

# PUMPING 9 TO 5: WHY THE FLSA’S PROVISIONS PROVIDE ILLUSORY PROTECTIONS FOR BREASTFEEDING MOMS IN THE WORKPLACE

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## INTRODUCTION

On March 30, 2010, former President Barack Obama signed into law the Patient Protection and Affordable Care Act, which amended the Fair Labor Standards Act (“FLSA”) of 1938. Due to this amendment, the FLSA now requires employers to provide workplace accommodations for

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working mothers who wish to continue expressing breast milk after returning to work. Although this legislation was intended to be a step in support of transforming the role of women in the workplace, in practice its protections fail to advance the legal policies and progressive changes to the American workplace that our society has tirelessly pushed for. This Note proposes legislative reform that would amend the FLSA to actually advance workplace equality and offers meaningful protections for working mothers. In support of this conclusion, this Note begins in Part I by discussing the benefits of adopting legislation that increases the amount of support for breastfeeding mothers in the workplace. Part I also compares the current American approach to the far more progressive approaches taken by select employers and other countries. Part II provides a discussion of the FLSA's legal impact on employers and employees and also addresses how the FLSA interacts with the Pregnancy Discrimination Act. Part III proposes legislative reform (accompanied by suggested regulations) that addresses and resolves the deficiencies in the FLSA. Finally, Part IV evaluates the effectiveness of the proposed solution while addressing concerns that commentators may have.

## I. BACKGROUND

### A. How Breastfeeding Better Babies, Mothers, Businesses, and Taxpayers

It is well settled that both children and mothers stand to benefit from an increase in the number of women who are able to breastfeed while at work.<sup>1</sup> Not only are breastfed babies less likely to be burdened by short-term illnesses,<sup>2</sup> but evidence also demonstrates that they will have a lesser risk of being stricken by Sudden Infant Death Syndrome,<sup>3</sup> childhood cancer,<sup>4</sup> type 1 and 2 diabetes,<sup>5</sup> cardiovascular disease,<sup>6</sup> and other fatal illnesses.<sup>7</sup> In fact, if every new mother was able to follow the medical

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1. Observational studies show that “[f]or every 1,000 babies not breastfed, there are an extra 2,033 physician visits, 212 days in the hospital and 609 prescriptions.” *Investing in Workplace Breastfeeding Programs and Policies*, NAT’L BUS. GRP. ON HEALTH, <https://www.businessgrouphealth.org/pub/f2ffe4f0-2354-d714-5136-79a21e9327ed> (2009); see also *Women, Infants and Children (WIC): Breastfeeding Promotion and Support in WIC*, U.S. DEP’T. OF AGRIC., <http://www.fns.usda.gov/wic/breastfeeding-promotion-and-support-wic> (last updated Apr. 22, 2016).

2. Tufts-New England Med. Ctr. Evidence-Based Practice Ctr., *Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries*, 153 EVIDENCE REPORT/TECHNOLOGY ASSESSMENT 1, 3-5 (Apr. 2007), <http://archive.ahrq.gov/downloads/pub/evidence/pdf/brfout/brfout.pdf>.

3. *Id.* at 5.

4. *Id.*

5. *Id.*

6. *Id.* at 4.

7. *Id.* at 3-5.

recommendation of breastfeeding exclusively for six months, then over 900 infant lives could be saved each year.<sup>8</sup> In addition to reducing childhood illnesses, breastfeeding can also largely impact the health of the nursing mother. Research unequivocally shows that mothers who breastfeed their children have a reduced risk of breast cancer, ovarian cancer, type 2 diabetes, postpartum depression,<sup>9</sup> and cardiovascular disease.<sup>10</sup>

Because this Note advances legislation that may impact the policies currently in place by American companies, it is important to discuss the companies that have already implemented progressive breastfeeding accommodation policies, based in part on the realization that these policies can benefit the company socially and economically. For starters, by accommodating the employees' work-life balances, these employers have put themselves in a better position to build loyalty with their employees. In fact, multiple companies with lactation support programs have increased their average retention rates to a staggering 94.2%.<sup>11</sup>

These forward-moving lactation programs have also brought huge financial benefits to employers. When CIGNA, a healthcare services company that employs approximately 26,000 employees, implemented a lactation program that enabled women to breastfeed in private rooms during work hours,<sup>12</sup> it reaped a net benefit of \$240,000 in annual healthcare savings.<sup>13</sup> Furthermore, the program led to another \$60,000 in savings due to a 77% reduction in lost work-time related to infant illness.<sup>14</sup> At the time of the study, 72% of mothers working at CIGNA continued breastfeeding through month six,<sup>15</sup> which is well above the national average of 21%.<sup>16</sup>

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8. Melissa Bartick & Arnold Reinhold, *The Burden of Suboptimal Breastfeeding in the United States: A Pediatric Cost Analysis*, 125 PEDIATRICS e1048, e1052 (2010).

9. In 2007, the Department of Health and Human Services Agency for Healthcare Research and Quality published a comprehensive review of research on the benefits of breastfeeding and concluded that breastfeeding mothers enjoy a reduced risk of breast cancer, ovarian cancer, type 2 diabetes, and postpartum depression. *Breastfeeding and Maternal and Infant Health Outcomes in Developed Countries*, *supra* note 2, at v.

10. Eleanor Bila Schwarz et al., *Duration of Lactation and Risk Factors for Maternal Cardiovascular Disease*, 113 OBSTETRICS & GYNECOLOGY 974, 976-77 (2009).

11. Joan Ortiz et al., *Duration of Breast Milk Expression Among Working Mothers Enrolled in an Employer-Sponsored Lactation Program*, 30 PEDIATRIC NURSING 111, 116 (2004).

12. Sarah Andrews, *Lactation Breaks in the Workplace: What Employers Need to Know About the Nursing Mothers Amendment to the FLSA*, 30 HOFSTRA LAB. & EMP. L.J. 121, 154-55 (2012). ("CIGNA implemented a lactation program across all its offices which included private rooms that either contain, or are within close proximity to: a sink; a breast pump for all employees; permission to express milk during standard break times; education kits; consultations before and after birth; classes; a lactation consultant; and mother-to-mother support via postings in the nursing mother rooms.")

13. *Id.* at 155.

14. *Id.*

15. *Id.*

16. *Investing in Workplace Breastfeeding Programs and Policies*, *supra* note 1, at 4.2.

Similarly, the Los Angeles Department of Water and Power implemented a workplace lactation program and reported that the program reduced absenteeism by 27% and health care claims by 35%.<sup>17</sup> Not only did it report an increase in employee loyalty, productivity, recruitment and public image, but it also “saw at least a \$2.50 return for every \$1.00 spent.”<sup>18</sup> Rather unexpectedly, companies that enable working moms to breastfeed on-site have also seen an increase in attendance at work from male employees with breastfeeding partners.<sup>19</sup>

While some employers may see these lactation programs as a financial burden, other employers are recognizing and taking advantage of the economic benefits that flow from such programs. Specifically, the Vice President of Human Resources at IBM Corporation spoke about the cost-benefit analysis of IBM’s lactation program, acknowledging that it “was not a huge cost in the grand scheme of things,” especially compared to the cost of “[g]etting and keeping qualified, talented female employees[.]”<sup>20</sup>

Unfortunately, with only 18%<sup>21</sup> of women meeting the recommended six months for breastfeeding,<sup>22</sup> our nation’s breastfeeding rates are far below average, which has resulted in a large and unnecessary financial burden on our country. Consequently, taxpayers are tasked with carrying this burden by having to contribute to the cost of feeding children that live in low-income families. A vast majority of infants born in the United States receive federal assistance from the Women, Children and Infants program (“WIC”).<sup>23</sup> This program uses government funding to provide low-income families with food packages and other health assistance.<sup>24</sup> Of the 1.93 million infants that annually receive this

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17. Kathryn Tyler, *Got Milk? How To Establish a Workplace Lactation Program*, 44 HR MAG, (Mar. 1999).

18. *Id.*

19. Judith Galtry, *Lactation and the Labor Market: Breastfeeding, Labor Market Changes and Public Policy in the United States*, 18 HEALTH CARE WOMEN INT’L 467, 480 (1997).

20. Jena McGregor, *IBM will make it easy for new moms to ship home breast milk for free while traveling*, THE WASHINGTON POST (July 13, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/07/13/ibm-will-make-it-easy-for-new-moms-to-ship-home-breast-milk-for-free-while-traveling/>.

21. *Breastfeeding Report Card: United States/2014*, NAT’L. CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION (July 2014), <http://www.cdc.gov/breastfeeding/pdf/2014breastfeedingreportcard.pdf>.

22. Andrea Freeman, “*First Food*” *Justice: Racial Disparities in Infant Feeding as Food Oppression*, 83 FORDHAM L. REV. 3053, 3062 n.65 (2015).

