.org/research/health/breastfeeding-state-laws.aspx>.

37. *See infra* Tables 2a and 2b.

38. *See infra* Tables 2a and 2b.

39. *See infra* Tables 2a and 2b.

40. *See infra* Tables 2a and 2b.

41. *See infra* Tables 2a and 2b.

42. *See infra* Tables 2a and 2b.

43. H.R.J. Res. 0005, 57th Leg., Gen. Sess. (Wyo. 2003).

44. *See infra* Tables 2a and 2b.

45. *See infra* Tables 2a and 2b.

46. *See infra* Tables 2a and 2b. *See generally About Us*, BABY-FRIENDLY USA, <https://www.babyfriendlyusa.org/about/> (last visited July 20, 2020).

Regarding break time, although twenty states and the District of Columbia require employers to provide reasonable, unpaid break time for milk expression, the language of many state-level statutes leaves room for varied application of the mandates.<sup>47</sup> For example, the language in lactation-related laws within nine states is unclear as to whether breaks need to be paid.<sup>48</sup> Similarly, a few states provide extensive exceptions, in addition to the federal-level exceptions, to who is allowed to take break time and when those breaks are paid.<sup>49</sup> State laws are similarly vague about workplace lactation facility requirements, which vary state-to-state.<sup>50</sup> The criteria for an appropriate lactation room and what is deemed a “reasonable attempt” at providing one is often unclear (e.g., N.Y. Labor Law § 206-C<sup>51</sup>). Only a few states (e.g., Colorado, Hawaii, Indiana, Minnesota, North Dakota, and Utah) make any mention of equipment that should be available in lactation rooms, such as a chair, sink, refrigerator, electrical outlet, and workstation.<sup>52</sup>

### C. Federal vs. State: Overlap and Discrepancies

When comparing federal and state mandates, the majority of state lactation-related laws overlap the federal mandates and provide supplemental support.<sup>53</sup> Many supports exist to facilitate time and space requirements; few supports exist to facilitate energy or social requirements.<sup>54</sup> Similarly, across both federal and state levels, legislation tends to be broad, leading to loose interpretations and enactments. For example, verbiage such as “providing reasonable breaks,” in terms of duration and frequency is used in the FLSA and is found in many individual state laws as well.<sup>55</sup> The issue with the ambiguity of terms is that the interpretation of “reasonable” likely differs from one employer to the next.

Although there are many similarities between federal and state mandates, there are also discrepancies between them, which can present challenges in interpretation and enforcement.<sup>56</sup> Most commonly, the discrepancies develop when mandates exist at only one level or provide varying degrees of specificity.<sup>57</sup> For example, although the provision of reasonable break time is federally regulated, nearly half of state laws do not explicitly mention

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47. See *infra* Tables 2a and 2b.

48. See *infra* Tables 2a and 2b. See also NAT'L CONF. STATE LEGISLATURES, *supra* note 38.

49. GA. CODE ANN. § 34-1-6 (2019). See also *infra* Tables 2a and 2b.

50. Compare § 34-1-6, with COLO. REV. STAT. § 8-13.5-104(2) (2008).

51. N.Y. LAB. LAW § 206-c (LexisNexis 2007).

52. See *infra* Table 2b.

53. See *infra* Table 3.

54. See *infra* Table 2b.

55. 29 U.S.C. § 207(r). See *infra* Table 2b.

56. See *infra* Table 2b.

57. Thu T. Nguyen & Summer Sherburne Hawkins, *Current State of US Breastfeeding Laws*, 9 MATERNAL CHILD NUTRITION 350, 351 (2013).

employers' requirements for lactation breaks and/or lactation facilities.<sup>58</sup> Similarly, federal law restricts lactation rooms to non-bathrooms, but many states that mention the provision of lactation rooms do not specify the need for a non-bathroom space.<sup>59</sup> Prohibition of employer discrimination is also a support that is enforced on a federal level, but not every state explicitly labels discriminatory acts unlawful.<sup>60</sup> Finally, there are differences across federal and state laws regarding exemptions to the employer protections.<sup>61</sup>