23. *See Women, Infants and Children (WIC): About WIC - WIC at a Glance*, U.S. DEP’T OF AGRIC., <http://www.fns.usda.gov/wic/about-wic-wic-glance> (last updated Feb. 27, 2015).

24. *Id.* (“WIC is not an entitlement program as Congress does not set aside funds to allow every eligible individual to participate in the program. WIC is a Federal grant program for which Congress authorizes a specific amount of funds each year for the program.”).

assistance, only 12.9% of them are fully breastfed.<sup>25</sup> Mothers participating in the WIC program breastfeed at a rate of one-half to one-third of the rate of non-WIC mothers,<sup>26</sup> which directly contributes to the \$850 million WIC spends a year on infant formula.<sup>27</sup> In sum, the United States could save \$13 billion annually in pediatric health care costs if it implemented policies that increased breastfeeding rates to 90%.<sup>28</sup>

## **B. America Lags in Accommodating Breastfeeding Employees**

Despite the undisputed benefits to having more women be able to breastfeed and breastfeed longer, American employers have been slow to react and adapt to this reality. In fact, the United States comes in behind all other developed countries in terms of providing support for breastfeeding.<sup>29</sup> While it is recommended that all mothers breastfeed exclusively for six months, a large amount of American mothers completely give up breastfeeding less than seven weeks after returning to work.<sup>30</sup> With America ranking last among developed countries in terms of supporting breastfeeding mothers, it no longer seems shocking that only 18% of American mothers meet the recommended six months of exclusive breastfeeding.<sup>31</sup> On the other hand, corporations in Norway allow nursing mothers to take an unlimited number of nursing breaks, which has contributed to an astonishing breastfeeding rate of 99%.<sup>32</sup> Norway's progressive approach proves that supportive policies bring favorable results.<sup>33</sup>

The Center for Disease Control and Prevention (the "CDC") acknowledged that American companies do not have sufficient policies in place for breastfeeding employees.<sup>34</sup> The CDC included increasing the

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25. See *FY 2015 WIC Breastfeeding Data Local Agency Report*, U.S. DEP'T. OF AGRIC. (July 2016), <http://www.fns.usda.gov/sites/default/files/wic/FY%202015%20BFDLA%20Report.pdf>.

26. See Freeman, *supra* note 22, at 3067 n.103.

27. Zoe Nueberger, *WIC Food Package Should Be Based on Science: Foods with New Functional Ingredients Should Be Provided Only If They Deliver Health or Nutritional Benefits*, CTR. ON BUDGET AND POLICY PRIORITIES (June 4, 2010), <http://www.cbpp.org/sites/default/files/atoms/files/6-4-10fa.pdf>.

28. Bartick & Reinhold, *supra* note 8, e1052.

29. The U.S. ranks last of the thirty-six countries listed, with a score of 4.2. At the other end of the list, Norway ranks highest, with a score of 9.2. See Gilan Gertz, *U.S. Tops the Charts with Stigma Against Breastfeeding*, DECODED PREGNANCY (Oct. 17, 2003), <http://decodedpregnancy.com/breastfeeding-stigma-in-america/3098/>.

30. Bartick & Reinhold, *supra* note 8.

31. See Freeman, *supra* note 22, at 3062 n.65; see also *Breastfeeding Report Card: United States/2014*, *supra* note 21.

32. See Gertz, *supra* note 29.

33. See *id.*

34. See *Breastfeeding Report Card: United States/2014*, *supra* note 21.

proportion of employers that have worksite lactation programs by 38% as part of its Health People 2020 goal, thus recognizing the impact that workplace accommodations have on increasing breastfeeding rates.<sup>35</sup> Indicators that America is failing to provide adequate support for breastfeeding moms in the workplace do not end there. Statistics show that despite the fact that the number of moms entering the workforce is increasing, the number of moms in the workplace that continue to breastfeed is decreasing. For example, in 2008 the number of mothers in the workforce that had children peaked at 71%,<sup>36</sup> but only 12% of those moms were exclusively breastfeeding their kids at six months.<sup>37</sup> Strikingly, in 2014 the CDC reported a 7% increase in the number of mothers meeting the breastfeeding recommendation,<sup>38</sup> but the labor force participation rate for mothers decreased by an identical 7%.<sup>39</sup> Further illustrative is data showing that, each year, the percentage of women with young children in the labor force is less than the rate of women with older children in the workforce.<sup>40</sup> These facts clearly prove that the current workplace environment provided by American employers is less conducive for mothers of young children.

Not only does the research demonstrate that our nation's employers are failing to provide nursing mothers with adequate support, legal scholars and legislators are also tirelessly advocating for a change in the American workplace. Galen Sherwin, Senior Staff at the American Civil Liberties Union, noted that "women who choose to continue breastfeeding when they return to the paid workforce face insurmountable obstacles that can make them choose between their jobs and what is in the best interest of their babies[.]"<sup>41</sup> The simple truth is that a vast majority of American employers have not implemented sufficient breastfeeding policies. Although a portion of this lag can likely be attributed to a lack of awareness of the immense

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35. *Id.*

36. *Labor force participation of mothers with infants in 2008*, U.S. DEP'T. OF LABOR (May 29, 2009), <http://www.bls.gov/opub/ted/2009/may/wk4/art04.htm>.

37. *Breastfeeding Report Card—United States, 2008*, NAT'L. CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION (Aug. 2008), <http://www.cdc.gov/breastfeeding/pdf/2008breastfeedingreportcard.pdf>.

38. *Breastfeeding Report Card: United States/2014*, *supra* note 21.

39. *Employment Characteristics of Families – 2015*, U.S. DEP'T. OF LABOR (Apr. 22, 2016), <http://www.bls.gov/news.release/pdf/famee.pdf>.

40. *See Labor force participation of mothers with infants in 2008*, *supra* note 36 (reporting that, in general, mothers with older children (six to seventeen years of age) are more likely to participate in the labor force than mothers with younger children (under six years of age)); *see also Employment Characteristics of Families – 2015*, *supra* note 39 (In 2014, the LFPR for mothers with children under six years old was 64%, while mothers with infants under a year old was 57%); *see also Labor force participation*, *supra* note 36 (In 2008, LFPR of mothers with children under one year was 56.4%, 77.5% of mothers with older children were in the labor force, compared with 63.6% of mothers with younger children).

41. Allison Yarrow, *Pumped Up: Breastfeeding Mothers Fight for Rights at Work*, NBC NEWS (Jan. 11, 2014), <http://www.nbcnews.com/news/us-news/pumped-breastfeeding-mothers-fight-rights-work-n7576>.

benefits associated with breastfeeding, the truth remains that the United States is continuing to fall far behind the rest of the developed countries and change needs to be effectuated.

## II. WHY FEDERAL LEGISLATION IS CURRENTLY INSUFFICIENT

If you are a mother returning to work after maternity leave, can you continue to feed your newborn baby breast milk? Is your workplace required to give you pumping breaks? If so, how many and for how long? Must your employer provide you with a private room to pump? What about a chair to sit in? Will you be paid during this time? What if you are a salaried employee?

Before 2010, employers had no obligation under federal law to provide nursing mothers with accommodations upon returning to work from maternity leave. Both the legislative and executive branches recognized this gap in American legislation and on March 30, 2010, former President Barack Obama signed into law the Affordable Care Act (the “ACA”), which, among other things, amended the FLSA to require employers to provide reasonable break time for an employee to express milk for up to one year after her child’s birth.<sup>42</sup> Unfortunately, even after the amendment to the FLSA, employees are often left without the accommodations and legal tools they need in order to continue breastfeeding after returning to work.

At the outset, the FLSA does not require employers to pay employees for time spent pumping, even if they continue to work while they are pumping.<sup>43</sup> It also fails to address what “unpaid pumping breaks” means for salaried workers. Furthermore, these accommodations expire on the baby’s first birthday, which effectively eliminates all protections for those employees who wish to breastfeed beyond year one.<sup>44</sup> The legislation also fails to mention the necessities tied to breastfeeding, such as a requirement that the employer provide a place for the employee to store her expressed milk. Mothers who work for employers with less than fifty employees will often find themselves without any protections at all under the FLSA because the employer can invoke the “undue hardship” exception.<sup>45</sup>

The discussion of the current framework of American federal legislation is divided into two parts. This Section starts by addressing the holes within the FLSA that have effectively rendered the provision useless to those employees wishing to continue expressing milk for their babies after returning to work. Due to the deficiencies in the FLSA, employees

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42. 29 U.S.C. § 207(r)(1)(A) (2015).

43. *Id.* § 207(r)(2).

44. *Id.* § 207(r)(1)(A).

45. *Id.* § 207(r)(3).

have attempted to sue non-compliant employers under the Pregnancy Discrimination Act (the “PDA”). Therefore, the second part of this Section addresses the approaches that federal courts have taken with regard to whether the PDA requires employers to provide workplace accommodations for nursing mothers.