#### IV. HOW DO THE LEGAL BENEFITS ALIGN WITH RESEARCH-BASED BEST PRACTICES?

Due to the importance of breastmilk and the common barriers that the workplace can present to successful lactation continuation after returning to work, there is a wealth of research that examines the organizational supports and challenges that relate to workplace lactation.<sup>62</sup> Building on the discussion of the types of legal protections that exist for lactating employees within the United States, it is important to examine how these legal protections align with recommendations from organizational- and management-based research and discuss potential areas where legal mandates may be falling short. Overall, current legal mandates are designed to promote the availability of lactation accommodations that are supported by evidence from organizational research. However, gaps in coverage exist that both prevent all lactating employees from accessing these benefits and limit the degree to which these benefits are helpful to employees. Across all the legal support categories, research findings suggest that the degree to which these legal supports promote successful lactation for employees depends largely on the ease of accessibility and the quality of implementation within an organization.

##### A. *Time for Lactation*

Research consistently shows that being afforded time to lactate at work is a major predictor of lactation success.<sup>63</sup> It is suggested that mothers require about

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58. See *infra* Table 2b.

59. See *infra* Tables 1 and 2b.

60. See *infra* Tables 1 and 2b.

61. See *infra* Table 1.

62. Marina L. Johnston & Noreen Esposito, *Barriers and Facilitators for Breastfeeding Among Working Women in the United States*, 36 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING 9, 10, 12–14 (2007).

63. See Maryam Sattari et al., *Infant-Feeding Intentions and Practices of Internal Medicine Physicians*, 11 BREASTFEEDING MED. 173, 178 (2016). See also Jane A. Johnston Balkam, *Problems with Breastfeeding/Breast Milk Feeding Reported by Women Participating in a Workplace Lactation Program*, 7 CLINICAL LACTATION 133, 137 (2016); Naomi Bromberg Bar-Yam, *Nursing Mothers at Work, Corp. and Maternal Strategies to Support Lactation in the*

two breaks per standard workday, each lasting slightly less than an hour, to properly express milk at levels that support continued milk supply.<sup>64</sup> To provide support for mothers to achieve their lactation goals, organizational research suggests that employers should provide time to lactate through formal lactation breaks.<sup>65</sup> Many of the legal supports available in the United States align with this recommendation and provide some level of support for time to lactate at work.<sup>66</sup>

Although federal law mandates reasonable lactation break accommodations, details concerning breaks vary by state, and breaks are, for the most part, not required to be paid.<sup>67</sup> Although there is some federal-level protection, about half of the states do not even mention lactation breaks in their statutes.<sup>68</sup> Among those that do mention breaks, it is unclear how many breaks are permitted, the length of time that is permitted per break, and if breaks are unpaid or paid.<sup>69</sup> Therefore, although there are legal supports for lactation breaks, many employees are still unable to take adequate lactation breaks, or (when breaks are unpaid) feel that taking lactation breaks is not a financially viable option.<sup>70</sup>

#### B. *Space for Lactation*

There is clear evidence that lactation behaviors are influenced by secure access to a designated non-bathroom lactation facility.<sup>71</sup> Conversely, research has linked insufficient access to a lactation room at work to lactation

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*Workplace*, 6 J. ASS'N FOR RSCH. ON MOTHERING 127, 133 (2004) [hereinafter *Nursing Mothers at Work*].

64. *Nursing Mothers at Work*, *supra* note 63; Wendelin M. Slusser et al., *Breast Milk Expression in the Workplace: A Look at Frequency and Time*, 20 J. HUM. LACTATION 164, 168 (2004).

65. Naomi Bromberg Bar-Yam, *Workplace Lactation Support, Part II: Working with the Workplace*, 14 J. HUM. LACTATION 321, 322 (1998) [hereinafter *Workplace Lactation Support*]; Susanha Yimyam & Wasana Hanpa, *Developing a Workplace Breast Feeding Support Model for Employed Lactating Mothers*, 30 MIDWIFERY 720, 724 (2014).

66. *Workplace Lactation Support*, *supra* note 65, at 325.

67. *See infra* Table 2b. NAT'L CONF. STATE LEGISLATURES, *supra* note 36.

68. *Id.*

69. *Id.*

70. *See* Murtagh & Moulton, *supra* note 6, at 219.

71. Margaret D. Whitley et al., *Workplace Breastfeeding Support and Job Satisfaction Among Working Mothers in the U.S.*, 62 AM. J. INDUS. MED. 716, 724 (2019). *See also* Sattari et al., *supra* note 63, at 178; Mildred L. Ocampo-Guirindola et al., *Utilization of Lactation Station and Lactation Breaks and Its Association with the Duration of Breastfeeding Among Filipino Mothers with Children Aged 0-23 Months*, 147 PHIL. J. SCI. 317, 322 (2018); Yeon Bai & Shahla M. Wunderlich, *Lactation Accommodation in the Workplace and Duration of Exclusive Breastfeeding*, 58 J. MIDWIFERY & WOMEN'S HEALTH 690, 693 (2013).

discontinuation<sup>72</sup> and the inability to reach individual lactation goals.<sup>73</sup> Findings from organizational research, therefore, suggest that lactation facilities are a critical component of workplace lactation success.

This Article's review of legal supports shows that there are many legal components that help encourage organizations to provide adequate lactation facilities. However, there are some states that do not have specific lactation space requirements or do not specify quality requirements for spaces.<sup>74</sup> Only eighteen states and the District of Columbia reiterate the FLSA requirements of designating a lactation room in the workplace that is specifically not a bathroom.<sup>75</sup> The remaining states either lack language specifying a non-bathroom lactation room or do not mention a lactation room at all.<sup>76</sup> This may leave unique challenges and needs unaddressed for employees across different organizations due to variation in organizations' enforcement of laws.

In addition to a non-bathroom space, findings from organizational research suggest that technical support within the room (i.e., equipment such as a refrigerator, hospital-grade pump, desk, and chair) is associated with increased lactation duration.<sup>77</sup> For example, lactation success for employees depends on access to a sanitary storage area for breastmilk.<sup>78</sup> The Centers for Disease Control (CDC) provides detailed recommendations for proper storage and preparation of breastmilk, and the most prominent guidelines require, at minimum, a refrigerator and sink in order to meet both breastmilk storage and bottle cleaning recommendations.<sup>79</sup> However, limited federal requirements exist for lactation technical support components, and only four states require some sort of technical support (e.g., chair, refrigerator, sink, or outlets).<sup>80</sup> Although federal (and sometimes state) mandates regarding designated lactation spaces generally align with research evidence, lack of legal guidance concerning the quality of the space and the equipment within it can hinder employee usage and

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72. Rahmah Mohd Amin et al., *Work Related Determinants of Breastfeeding Discontinuation Among Employed Mothers in Malaysia*, INT'L BREASTFEEDING J., Dec 2011, at 1, 4.

73. Erika L. Rangel et al., *Pregnancy and Motherhood During Surgical Training*, 153 JAMA SURGERY 644 (2018).

74. See *infra* Table 2b; NAT'L CONF. STATE LEGISLATURES, *supra* note 36.

75. *Id.*

76. *Id.*

77. Eric A. Lauer et al., *Identifying Barriers and Supports to Breastfeeding in the Workplace Experienced by Mothers in the New Hampshire Special Supplemental Nutrition Program for Women, Infants, and Children Utilizing the Total Worker Health Framework*, 16 INT'L J. ENV'T RES. & PUB. HEALTH, Feb. 13, 2019, at 529.

78. Balkam, *supra* note 63, at 134.

79. *Proper Storage and Preparation of Breast Milk*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 22, 2020), [https://www.cdc.gov/breastfeeding/recommendations/handling\\_breastmilk.htm](https://www.cdc.gov/breastfeeding/recommendations/handling_breastmilk.htm).