### A. Illusory Protections Under the Patient Protection and Affordable Care Act

As part of the gradual transformation of the role of women in the workplace, Congress made its first real attempt to provide post-partum protection for working mothers in 2010 when it enacted the ACA. In part, the ACA amended the FLSA so that federal law now *requires*<sup>46</sup> employers to provide “*reasonable* break time for an employee to express breast milk for her nursing child for [one] year after the child’s birth each time such employee has need to express the milk[.]”<sup>47</sup> Under the ACA’s amendment to the FLSA, which is contained in Section 207(r) of the FLSA, employers are told to provide working mothers with “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”<sup>48</sup> While this legislation can certainly be viewed as a step toward workplace equality, it is unfortunately flawed in three significant ways: (1) the limited scope of its application; (2) the bare-bone requirements that leave employees without vital accommodations; and (3) the lack of an enforcement mechanism or remedy against non-compliant employers.

In terms of exceptions, employers with less than fifty employees can escape Section 207(r) altogether by showing that providing the accommodations would cause the employer an “undue hardship.”<sup>49</sup> Furthermore, the FLSA carves out a broad group of exempt employees to which employers do not owe a duty of accommodation.<sup>50</sup> In light of these broad-sweeping exceptions, Grace Meng from the United States House of Representatives introduced the 2015 Fair Access for Moms Act.<sup>51</sup> This pending legislation would extend protections by requiring employers with less than *fifteen* employees to give working moms a private place to pump breast milk at work.<sup>52</sup> While employers or other opponents may argue against limiting the scope of the undue hardship exception, the Fair Access for Moms Act simply makes the rights for nursing mothers in the workplace

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46. The emphasis on “requirement” is added because the legislation’s exceptions, language, and enforcement procedures for violators hardly work together to actually require employers to do anything.

47. 29 U.S.C. § 207(r)(1)(A) (emphasis added).

48. *Id.* § 207(r)(1)(B).

49. *Id.* § 207(r)(3).

50. *Id.* § 207(r)(2).

51. Fair Access for Moms Act, H.R. 2836, 114th Cong. (2015).

52. H.R. 2836 (emphasis added).

apply to the same scope of employers as the Civil Rights Act of 1964;<sup>53</sup> the Americans with Disabilities Act;<sup>54</sup> other similar federal accommodation and anti-discrimination laws; and similar proposed legislation, such as the Pregnant Workers Fairness Act.<sup>55</sup>

The second issue with the FLSA lies with its bare-bone standards. Under the FLSA, employers that do not fall into one of the exceptions must comply with only two requirements. They must provide the employee with (1) reasonable break time to express breast milk and (2) a place, other than a bathroom, to express breast milk.<sup>56</sup> Unfortunately, these two requirements are written and structured in a way that hinders the advancement of meaningful protections for employees who want to express milk after returning to work. The first provision requires employers to provide “reasonable break time” for an employee to express milk.<sup>57</sup> In practice, the use of a “reasonableness” standard leaves employers with a considerable amount of discretion in determining how much time to give an employee to express milk at work.

The Department of Labor’s Wage and Hour Division (the “WHD”) is the body in charge of administering and enforcing these provisions, yet it has offered employers and employees virtually zero guidance as to what it believes is required of employers under the FLSA.<sup>58</sup> In terms of the length of breaks, the United States Department of Health and Human Services recommended that employers allow employees to take a fifteen-minute break, plus time to go to and from the lactation room, every three hours.<sup>59</sup> This recommendation fails to take into account the fact that a fifteen-minute break would often be insufficient for a mother who only feeds her infant breast milk and does not wish to supplement with formula. In addition, this recommendation is not mandatory authority, and nothing in the FLSA expressly prohibits an employer from limiting breaks to five or ten minutes at a time.

The second provision of Section 207(r) states that employers should provide “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”<sup>60</sup> Equally insufficient is the WHD’s suggestion that employers ensure the nursing mother’s privacy

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53. 42 U.S.C. § 2000e (1978).

54. 42 U.S.C. § 12101 (2009).

55. H.R. 2836.

56. 29 U.S.C. § 207(r)(1)(A)-(B) (2015).

57. *Id.* § 207(r)(1)(A).

58. *Break Time for Nursing Mothers under the FLSA*, U.S. DEP’T OF LABOR (2013), <https://www.dol.gov/whd/regs/compliance/whdfs73.pdf>.

59. *The Business Case for Breastfeeding For Managers*, U.S. DEP’T OF HEALTH AND HUMAN SERVS. (2008), <https://www.womenshealth.gov/files/assets/docs/breastfeeding/business-case/business-case-for-breastfeeding-for-business-managers.pdf>.

60. 29 U.S.C. §207(r)(1)(B).

“through means such as signs . . . or a lock on the door.”<sup>61</sup> Once again, the FLSA does not actually require employers to provide nursing mothers with an enclosed room that has a lock or even a door. Furthermore, there is no guidance from the text of the legislation or from the WHD on how much space employers need to provide for the employee. It is the absence of particulars like these that leaves room for an employer to merely offer an employee a small closet with a curtain or a divider. Not only would this likely discourage an employee from continuing to breastfeed, but an employee forced to nurse in such conditions would likely suffer from embarrassment and a hostile work environment.<sup>62</sup>

The two requirements in Section 207(r) also allow employers to deny employees access to the necessities associated with expressing milk. For example, if an employer refused to provide a place for the employee to store her expressed milk, which could easily be kept in the office refrigerator, it would not be a per se violation of the FLSA. Similarly, Section 207(r) does not require an employer to provide a room that has an electrical outlet for the pump or a chair or table for the mother to use while breastfeeding, all of which are necessary parts of the breastfeeding or breast milk-pumping process.<sup>63</sup> Furthermore, the FLSA does not require employers to compensate employees for time spent expressing milk, making the option economically infeasible for lower-class women and leaving unclear how employers should handle salaried employees.<sup>64</sup>

The fatal flaw in Section 207(r) is the lack of protection from workplace discrimination that it provides to breastfeeding employees. Section 216(b) of the FLSA governs enforcement of Section 207.<sup>65</sup> In pertinent part, Section 216(b) provides that “[a]ny employer who violates the provision[] of . . . section 207 . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.”<sup>66</sup> Since damages for violations of Section 207(r) are limited to unpaid wages,<sup>67</sup> and since employers are not required to compensate employees for time spent expressing milk,<sup>68</sup> there does not appear to be a remedy for those employees that are denied

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61. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80,073, 80,076 (Dec. 21, 2010).

62. Nancy Ehrenreich & Jamie Siebrase, *Breastfeeding on a Nickel and a Dime: Why the Affordable Care Act's Nursing Mothers Amendment Won't Help Low-Wage Workers*, 20 MICH. J. RACE & L. 65, 91-92 (2014).

63. Katherine R. Shealy et al., *The CDC Guide to Breastfeeding Interventions*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., 8 (2005), [www.cdc.gov/breastfeeding/pdf/breastfeeding\\_interventions.pdf](http://www.cdc.gov/breastfeeding/pdf/breastfeeding_interventions.pdf).

64. 29 U.S.C. § 207(r)(2).

65. *Id.* § 216(b).

66. *Id.*

67. *Id.*

68. *Id.* § 207(r)(2).

accommodations. Further limiting the WHD's enforcement abilities is the FLSA's failure to grant employees a cause of action against non-compliant employers.<sup>69</sup> This means that when the WHD investigates a claim, it is limited to mediating disagreements among employers and employees and explaining to the employer what the FLSA requires.<sup>70</sup>

The cases following the amendment to the FLSA are illustrative of the lack of protection an employee receives when an employer denies her the required accommodations.<sup>71</sup> In *Salz v. Casey's Marketing Co.*, the plaintiff brought a federal claim against her employer after the employer denied her a place to express milk that was free of video surveillance cameras.<sup>72</sup> Prior to returning to work at the local convenience store, the plaintiff's supervisor assured her that she would be allowed to express breast milk while at work and that the store's office was a secure and private place for her to do so.<sup>73</sup> Shockingly, while the plaintiff was expressing milk, she discovered that she was being recorded by a video camera that was recently installed in the office.<sup>74</sup> She alerted her employer that the camera was causing her discomfort, interfering with her ability to relax, and ultimately causing a noticeable reduction in her milk production.<sup>75</sup> The employer subsequently refused to disable the camera and reprimanded her for allegedly failing to fill an ice cream machine.<sup>76</sup>

When the plaintiff brought suit under the FLSA, the employer filed a motion to dismiss, arguing that Section 207(r) did not provide the plaintiff with a cause of action for failure to accommodate.<sup>77</sup> Unfortunately, the employer was legally correct and the United States District Court for the Northern District of Iowa dismissed the plaintiff's claim.<sup>78</sup> In doing so, the court explained:

Since Section 207(r)(2) provides that employers are not required to compensate employees for time spent express milking, and Section 216(b) [the enforcement provision for Section 7 of the FLSA] provides that enforcement of Section 207 is limited to unpaid wages, there does not appear to be a manner of enforcing the express breast milk provisions.<sup>79</sup>

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69. *Id.* § 216(b).