80. NAT'L CONF. STATE LEGISLATURES, *supra* note 36.

subsequently lactation success should companies fail to provide quality lactation spaces.<sup>81</sup>

### C. *Protection from Discrimination*

Unfortunately, breastfeeding and lactation at work are still stigmatized behaviors within the United States.<sup>82</sup> The impact of such stigmatization (and associated discrimination or micro-aggressions) has been shown to negatively impact workplace lactation behaviors.<sup>83</sup> Federal law prohibits employment discrimination based on pregnancy, childbirth, or related medical conditions.<sup>84</sup> While this discrimination protection is perhaps more widely accepted and enforced compared to the time and space policies, not every state explicitly recognizes lactation as a related medical condition.<sup>85</sup> Furthermore, lactating employees may experience discrimination in the form of hiring practices, pay inequities, and promotion practices, but beyond that, mothers can experience less visible discriminatory acts from supervisors and coworkers. For example, a supervisor may perceive a lactating employee as not serious about their work for taking multiple thirty-minute breaks a day, so the supervisor may withhold advancement opportunities for that employee. Research suggests that negative interactions with others at work about lactation behaviors is an important predictor of lactation discontinuation, with some evidence noting that these social components are even more important than the provision of structural supports such as breaks or lactation spaces.<sup>86</sup> Although laws are unable to directly influence social interactions, they can provide directives to organizations about what type of inclusionary behavior is expected and provide basic support against lactation-based discrimination. However, this is not the case as many of the current legal supports do not adequately address lactation-based discrimination.

### D. *Provision of Online Data and Lactation Information*

Some state laws (e.g., Colorado, Hawaii) require that state websites provide workplace lactation-related data and resources for employers and mothers.<sup>87</sup> No equivalent federal mandate exists.<sup>88</sup> Although providing links and online resources is not a primary, research-backed lactation support, increased knowledge about lactation has been shown to support continued lactation

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81. LIZ MORRIS ET AL., *CTR. FOR WORKLIFE L., EXPOSED: DISCRIMINATION AGAINST BREASTFEEDING WORKERS* 5 (2019).

82. *Id.* at 4.

83. Balkam, *supra* note 63, at 139.

84. *CTR. FOR WORKLIFE L., 50 STATE SURVEY OF WORKPLACE LACTATION LAWS* 2 (2019).

85. *Id.* at 5.

86. *Got Milk?*, *supra* note 2, at 692.

87. NAT'L CONF. STATE LEGISLATURES, *supra* note 36.

88. *See infra* Table 3.

behaviors.<sup>89</sup> While not covered by current laws, organizations should also communicate their own policies and benefits in addition to sharing government resources online. Research shows that having awareness of organizational policies and benefits can increase both lactation initiation and continuation.<sup>90</sup>

In addition to providing direct, clear information on how to lactate at work and how to access benefits, knowledge about workplace lactation and the lactation policies and benefits can help build perceptions of societal and organizational support for lactation.<sup>91</sup> Providing information on state websites can help support positive societal norms around workplace lactation, providing visible information about company-specific workplace lactation supports within an organization can cultivate a supportive organizational climate for lactation.<sup>92</sup> Overall, there is some evidence from organizational science that providing access to lactation information-based resources likely facilitates prolonged lactation behaviors.<sup>93</sup> The lack of legal mandates to provide accessible policy and lactation information is a gap in current legislation.

#### E. Baby-Friendly Designation

Finally, several states either encourage (e.g., Alaska) or require (e.g., California) their health care facilities to participate in the Baby-Friendly Hospital Initiative.<sup>94</sup> A handful of others (e.g., Florida) deem it appropriate for employers to use the designation “baby-friendly” on promotional materials if they follow at least eighty percent of the initiatives.<sup>95</sup> It is important to note that “baby-friendly” is specific to the hospital setting; however, three states (i.e., North Dakota, Texas, and Washington) extend this term to employers beyond the health care field and award employers for adopting workplace lactation policies (e.g., “scheduling breaks and permitting work patterns that provide time for expression of breast milk; convenient, sanitary, safe, and private location other than a restroom for expressing breast milk; and a refrigerator in the workplace for temporary storage of breastmilk”).<sup>96</sup> Hospitals’ “baby-friendly” designation has not been associated with significant increases in lactation

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89. OFF. SURGEON GEN., DEP’T HEALTH & HUM. SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO SUPPORT BREASTFEEDING 16 (2011).

90. Su-Ying Tsai, *Impact of a Breastfeeding-Friendly Workplace on an Employed Mother’s Intention to Continue Breastfeeding After Returning to Work*, 8 BREASTFEEDING MED. 210, 215 (2013).

91. *Id.*

92. Liz Morris et al., *How Companies Can Support Breastfeeding Employees*, HARV. BUS. REV. (Apr. 30, 2019), <https://hbr.org/2019/04/how-companies-can-support-breastfeeding-employees>.

93. OFF. SURGEON GEN., *supra* note 89, at 23.

94. *New Data: Baby-Friendly Hospital Laws*, BILL HEALTH (July 27, 2017), <https://blog.petrieflom.law.harvard.edu/2017/07/27/new-data-baby-friendly-hospital-laws/>.

95. NAT’L CONF. STATE LEGISLATURES, *supra* note 36.

96. *Id.*

duration,<sup>97</sup> but worksite lactation support recognition initiatives are the least backed by research evidence.<sup>98</sup> Although the research supporting their efficacy in promoting lactation success is sparse,<sup>99</sup> worksite lactation support recognition initiatives are likely an impactful step in dismantling social barriers associated with lactation success (e.g., stigma, supervisor retaliation).

#### V. WHAT IS MISSING? RESEARCH-BASED RECOMMENDATIONS NOT COVERED BY LAW

Although time and space provisions are the most commonly studied benefits and the benefits most commonly included in policy, recent reviews on the predictors of successful workplace lactation suggest that there are additional workplace factors that are important in facilitating successful workplace lactation.<sup>100</sup> The majority of these are social factors. Interpersonal support from others at work (e.g., supervisors and coworkers) is a consistent predictor of workplace lactation success.<sup>101</sup> Although laws cannot address the social components directly, laws and policies can indirectly influence these by (1) providing protections against discrimination due to workplace lactation behaviors, and (2) helping to build national and local climates and norms where workplace lactation is common and accepted.<sup>102</sup>

There are several additional factors that have been identified as supporting employee lactation that can be directly addressed by policy. First, having access to the infant during work hours and/or quality childcare that is located near the workplace or home are predictive of increased lactation durations.<sup>103</sup> Second, the physical conditions of the job can also play an important role in workplace lactation. Hazardous work conditions, safety and privacy concerns, and restrictive work environments are all associated with decreased lactation behaviors.<sup>104</sup> Legislation that provides childcare support and worksite accommodations for safe work conditions may be a way to expand upon current policies to further support working mothers and their associated lactation goals.

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97. OFF. SURGEON GEN., *supra* note 89, at 25.

98. Allison C. Munn et al., *The Impact in the United States of the Baby-Friendly Hospital Initiative on Early Infant Health and Breastfeeding Outcomes*, 11 BREASTFEEDING MED. 222, 228 (2016).

99. *Id.*

100. Lauer et al., *supra* note 77.

101. See Bai & Wunderlich, *supra* note 71, at 695; Balkam, *supra* note 63, at 139.

102. OFF. SURGEON GEN., *supra* note 89, at 19.

103. See Jennifer Baxter, *Breastfeeding, Employment and Leave: An Analysis of Mothers in Growing Up in Australia*, FAM. MATTERS, no. 80, 2008 at 17, 23; Carole Gilmour et al., *Breastfeeding Mothers Returning to Work: Experiences of Women at One University in Victoria, Australia*, 21 BREASTFEEDING REV. 23, 26 (2013); Alison Jacknowitz, *The Role of Workplace Characteristics in Breastfeeding Practices*, 47 WOMEN & HEALTH 87, 91 (2008).

104. *Identifying Job Characteristics*, *supra* note 5, at 468.