70. *See* Ehrenreich & Siebrase, *supra* note 62, at 94-95.

71. *Salz v. Casey's Mktg. Co.*, No. 11-CV-3055-DEO, 2012 WL 2952998, at \*3 (N.D. Iowa July 19, 2012) (dismissing Salz's FLSA claim and determining her sole remedy was to file a claim with the WHD).

72. *Id.* at \*2-3.

73. *Id.* at \*1.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Salz v. Casey's Mktg. Co.*, No. 11-CV-3055-DEO, 2012 WL 2952998, at \*2-3 (N.D. Iowa July 19, 2012)

78. *Id.*

79. *Id.* at \*3.

The court reasoned that “[s]ince Section 207(r)(2) provides that employers are not required to compensate employees for time spent express[ing] milk[], and Section 216(b) provides that enforcement of Section 207 is limited to unpaid wages, there does not appear to be a manner of enforcing the express breast milk provisions.”<sup>80</sup> Rather, the court stated that the plaintiff’s sole remedy was to file a claim with the Department of Labor, which could then seek injunctive relief in federal court.<sup>81</sup>

While the FLSA is a huge step towards workplace equality, it is clear that its protections are far too limited to sufficiently deter employers from discriminating against employees who wish to continue expressing milk for their babies after returning to work. Under the current standards, employers are able to circumvent the statute by providing accommodations of such a limited nature that women are still effectively forced to choose between their jobs and providing their babies with the recommended nutrition. The bare-bone requirements of the legislation, along with its exceptions and its lack of enforcement rights against violators, cripple the legislation from serving its intended purpose.

## **B. Seeking Shelter Under the Pregnancy Discrimination Act is Equally Unavailing**

Another question that courts have wrestled with is how breastfeeding accommodations tie into PDA, which forbids discrimination on the basis of pregnancy or *pregnancy-related medical conditions*.<sup>82</sup> The PDA was enacted to “put an end to an unrealistic and unfair system that forces women to choose between family and career—clearly a function of sex bias in the law, which no longer reflects the conditions of women in our society.”<sup>83</sup> While some courts have come to the sensible conclusion that breastfeeding is a “related medical condition” within the meaning of the PDA and thus protected,<sup>84</sup> other courts have followed a far more restrictive approach by declining to interpret the PDA as covering claims for breastfeeding discrimination.<sup>85</sup> Additionally, some courts have taken an

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80. *Id.*

81. *Id.*

82. *See* 42 U.S.C. § 2000e(k) (1978) (emphasis added).

83. 124 CONG. REC. 21,442 (1978) (statement of Rep. Paul Tsongas).

84. *See* E.E.O.C. v. Houston Funding II, Ltd., 717 F.3d 425, 428 (5th Cir. 2013)

(“Moreover, we hold that lactation is a related medical condition of pregnancy for purposes of the PDA. Lactation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth.”); *see also* Hicks v. City of Tuscaloosa, No. 7:13-cv-02063-TMP, 2015 WL 6123209, at \*19 (N.D. Ala. Oct. 19, 2015) (stating that lactation is a related medical condition of pregnancy).

85. Stanley v. Abacus Tech. Corp., No. 08-2306, 2010 WL 11064, at \*2 n.3 (10th Cir. Jan. 5, 2010) (stating that “courts have uniformly held breastfeeding does not fall within the

intermediate approach to the issue by holding that the claims for breastfeeding discrimination are not per se excluded from being brought under the PDA.<sup>86</sup> Regardless of the approach taken by each court, there is widespread acknowledgement that the PDA is unclear as to whether it protects mothers who have been denied reasonable breastfeeding accommodations in the workplace.<sup>87</sup>

The courts that have adopted the narrow interpretation of the PDA still acknowledge that such a result creates a paradox. In other words, by limiting pregnancy discrimination claims to those that are based on actions that occurred during the pregnancy, the statute provides employers with a liability scapegoat because they can simply “wait until after the employee gives birth and then terminate her some time later.”<sup>88</sup>

In *McNill v. New York City Department of Corrections*, the employer demoted the plaintiff for taking leave to breastfeed and care for her infant son, who was born with a cleft palate and lip.<sup>89</sup> Due to the complications suffered by both the plaintiff and her son, the plaintiff was not approved to return to work until November of 2010, which was about five months after her son was born.<sup>90</sup> Even though her son’s life depended on her ability to breastfeed,<sup>91</sup> the plaintiff’s employer classified her absence from June through November as “sick leave” rather than “medical leave” and then used that as a justification for demoting her.<sup>92</sup> The plaintiff brought suit against the employer for pregnancy discrimination, but the court granted the employer’s motion for summary judgment because “[b]ased on the language of the PDA, its legislative history and the decisions from other courts interpreting the statute . . . the condition of [the

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scope of the ‘related medical conditions’ language in the PDA.”); *Jacobson v. Regent Assisted Living, Inc.*, No. CV-98-564-ST, 1999 WL 373790, at \*11 (D. Or. April 9, 1999) (“Title VII and the PDA do not cover breast feeding or childrearing concerns because they are not ‘medical conditions related to pregnancy, childbirth or related medical conditions.’”).

86. See *Frederick v. New Hampshire*, No. 14-cv-403-SM, 2015 WL 5772573 (D.C.N.H. Sept. 30, 2015); see also *Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487 (D. Colo. 1997).

87. See *Hicks*, 2015 WL 6123209, at \*19 (“Whether breastfeeding or expressing breast milk constitutes a ‘related medical condition’ to pregnancy for purposes of Title VII is a controversial issue to which the courts have taken a nuanced approach.”); see also *E.E.O.C. v. Vamco Sheet Metals, Inc.*, No. 13 Civ. 6088(JPO), 2014 WL 2619812, at \*6 (S.D.N.Y. June 5, 2014) (“Where a plaintiff’s claim focuses on adverse employment actions or conditions relating to her lactation breaks, as opposed to an alleged failure to accommodate a disability, an employer may be liable under Title VII.”).

88. *Jacobson*, 1999 WL 373790, at \*10. The United States District Court for Oregon further noted that “[i]f an employer is allowed to terminate an employee soon after she gives birth because Title VII would not cover her as a new parent, then the PDA would have no meaning.” *Id.*

89. *McNill v. N.Y.C. Dep’t. of Corr.*, 950 F. Supp. 564, 566-68 (S.D.N.Y. 1996).

90. *Id.* at 567.

91. *Id.* at 566.

92. *Id.* at 567-68.

plaintiff's] son is not within the scope of the PDA[.]”<sup>93</sup> The court reasoned that “[t]he PDA’s legislative history . . . demonstrates that its coverage focuses on the medical condition of the mother—not the needs of the child.”<sup>94</sup> Thus, the employer was able to completely circumvent the purpose of Title VII and of the PDA, which is to “protect working women who become pregnant from adverse actions by employers.”<sup>95</sup>

As mentioned, some courts have taken an intermediate approach to these claims and held that claims regarding the denial of breastfeeding accommodations are not per se excluded from being brought under the PDA. This approach was adopted by the United States District Court for the District of Colorado, which stated that the PDA “does not specify whether the discrimination must occur during the pregnancy,” but recognized that “to read Title VII so narrowly would lead to absurd results such as ‘prohibit[ing] an employer from firing a woman during her pregnancy but permit[ting] the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place.’”<sup>96</sup>

The United States District Court for the District of New Hampshire also acknowledged the deficiencies that are developing as a result of a legislative structure that forces women to seek relief under the PDA when they are denied breastfeeding accommodations.<sup>97</sup> *Frederick v. New Hampshire* tells the story of a woman who was praised and well received by her superiors during her employment at the New Hampshire Department of Health and Human Services (“DHHS”) up until she asked for a mere thirty-minute break to breastfeed her infant child.<sup>98</sup> Around May 20, 2012, Ms. Frederick gave birth to her son and had to begin breastfeeding him because he would not accept nutrition from a bottle.<sup>99</sup> When her baby was about eight weeks old, her doctor approved her to return to work on a part-time basis.<sup>100</sup> More specifically, Ms. Frederick’s doctor instructed her to work up to four hours a day, five days a week and to “take breaks as needed” to breastfeed her baby.<sup>101</sup> Ms. Frederick estimated she would only need a single thirty-minute break to breastfeed her son since she was

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93. *Id.* at 569.

94. *Id.* at 571 (“Congress’ intent that ‘related medical conditions’ be limited to incapacitating conditions for which medical care or treatment is usual and normal. Neither breast-feeding and weaning, nor difficulties arising therefrom, constitute such conditions.”).