## VI. ADDITIONAL CONSIDERATIONS

A. *Laws Function as Guides for Organizational Policy*

Lactation-supportive laws empower lactating employees by influencing organizational policy, which in turn influences employee lactation behaviors.<sup>105</sup> Therefore, laws represent a macro-level way to support workplace lactation and help ensure that lactating employees have at least the minimum protections and benefits needed to sustain lactation after returning to work postpartum. Legal supports for lactation can also positively influence societal norms surrounding employee lactation by communicating that lactation is an accepted and protected workplace behavior.<sup>106</sup> This Article's review found that there are a variety of different federal and state legal protections that both directly (e.g., lactation break time mandates) and indirectly (e.g., maternity leave) support lactation. Laws and policies for maternity leave, adequate break time, and appropriate non-bathroom lactation space are all well-documented as promoting continued breastfeeding.<sup>107</sup>

However, the utility of organizational benefits in supporting employee health behaviors is more complex than simply policy and benefit provisions.<sup>108</sup> Even when lactation benefits are provided by organizations, there are a variety of reasons why a lactating employee may not utilize them.<sup>109</sup> For example, an employee may be more likely to use a lactation room that is conveniently located near her workspace than a lactation room that requires that she travel longer distances or have to transport pumping equipment across buildings. Similarly, an employee who must renegotiate lactation breaks with their supervisor on a daily basis or continuously find coworkers to cover for them during their break time may be less likely to sustain workplace lactation over time compared to an employee who has set break times and established workload sharing routines. Other factors such as possible financial burdens, social cues, and the quality of the benefits provided can all impact usage and usefulness.<sup>110</sup> Employees must feel that the benefit is safe to use—retaliation or discrimination can be a major contributor to benefit nonuse.<sup>111</sup>

For organizational policies to work, employees must know about the policies, feel safe using them, and feel that the benefits are being provided in a

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105. Whitley et al., *supra* note 71, at 717.

106. OFF. SURGEON GEN., *supra* note 89, at 17.

107. Murtagh & Moulton, *supra* note 6, at 219–21.

108. Ocampo-Guirindola et al., *supra* note 71, at 323.

109. Lauer et al., *supra* note 77.

110. OFF. SURGEON GEN., *supra* note 89, at 13.

111. MORRIS ET AL., *supra* note 81, at 11.

way that is feasible and helpful.<sup>112</sup> This requires quality implementation of the benefits within each organization to effectively impact individual employee lactation behaviors.<sup>113</sup> Although research generally shows that the benefits outlined in current laws and policies are helpful for employee lactation, research also demonstrates that there is a wide variability in how helpful benefits are based on their implementation and quality.<sup>114</sup> For example, the availability of equipment like a refrigerator, outlet, sink, or pump that supports milk expression can impact lactation room use.<sup>115</sup> However, many of the legal protections are broad and, outside of some specific requirements for non-bathroom spaces, do not provide specific requirements for the equipment and conditions needed to adequately support employees.<sup>116</sup> Because of this, meeting the legal requirements and providing only the bare minimum benefits to lactating employees is likely insufficient to completely support continued lactation. Without more comprehensive laws and policies that require high quality implementation—and clear guidance of what that entails—variability of how organizations provide helpful supports to their lactating employees will continue.

*B. Minimal Benefits Can Disadvantage Lower Income Mothers*

Breastfeeding rates vary across states and demographics (e.g., race, income level, and age).<sup>117</sup> Subgroups of mothers may have different lactation practices because discrepancies in policies and insufficient legal protection have a domino effect that results in varied organizational policy availability and resource use.<sup>118</sup> At an individual level, the economic status of mothers is likely to influence their decision on taking a shorter postpartum leave and returning to work early if they have financial obligations to fulfill.<sup>119</sup> In addition, women who are high-wage earners have an advantage in juggling work and lactation demands compared to

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112. DIV. NUTRITION, PHYSICAL ACTIVITY, & OBESITY, CTRS. FOR DISEASE CONTROL & PREVENTION, STRATEGIES TO PREVENT OBESITY AND OTHER CHRONIC DISEASES: THE CDC GUIDE TO STRATEGIES TO SUPPORT BREASTFEEDING MOTHERS AND BABIES 25 (2013).

113. *Id.* at 24.

114. Bai & Wunderlich, *supra* note 71.

115. *Id.*

116. *See infra* Table 2b.

117. *Results: Breastfeeding Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION (2019), [https://www.cdc.gov/breastfeeding/data/nis\\_data/results.html](https://www.cdc.gov/breastfeeding/data/nis_data/results.html).

118. Summer S. Hawkins et al., *The Impact of Maternal Employment on Breast-feeding Duration in the UK Millennium Cohort Study*, 10 PUB. HEALTH NUTRITION 891, 895 (2007). *See also infra* Table 2b.

119. Lauer et al., *supra* note 77; Murtagh & Moulton, *supra* note 6, at 219.

those in lower-wage earning positions due to both financial and job flexibility (e.g., more schedule control).<sup>120</sup>

Without incentives to provide lactation benefits that fit employees' financial and situational needs, many companies only provide the minimum support required by law.<sup>121</sup> This can result in lack of benefit usage, particularly for economically disadvantaged employees.<sup>122</sup> Unpaid lactation breaks, for example, can disincentivize taking such breaks and cause employees who do use them to spend more time at work (which can have additional negative downstream challenges, such as increased child/elder care costs or disrupted family care) to earn wages comparable to their pre-lactating norms.<sup>123</sup> Thus, although the laws are generally in alignment with resources recommended by organizational research, they may not be effectively promoting workplace lactation for all mothers in an equitable manner. These bare-minimum, basic-level legal protections for worksite lactation support may not be enough to provide the financial and social supports necessary for employees to truly succeed in reaching their lactation or breastfeeding goals.

## VII. CONCLUSION

The responsibility of supporting successful breastfeeding extends beyond families and health care workers in the initial days after delivery. New mothers also rely on their employers to achieve lactation goals in the months following childbirth.<sup>124</sup> The CDC cites unsupportive work policies and lack of parental leave as key reasons why mothers struggle to reach their personal breastfeeding goals and national breastfeeding duration recommendations.<sup>125</sup> To facilitate employee lactation continuation and continued labor force participation for women with infants, there are a variety of laws and policies that instruct organizations regarding the minimum basic requirements to support lactation at work. Although the current legal supports are a necessary first step in supporting lactating employees, there remain clear legislative gaps that leave many women without adequate resources to meet the AAP's lactation recommendations for their infants or to meet their personal breastfeeding goals.

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120. Guendelman et al., *supra* note 2; Cynthia M. Visness & Kathy I. Kennedy, *Maternal Employment and Breast-feeding: Findings from the 1988 National Maternal and Infant Health Survey*, 87 AM. J. PUB. HEALTH 945, 949 (1997).

121. OFF. SURGEON GEN., *supra* note 89, at 14.

122. Lauer et al., *supra* note 77.

123. *Id.*; Morris et al., *supra* note 92; MORRIS ET AL., *supra* note 81, at 13.

124. *Identifying Job Characteristics*, *supra* note 5, at 467.

125. *Breastfeeding: Data and Statistics*, CTR. FOR DISEASE CONTROL & PREVENTION (2019), <https://www.cdc.gov/breastfeeding/data/facts.html>.

Every woman should have the right to make the infant-feeding decision that is best for herself and her family.<sup>126</sup> However, current federal- and state-level laws and policies do not fully support this. Workplace constraints frequently disrupt lactation success, in spite of the laws intended to support lactating women. Lack of adequate coverage (e.g., exemptions for companies with fewer than fifty employees), limited scope (e.g., lack of important equipment for lactation spaces), and inconsistent or vague language used to describe necessary worksite supports limits the utility of the laws in supporting lactation behaviors for many women. Lactating employees need consistent break time, a non-bathroom space, equipment such as refrigerators and sinks, and social support to meet their breastfeeding goals. This Article's review found that although legal support exists for some of these needs, the current federal and state laws do not provide sufficient support for all lactation needs for all employees. To be more effective, additional protections need legal backing to ensure they are inclusive of, and financially viable for, all employees.