95. *Jacobson v. Regent Assisted Living, Inc.*, No. CV-98-564-ST, 1999 WL 373790, at \*10 (D. Or. Apr. 9, 1999).

96. *See Fejes v. Gilpin Ventures, Inc.*, 960 F. Supp. 1487, 1492-93 (D. Colo. 1997) (quoting *Donaldson v. American Banco Corp.*, 945 F. Supp. 1456, 1463-64 (D. Colo. 1996)).

97. *See Frederick v. New Hampshire*, No. 14-cv-403-SM, 2015 WL 5772573 (D.C.N.H. Sept. 30, 2015).

98. *Id.* at \*2.

99. *Id.*

100. *Id.*

101. *Id.* (internal citations omitted).

working part-time and her son's daycare facility was conveniently located three minutes from her office.<sup>102</sup> Ms. Frederick explained this to the Human Resources Department personnel, who then immediately denied her request and forbade her from leaving the work premises to breastfeed her baby during her lunch or break time.<sup>103</sup> Furthermore, her employer told her that she could only breastfeed her baby in a public space on the work premises, rather than in the designated lactation room.<sup>104</sup> Ultimately, Ms. Frederick was forced to choose between the health of her baby and her employment.<sup>105</sup>

In assessing Ms. Frederick's PDA claim, the court stated that a "plaintiff could potentially succeed on a [PDA] claim if she alleged and was able to prove that lactation was a medical condition related to pregnancy, and that this condition, and not a desire to breastfeed, was the reason for the discriminatory action(s) that she suffered."<sup>106</sup> Unfortunately, the court dismissed Ms. Frederick's PDA claim on the theory that "[t]here must have been some reason behind DHHS's resolute refusal to be cooperative[.]"<sup>107</sup> Ironically, Ms. Frederick's employer has publically stated that "[t]he workplace environment should enable mothers to continue breastfeeding as long as the mother and baby desire."<sup>108</sup>

Finally, some courts have adopted the broad approach of allowing these claims to be brought under the PDA on the rationale that the focus should be on the intent, rather than the timing, of the employer's actions. This approach was adopted by the United States Court of Appeals for the Fifth Circuit in *Equal Employment Opportunity Commission v. Houston Funding II, Ltd.*<sup>109</sup> The court was presented with the issue of whether an employer discriminates on the basis of pregnancy when it denies a female employee breastfeeding accommodations in the workplace.<sup>110</sup> The court first noted that the PDA *does* provide women with a sex discrimination claim under Title VII when her employer terminates or otherwise disciplines her in relation to her breastfeeding needs.<sup>111</sup> The court reasoned that lactation is a pregnancy-related medical condition for purposes of the PDA.<sup>112</sup>

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102. *Id.*

103. *Frederick v. New Hampshire*, No. 14-cv-403-SM, 2015 WL 5772573, at \*3 (D.C.N.H. Sept. 30, 2015).

104. *Id.*

105. *Id.*

106. *Id.* at \*6 (quoting *Falk v. City of Glendale*, No. 12-cv-00925-JLK, 2012 WL 2390556, at \*4 n.7 (D. Colo. June 25, 2012)).

107. *Id.*

108. *HHS Blueprint for Action on Breastfeeding*, U.S. DEP'T OF HEALTH AND HUMAN SERVS. 20 (Oct. 2000).

109. *See generally* *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013).

110. *Id.* at 428.

111. *Id.*

112. *Id.*

Aside from the various inconsistent approaches adopted by the courts, the second issue with the current federal legislative regime is how the FLSA and PDA interact. In other words, when an employer meets the technical requirements of the FLSA but then makes it effectively impossible for the nursing mother to take advantage of the accommodations, legislation leaves the nursing mother without a viable avenue for relief. This is exactly the position that Angela Ames, a loss-mitigation specialist at Nationwide Insurance, found herself in when she was denied a place to express milk after returning to work from maternity leave.<sup>113</sup> Ms. Ames suffered many pregnancy-related complications and was placed on bed rest in April of 2010.<sup>114</sup> While she was on maternity leave, Ms. Neel, the head of Ms. Ames' department, called to inform Ms. Ames that her maternity leave would expire on July 12, 2010 and warned her that taking additional unpaid leave could result in "red flags" or "issues down the road."<sup>115</sup> In order to ensure that she would be able to express milk upon her return to work, Ms. Ames contacted a Nationwide disability case manager who told her that she would be able to use the on-site lactation room.<sup>116</sup> However, it was not until she returned to work on July 19, 2010 that she was informed of the three-day application process that had to be completed before the company could give her access to the lactation room.<sup>117</sup>

At this point, it had already been three hours since Ms. Ames last breastfed and she began to experience discomfort.<sup>118</sup> First, Ms. Ames spoke with Ms. Neel, who told her it was not her responsibility to provide Ames with a lactation room.<sup>119</sup> Second, Ms. Ames spoke with the company nurse, Ms. Hallberg, who advised her that her only option was to use the wellness room that "might expose her breast milk to germs."<sup>120</sup> Because the wellness room was occupied, Ms. Ames brought the issue to Mr. Brinks, her immediate supervisor, who then informed her that the temporary employee Nationwide hired to do her work<sup>121</sup> did not complete any of it and that she would be disciplined if she did not work overtime to finish it all within two weeks.<sup>122</sup> At this point, it had been over five hours since Ms. Ames had last expressed milk and her discomfort was increasing rapidly.<sup>123</sup> She went to Ms. Neel for the second time in hopes that she would help find a place for her to lactate, but instead Ms. Neel handed her a piece of paper and a pen,

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113. *See generally* Ames v. Nationwide Mut. Ins. Co., 760 F.3d 763 (8th Cir. 2014).

114. *Id.* at 765.

115. *Id.* at 766.

116. *Id.*

117. *Id.*

118. *Id.* at 768.

119. Ames v. Nationwide Mut. Ins. Co., 760 F.3d 763, 766 (8th Cir. 2014).

120. *Id.*

121. *Id.* at 765.

122. *Id.* at 766.

123. *Id.* at 768.

told her, “I think it’s best that you go home to be with your babies,” and instructed her on what she should write on the paper to effectuate her resignation.<sup>124</sup>

After being coerced into resigning merely five hours after returning from maternity leave,<sup>125</sup> Ms. Ames brought claims against Nationwide for denying her the accommodations required under Section 207(r) of the FLSA<sup>126</sup> and for gender- and pregnancy-based employment discrimination under Title VII.<sup>127</sup> Despite the fact that both Ms. Neel and Mr. Brinks were wholly unwilling to accommodate Ms. Ames’s breastfeeding needs in a reasonable manner, the district court dismissed Ms. Ames’s FLSA claim before even evaluating whether Nationwide’s policies complied with Section 207(r) on the rationale that there is no private right of action under the FLSA.<sup>128</sup> Ms. Ames’s sex and pregnancy-based discrimination claims met a similar fate when the court dismissed them, in part because it felt that Ms. Ames did not take sufficient steps to complain internally before resigning.<sup>129</sup> This reasoning illustrates the court’s complete disregard for the fact that it was Ms. Ames’s own supervisor that handed her the pen and paper and told her what she needed to write. Furthermore, the court held that even if Ms. Ames was fired for wanting to breastfeed, that would *not* constitute sex discrimination within the meaning of the PDA and noted that Ms. Neel’s comment that Ms. Ames should “go home and be with [her] babies” was gender-neutral.<sup>130</sup>

Ms. Ames appealed the district court’s decision with regard to her gender- and pregnancy-based discrimination claims.<sup>131</sup> The Equal Employment Opportunity Commission (the “EEOC”) wrote a brief in support of Ms. Ames and stated that Ms. Neel’s comment that “it’s best that you just go home to be with your babies”<sup>132</sup> was “direct evidence of gender discrimination because it invoked widely-understood stereotypes about the role of women in the home and the workplace.”<sup>133</sup> On appeal, the United States Court of Appeals for the Eighth Circuit rejected the EEOC’s interpretation of Title VII and affirmed the district court’s holding.<sup>134</sup> The

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124. *Id.* at 766.

125. *See* Ames v. Nationwide Mut. Ins. Co., 760 F.3d 763, 766 (8th Cir. 2014). (“By the time Ames had arrived at work that morning, more than three hours had passed since her son had last nursed.”); *id.* at 768 (“[A]t the time Ames resigned, it had been more than five hours since she had last expressed milk and she was in considerable physical pain.”).

126. Ames v. Nationwide Mut. Ins. Co., No. 4:11-cv-00359 RP-RAW, slip op. at 5 (S.D. Iowa Oct. 16, 2012).

127. *Id.*

128. *Id.* at 11.

129. *Id.* at 33.

130. *Id.* at 18 n.29.

131. *Id.* at 11.