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126. *Joint Statement by the UN Special Rapporteurs on the Right To Food, Right To Health, The Working Group on Discrimination Against Women in Law and in Practice, and the Committee on the Rights of the Child in Support of Increased Efforts to Promote, Support and Protect Breast-feeding*, UNITED NATIONS (Nov. 22, 2016), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20871>.

Table 1. Federal mandates protecting breastfeeding employees in the workplace

Mandate	Amendment	Employer Requirements	Exclusionary Criteria
Fair Labor Standards Act of 1938 (FLSA)	Patient Protection and Affordable Care Act of 2010	<ul style="list-style-type: none"> <li>Employers must allow their employees a reasonable frequency and length of breaks to allow them to express milk.</li> <li>Employer must also provide either a dedicated lactation room or space available when the employee needs to express milk.</li> <li>Employers cannot designate bathrooms as the designated lactation space. Temporary lactation spaces are allowed only if they meet requirements of being out of view and entrance from others.</li> <li>Employers must protect employees from retaliation if they file a complaint.</li> </ul>	<ul style="list-style-type: none"> <li>Employers <i>do not</i> need to pay employees during breaks for expressing milk.</li> <li>Employers with fewer than 50 employees <i>do not</i> need to meet the FLSA time requirements for lactation breaks.</li> </ul>
Title VII of the Civil Rights Act of 1964	Pregnancy Discrimination Act of 1978	<ul style="list-style-type: none"> <li>Employers must consider expressing of milk to fall under related medical conditions due to lactation only occurring amongst those who have had a pregnancy.</li> </ul>	N/A
Family Medical Leave Act of 1993 (FMLA)	N/A	<ul style="list-style-type: none"> <li>Employers must provide 12 weeks of unpaid leave for the birth and care of a newborn child or caring for a newly adopted child.</li> </ul>	<ul style="list-style-type: none"> <li>Leave is only required to be given to employees who have worked at least 1,250 hours the past 12 months, worked for their company for at least 12 months, and their company employs 50+ employees in a 75-mile radius.</li> </ul>
Fairness for Breastfeeding Mothers Act of 2019	N/A	<ul style="list-style-type: none"> <li>Certain public federal buildings provide lactation rooms with the following characteristics: not visible to the public, not allow interruptions, chair in room, work surface in room, and electrical outlet in room.</li> </ul>	<ul style="list-style-type: none"> <li>The cost for repurposing a space or creating a new space for lactation purposes must be at a “reasonable” cost.</li> </ul>









Table 3. *Federal vs. State Differences in Breastfeeding Laws*

	Resource Provided Under Federal Law	Resource <u>Not</u> Provided Under Federal Law
<p><b>Resource Provided Under State Laws</b></p>	<ul style="list-style-type: none"> <li>• Employer must provide reasonable <b>unpaid</b> break time</li> <li>• Employer must provide a private, secure, and sanitary room for lactation (other than a restroom)</li> <li>• Prohibits discriminatory practices against breastfeeding or related medical conditions</li> </ul>	<ul style="list-style-type: none"> <li>• Allowed in any public/private location</li> <li>• Prohibits restriction in any public place or indecent exposure charges</li> <li>• Employer must provide reasonable <b>paid</b> break time</li> <li>• Employer must provide tools in designated lactation space (e.g., chair, refrigerator, sink, outlets)</li> <li>• State websites must provide data and resources for employers and mothers</li> <li>• Orgs with supportive policies can promote as infant- or mother-friendly</li> </ul>
<p><b>Resource Not Further Specified Under State Laws</b></p>	<ul style="list-style-type: none"> <li>• Employers must provide 12 weeks of unpaid leave for the birth and care of a newborn child or caring for a newly adopted child. <b>IF</b> (1) employees who have worked at least 1,250 hours the past 12 months, (2) worked for their company for at least 12 months, (3) and their company employs 50+ employees in a 75-mile radius.</li> </ul>	<ul style="list-style-type: none"> <li>• Unpaid or paid leave for <b>all</b> employees for the birth and care for a newborn child or caring for a newly adopted child.</li> </ul>