132. Ames v. Nationwide Mut. Ins. Co., 760 F.3d 763, 766 (8th Cir. 2014).

133. Brief for the Equal Emp’t Opportunity Comm’n as Amicus Curiae Supporting Plaintiff at 8, Ames v. Nationwide Mut. Ins. Co., No. 12-3780 (8th Cir. Jan. 30, 2013).

134. Ames, 760 F.3d at 765.

Supreme Court of the United States denied her petition for certiorari, foreclosing any possibility of relief for Ms. Ames.<sup>135</sup>

The sharp variance in the approaches taken by the federal courts further exposes of the need for federal reform.<sup>136</sup> The current state of federal legislation is wholly inadequate in terms of providing meaningful accommodations for mothers who wish to continue breastfeeding upon returning to work. While Congress attempted to respond to the nation's demand for workplace equality by adding Section 207(r) to the FLSA, it is clear that its protections are far too limited to sufficiently deter employers from denying employees these accommodations that they are supposedly entitled to. Even with the PDA in play, women are often still being denied relief when their employers refuse to provide reasonable breastfeeding accommodations. Put simply, the deficiencies in the FLSA and the uncertainty of protection under the PDA have placed our working moms in the position of choosing between either financially providing or nutritionally providing for their babies.

### III. MOVING FROM PROMOTION TO ACCOMMODATION

Due to the truly unique and variable nature of a woman's breastfeeding needs, a uniform standard is not the answer. This is exactly the reason the Department of Labor deferred to the reasonableness standard in the first place. However, there are three core issues with the existing federal legislation that need to be remedied in order for women to truly have proper access to nursing accommodations in the workplace. The first major issue with the FLSA is that it only applies to employers with fifty or more employees. Even with this narrow application, it still provides a carve-out for employers who claim that the provisions would impose an undue hardship. Secondly, the FLSA's reasonableness standard gives far too much discretion to employers to determine both the amount of time and the space that will be provided to employees and therefore it fails to take into account the number of variables that will affect the type of accommodation needed for each individual employee. Finally, any potential

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135. *Ames v. Nationwide Mut. Ins. Co.*, 135 S. Ct. 947 (2015).

136. *See Hicks v. City of Tuscaloosa*, No. 7:13-cv-02063-TMP, 2015 WL 6123209, at \*19, \*21 (D.C.N.D. Ala. Oct. 19, 2015) (stating that the PDA forbids employers from terminating or disciplining female employees in relation to their breastfeeding needs but declining to extend a cause of action under the PDA when employers fail to provide reasonable breastfeeding accommodations). *But see Martin v. Canon Bus. Solutions, Inc.*, No. 11-cv-02565-WJM-KMT, 2013 WL 4838913, at \*8 n.4 (D. Colo. Sept. 10, 2013) (holding that employer's denial of "access to facilities to express breast milk is relevant to whether Defendant discriminated against [plaintiff] based on her pregnancy."); *Falk v. City of Glendale*, No. 12-cv-00925-JLK, 2012 WL 2390556, at \*3 (D. Colo. June 25, 2012) (stating that "lactation is not *per se* excluded," but "[s]ince the complaint asserts that Plaintiff's desire to 'continue to breast feed her infant daughter' formed the basis for the alleged discrimination, her protected status is not established.") (internal citations omitted).

viability that the FLSA had was completely lost when Congress decided not to provide women with an effective enforcement mechanism to use against employers that deliberately fail to satisfy the FLSA's requirements.

In practice, and as the case law demonstrates, these three issues have rendered the FLSA useless to a large amount of nursing employees, which negatively affects the youth of the nation. The solution to the FLSA's issues is two-fold. The first step is to enact an amendment to the FLSA—the text of which follows in the next subsection—that will broaden the scope of application, place mandatory minimum requirements on employers, and provide employees with a private cause of action against non-compliant employers. Secondly, a detailed and thorough set of suggested regulations is needed in order to clarify the intention of the amendment and clear up any remaining questions that both employers and employees may have regarding the required accommodations.

#### **A. Step 1: The Fair Accommodations for Moms Act**

By drawing upon existing federal and state legislation, I have created an amendment to the FLSA that clearly addresses and resolves its core issues. The provisions of the model legislation—hereinafter referred to as the “Fair Accommodations for Moms Act” or “FAM”—work together in order to serve three main functions. First, Section 2 amends the scope of the FLSA so that its provisions apply to employers with fifteen or more employees, but still reserves the carve-out for smaller employers that will suffer an undue hardship under these provisions. Section 3 of the amendment uses mandatory minimum requirements that provide employers with guidance as to what specifically they must provide nursing employees. Most importantly, Section 4 of the amendment grants employees with the enforcement procedure needed so that the FLSA may actually provide nursing employees with the accommodations Congress has already recognized as necessary. These proposed amendments to the FLSA are provided below, and the complete text of Sections One, Two, Three and Four of the FLSA, as amended by FAM, can be found in Appendix A.

### **Fair Accommodations for Moms Act**

**SECTION 1. SHORT TITLE.** This Act may be cited as the ‘Fair Accommodations for Moms Act’ or ‘FAM.’

**SECTION 2. EMPLOYERS REQUIRED TO PROVIDE ACCOMMODATIONS FOR EXPRESSING MILK.** Section 207(r)(3) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(r)(3)) is amended by striking “50” and inserting “15”.

**SECTION 3. REASONABLE ACCOMMODATIONS FOR EXPRESSING MILK.** Section 207(r)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(r)(1)) is amended –

(1) In subsection (A) by striking “for her nursing child” and all that follows and inserting “and permit an employee to use paid break time, meal time, or both, each day to express milk for up to three years after her child’s birth;” and

(2) In subsection (B) by striking “place” and inserting “clean room or other clean location in close proximity to the work area” and by striking ‘.’ and inserting ‘;’; and

(3) By inserting after subsection (B) the following:

“(C) A chair that remains in the designated space for the employee to use while expressing milk;”

“(D) A table that remains in the designated space for the employee to use while expressing milk; and”

“(E) A refrigerator or other cold storage space for keeping milk that has been expressed or allow the employee to provide the employee’s own portable cold storage device for keeping milk that has been expressed cold until the end of the employee’s work day.”

**SECTION 4. ENFORCEMENT PROVISIONS.** Section 207(r) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207(r)) is amended by adding at the end the following:

“(5) Except in cases of willful misconduct, gross negligence, or bad faith, an employer is not liable for any harm caused by or arising from either of the following that occur on the employer’s premises:”

“(A) The expressing of an employee’s breast milk; or”

“(B) The storage of expressed milk.”

“(6) An employer that makes reasonable efforts to accommodate an employee who chooses to express breast milk in the workplace shall be deemed to be in compliance with the requirements of this Section.”

“(7) An employer shall not discriminate against, discipline, or take any adverse employment action against any employee because such employee has elected to exercise her rights under this Section.”

“(8) An employer shall not retaliate or discriminate against an employee who exercises or attempts to exercise the rights provided under this Section.”

“(9) An employee aggrieved by a violation of Section (1), (7), or (8), or some combination of those sections, may file a charge with the Commission within one hundred and eighty days after the alleged unlawful employment practice occurred.”

“(10) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in Sections (1), (7), and (8).”

“(A) If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action.”

“(B) If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”

“(C) If within thirty days after a charge is filed with the Commission the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent that is not a government, governmental agency, or political subdivision named in the charge.”

“(D) If a charge filed with the Commission is dismissed by the Commission or if within one hundred and eighty days from the filing of such charge the Commission has not filed a civil action under this section, the Commission shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (i) by the person claiming to be aggrieved; or (ii) if such charge was filed by

a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.”

“(11) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.”

“(A) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.”

“(B) Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.”

“(12) In any action or proceeding under this Section the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney’s fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.”

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## **B. Step 2: Suggested Regulations**

Since the ACA amended the FLSA in 2010, the EEOC has yet to issue a single regulation regarding the breastfeeding accommodation requirements of Section 207(r). Because the standard of reasonableness will vary according to each individual’s nursing needs, federal regulations would provide employers, employees, and courts with impactful guidance in terms of interpreting Section 207(r). As case law has demonstrated, courts have been at a loss in terms of trying to enforce the provisions of

Section 207(r). Furthermore, even with FAM, there are still a few areas of uncertainty and employers, employees, and courts need clarification and guidance in these areas. These areas include: the duration and frequency of nursing breaks; the location and space required; whether the time spent nursing is compensable; storage of milk; what accommodations are provided for traveling employees; and whether employers should issue a company policy. In light of these gray areas, I have drafted the following model regulations:

**(1) Duration & Frequency.** Employers should allow nursing mothers to take a minimum fifteen-minute break for every three hours they are working.<sup>137</sup> For example, women working a nine-hour day should have the option of taking three fifteen-minute breaks in addition to their lunch break.<sup>138</sup> Should an employee inform the employer that she has a low milk supply or needs a longer amount of time than average due to a medical condition, this issue should be evaluated under the provisions of the Americans with Disabilities Act as amended by the ADA Amendments Act of 2008.<sup>139</sup> The amended law covers impairments to an individual organ within the bodily system, such as the reproductive system.<sup>140</sup> Diabetes, thyroid imbalance, anemia, and previous breast surgery can all impact milk supply, and a cautious employer will consider engaging in a documented interactive process to determine how to accommodate the employee.

**(2) Location.** Employers should provide employees with a convenient location that includes access to electricity and is in close proximity to sink facilities to use in washing both hands and pump parts, allowing the employee to return to work more quickly.<sup>141</sup> In the interest of smaller employers, a permanent space is not required. If employers elect to dedicate a temporary room to breastfeeding, it must be shielded from view and free of intrusion by others when being used by nursing employees. Furthermore, employers must make the temporary room available whenever a nursing employee needs it.

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137. See Reasonable Break Time for Nursing Mothers, *supra* note 61, at 80,075 (stating that most nursing mothers can effectively express milk in fifteen to twenty minutes).

138. Freeman, *supra* note 22, at 3073 (“Without sufficient accommodations for breastfeeding at work, including a private place to express milk, a refrigerator to store expressed breast milk, and sufficient and flexible breaks to allow for pumping, working women simply cannot continue to provide their infants with a sufficient supply of breast milk.”).

139. 42 U.S.C. § 12101 (2009).

140. 29 C.F.R. § 1630.2(h)(1) (2012).

141. Freeman, *supra* note 22, at 3062. (“Pumping, or ‘expressing milk,’ requires a sink to wash hands, an electric outlet to plug in the pump, a private space in which to use the pump, and a cool place to store the bottles of expressed breast milk. A pumping session can last up to thirty minutes. To breastfeed a baby while outside the home, a mother requires a comfortable, private place where she can sit for the duration of the feeding and will not experience harassment.”).

**(3) Pay.** Employers should determine whether it is beneficial to adopt flexible scheduling to allow employees to make up for lost time before or after the usual work schedule. Lactation break time is generally unpaid.

**(A)** But, if the employer offers paid break time to all employees and a nursing employee uses paid break time to express milk, then that time should remain paid.

**(B)** Additionally, if the employee engages in compensable work while expressing milk, that time should be paid. An employee must be completely relieved of duty in order to be on an unpaid break. An employee with a private office is likely to be able to continue working while expressing milk if she has a hands-free pump.

**(i)** Employers should create a clear policy that compensates all employees for time spent on work but makes explicit that time spent in set-up or clean-up is unpaid unless it coincides with what would normally be paid break time.

**(ii)** Employers should have a clear policy for recording work time during lactation breaks taken by non-exempt employees. Employers should never reduce the pay of exempt employees for taking lactation breaks.

**(4) Storage.** Employers shall make reasonable efforts to assist nursing mothers in storing their expressed milk by allowing them to store it in the office refrigerator, providing a separate refrigerator, or allowing the nursing mothers to bring their own forms of storage.

**(5) Traveling employees.** The employer's obligation to provide accommodations for nursing mothers extends to off-site situations. For example, if an employee must travel for work, the employer continues to have a duty to secure appropriate lactation space.<sup>142</sup>

**(6) Policy made available.** A written lactation policy should be distributed to all employees and/or included in an employee handbook, and such policy should encourage open dialogue between the employer and any employee who anticipates the need for lactation breaks.

**(A)** Employers should prepare to initiate these conversations before an employee goes on maternity leave or upon making a new hire.

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142. Reasonable Break Time for Nursing Mothers, *supra* note 61, at 80,074.

**(B)** Employers should communicate clearly with respect to the use of paid break time for lactation purposes and specify that time taken for lactation purposes in excess of normal paid break time is unpaid for hourly employees.

#### IV. WHY IT WORKS

By enacting FAM and issuing the suggested regulations, Section 207(r) will finally be in a position to serve its intended purpose. Specifically, this proposal is best suited for enactment for three reasons. First, it provides employers with clear guidance on what is required of them under Section 207(r), while still allowing for fluctuations depending upon the unique circumstances of each employee's needs. Second, this legislation strikes the proper policy balance by providing nursing mothers with the accommodations they need to further their careers and their children's health while still preserving protection for the financial and economic realities faced by smaller businesses. Finally, this proposal recognizes and furthers the progressive nature of today's society and the desire our nation has for workplace equality.

FAM works collectively with the suggested regulations in order to clearly articulate what accommodations employers need to provide to nursing employees. The amendment made to Section 207(r)(1)(A) clarifies that if an employee wishes to use her paid lunch time to express milk, the employer shall allow her to do so. This provision does not impose any additional burden on the employer; it simply ensures that employers do not deter employees from seeking accommodations by forcing them to take several unpaid breaks throughout the day. In practice, this type of circumvention would undermine the entire purpose of the legislation and would inevitably lead to an influx of litigation. By addressing the issue expressly in the text of the statute, this provision prevents this type of pretextual behavior from employers and decreases the likelihood of related litigation.

The amendment made to Section 207(r)(1)(B) specifies that the space provided must be clean and also provides employers with the flexibility to provide a space that is off-site but nearby. The requirement that the room be clean furthers the health of both the nursing employees and the babies that are consuming the expressed milk. Additionally, making off-site lactation rooms permissible gives the employer greater flexibility if its current location is not feasible for providing a lactation room. Sections 207(r)(1)(C) and (D) expressly require employers to ensure that both a chair and a table are kept in the room for employees to use while expressing milk. These items are necessary in order for employees to express milk by means of a breast pump. It is therefore important that the statute expressly

require them to be provided. Finally, Section 207(r)(1)(D) ensures that employees are able to store their milk properly, so that it is safe for their children to consume later. As stated in the language of the legislation, employers are not required to provide a refrigerator in the lactation space or even at all. The provision simply requires employers to allow employees to keep their milk stored properly, at their own cost.

FAM balances public policy interests by providing nursing mothers with necessary accommodations while still preserving protection for the financial and economic realities faced by smaller businesses. While it may seem that FAM disadvantages small business owners because it makes Section 207(r) apply to employers with fifteen or more employees, in reality it provides a framework where even small employers can achieve proper standards and privacy for nursing mothers. One way FAM strikes this balance is by preserving the reasonableness standard but also having specific regulations that address issues that smaller employers may face. Specifically, in the interest of these smaller employers, the regulations state that a permanent space is not required. Smaller employers may elect to dedicate a temporary room to breastfeeding as long as it is shielded from view, free of intrusion by others, and made available when needed. Likewise, FAM allows nursing employees to use their lunch hours to express milk and to work while expressing milk, both of which reduce the amount of time that an employee will miss work. Furthermore, businesses that have implemented nursing policies similar to FAM show that an increase in accommodations for nursing employees leads to increased loyalty,<sup>143</sup> productivity,<sup>144</sup> public image,<sup>145</sup> recruitment,<sup>146</sup> and healthcare savings.<sup>147</sup> Additionally, an increase in accommodations also reduces the amount of work time lost due to infant illness.<sup>148</sup>

Finally, FAM recognizes and furthers the progressive nature of today's society and the desire our nation has for workplace equality. It is worth noting that nothing in this proposed solution seeks to alter the original intent Congress had when it originally passed the ACA amendment to the FLSA back in 2010. Congress intended to require employers to provide accommodations that allow employees to express milk. Congress surely did not intend for employers to be able to circumvent the statute's requirements upon realizing there is no way for employees to enforce its provisions. But as the case law has shown, the reasonableness standard is ineffective when women are unable to challenge in court the reasonableness of the accommodations provided.

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143. Ortiz et al., *supra* note 11, at 116.

144. *Id.* at 117; Tyler, *supra* note 17, at 70.

145. Tyler, *supra* note 17, at 70.

146. *Id.*

147. Ortiz et al., *supra* note 11, at 116.

148. *Id.*

Some state legislatures have taken it upon themselves to enact legislation that actually embraces society's desire to accommodate nursing mothers in the workplace. In fact, twenty-five states, as well as the District of Columbia and Puerto Rico, have adopted legislation that provides some level of protection for women to breastfeed in the workplace.<sup>149</sup> States like Colorado, Connecticut, Hawaii, and Maine have raised the bar for Congress by specifically prohibiting discrimination against women who choose to express milk or breastfeed in the workplace.<sup>150</sup> Furthermore, state requirements are far more specific and more demanding than what the FLSA provides. Vermont, which has the highest rate of mothers who are breastfeeding exclusively at six months, requires pumping breaks for nursing mothers for up to three years.<sup>151</sup> Colorado requires employers to provide unpaid breaks for milk expression for up to two years after birth instead of the one year mandated by the FLSA.<sup>152</sup> Maine requires pumping breaks for nursing mothers for up to three years.<sup>153</sup> Indiana's statute is more specific than the FLSA in that it compels employers to provide refrigeration or other cold storage for expressed milk and to offer employees paid breastfeeding breaks.<sup>154</sup> Oregon's statute provides for break time for up to eighteen months,<sup>155</sup> applies to employers with twenty-five employees or more,<sup>156</sup> and offers additional protections for school board employees.<sup>157</sup>

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149. ALASKA STAT. ANN. § 29.25.080 (West 1998); ARK. CODE ANN. § 11-5-116 (West 2014); CAL. LAB. CODE § 1030 (West 2015); COLO. REV. STAT. § 8-13.5-104 (2015); CONN. GEN. STAT. ANN. § 31-40w (West Supp. 2013); GA. CODE ANN. § 34-1-6 (West 2003); HAW. REV. STAT. ANN. § 378-2(7) (LexisNexis 2011); 820 ILL. COMP. STAT. ANN. 260/10 (West 2001); IND. CODE ANN. § 22-2-14-2 (West Supp. 2012); ME. REV. STAT. ANN. tit. 26, § 604 (2009); MINN. STAT. ANN. § 181.939 (West 2014); MISS. CODE ANN. § 43-20-31 (West 2006); MONT. CODE ANN. § 39-2-215 (West 2007); N.M. STAT. ANN. § 28-20-2 (West 2007); N.Y. LAB. LAW § 206-c (2007); N.D. CENT. CODE ANN. § 23-12-17 (West 2009); OKLA. STAT. ANN. tit. 40, § 435 (2006); OR. REV. STAT. ANN. § 653.077 (West 2011); R.I. GEN. LAWS ANN. § 23-13.2-1 (West 2008); TENN. CODE ANN. § 50-1-305(a) (2014); TEX. HEALTH & SAFETY CODE ANN. § 165.003 (West 2010); VT. STAT. ANN. tit. 21, § 305(a) (2009 & Supp. 2015); VA. CODE ANN. § 2.2-1147.1 (2015); WASH. REV. CODE ANN. § 43.70.640 (West 2014); Wyo. H.R.J. Res. 0005, 57th Leg., G.S. (2003).

150. COLO. REV. STAT. § 8-13.5-104(5); CONN. GEN. STAT. ANN. § 31-40w(c) ("An employer shall not discriminate against, discipline or take any adverse employment action against any employee because such employee has elected to exercise her rights [to express breast milk or breastfeed]."); HAW. REV. STAT. ANN. § 378-2(a)(7) ("It shall be an unlawful discriminatory practice . . . [f]or any employer to refuse to hire or employ, bar or discharge from employment, withhold pay from, demote, or penalize a lactating employee because the employee breastfeeds or expresses milk at the workplace."); ME. REV. STAT. ANN. tit. 26, § 604 ("An employer may not discriminate in any way against an employee who chooses to express breast milk in the workplace.").

151. VT. STAT. ANN. tit. 21, § 305(a).

152. COLO. REV. STAT. § 8-13.5-104(1).

153. ME. REV. STAT. ANN. tit. 26, § 604.

154. IND. CODE ANN. § 22-2-14-2(b).

155. OR. REV. STAT. ANN. § 653.077(7) (West 2011).

156. *Id.* § 653.077(8).

157. *Id.* § 653.077(10)(a).

Some states have also attempted to fill the gaps left by Congress by making the legislation apply to every employer. Tennessee's statute applies to employers with one or more employees,<sup>158</sup> while California's statute applies to employers of all sizes.<sup>159</sup> A number of states make it a matter of public policy to support breastfeeding mothers and encourage employers to offer paid breaks or to allow employees to make up for unpaid break time at the beginning or end of each shift. States like California and Oregon have already taken substantial steps towards promoting workplace environments that enable mothers to continue nursing.<sup>160</sup> North Dakota, Texas, and Washington incentivize employers to adopt a workplace breastfeeding policy by allowing them to designate themselves as "infant-friendly" or "mother-friendly" on promotional materials if their policies include flexible work scheduling; a convenient, sanitary, safe, and private location, other than a restroom, for breastfeeding or expressing breast milk; a convenient clean and safe water source with facilities for washing hands and rinsing breast-pumping equipment located in the private location; and a convenient hygienic refrigerator in the workplace for the temporary storage of the mother's breast milk.<sup>161</sup>

U.S. policy should reflect the value that our citizens and states have already placed on maternal support.<sup>162</sup> By enacting the Fair Accommodations for Moms Act, Congress will advance equality in the workplace and provide consistent obligations for employers to follow nationwide. Furthermore, by issuing the suggested regulations, employers, employees, and courts will have a clear understanding of what Section 207(r) requires and what remedies employees have against non-compliant employers.

## CONCLUSION

The enactment of Section 207(r) represents a significant step forward in federal legislation in that it requires employers to provide both break time and a private space appropriate for nursing employees to express breast milk. Employers are not wrong in thinking that the requirements may create an initial burden on smaller companies. However, the lactation policies already implemented by various employers are evidence that employers actually stand to benefit in the end from such policies by enjoying decreased healthcare costs, absenteeism, and employee turnover.

Unfortunately, the framework of Section 207(r) works in a way that limits the benefits that one might assume would flow from the statute's

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158. TENN. CODE ANN. § 50-1-305(a) (2014).

159. CAL. LAB. CODE § 1030 (West 2015).

160. *Id.*; OR. REV. STAT. ANN. § 653.077.

161. *See* N.D. CENT. CODE ANN. § 23-12-17(1) (West 2009); TEX. HEALTH & SAFETY CODE ANN. § 165.003 (West 2010); WASH. REV. CODE ANN. § 43.70.640 (West 2014).

162. Gertz, *supra* note 29.

seemingly progressive step towards accommodation. First, the broad-sweeping exception allows employers with less than fifty employees to escape accommodation requirements altogether simply by demonstrating that the lactation breaks impose on undue hardship on the company. Second, the broad language of the legislation allocates considerable discretion to employers, which leaves ample opportunity for pretext and circumvention. Finally, the legislation has been rendered completely ineffective due to the fact that women are unable to challenge in court the reasonableness of the accommodations provided.

By enacting the Fair Accommodations for Moms Act and issuing the suggested regulations, Section 207(r) will finally be in a position to serve its intended purpose. This proposal is best suited for enactment because it provides employers with clear guidance on what is required from them under Section 207(r), while still allowing for fluctuations depending upon the unique circumstances of each employee's needs. Furthermore, FAM strikes the proper policy balance by providing nursing mothers with the accommodations they need to further their careers and their children's health while still preserving protection for the financial and economic realities faced by smaller businesses. Finally, this proposal recognizes and furthers the progressive nature of today's society and the desire our nation has for workplace equality.

## APPENDIX A

The Fair Accommodations for Moms Act would amend the FLSA so that it would provide as follows [Note: new material is indicated by underscoring; deleted material is indicated by strikethrough]:

### **Fair Accommodations for Moms Act**

**(r)(1)** An employer shall provide--

**(A)** a reasonable break time for an employee to express breast milk and permit an employee to use paid break time, meal time, or both, each day to express milk for up to three years after her child's birth ~~for her nursing child for 1 year after the child's birth each time such employee has need to express the milk;~~ and

**(B)** a ~~place~~ clean room or other clean location in close proximity to the work area, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk;

**(C)** a chair that remains in the designated space for the employee to use while expressing milk;

**(D)** a table that remains in the designated space for the employee to use while expressing milk; and

(E) a refrigerator or other cold storage space for keeping milk that has been expressed or allow the employee to provide the employee's own portable cold storage device for keeping milk that has been expressed cold until the end of the employee's work day.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than ~~50~~ 15 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

(5) Except in cases of willful misconduct, gross negligence, or bad faith, an employer is not liable for any harm caused by or arising from either of the following that occur on the employer's premises:

(A) The expressing of an employee's breast milk;

(B) The storage of expressed milk.

(6) An employer that makes reasonable efforts to accommodate an employee who chooses to express breast milk in the workplace shall be deemed to be in compliance with the requirements of this section.

(7) An employer shall not discriminate against, discipline or take any adverse employment action against any employee because such employee has elected to exercise her rights under this section.

(8) An employer shall not retaliate or discriminate against an employee who exercises or attempts to exercise the rights provided under this section.

(9) An employee aggrieved by a violation of section (1), (7), (8), or some combination of those sections, may file a charge with the Commission within one hundred and eighty days after the alleged unlawful employment practice occurred.

(10) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in sections (1), (7) and (8).

(A) If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action.

(B) If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

(C) If within thirty days after a charge is filed with the Commission the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

(D) If a charge filed with the Commission is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge the Commission has not filed a civil action under this section the Commission shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (i) by the person claiming to be aggrieved; or (ii) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice

(11) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders.

(A) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

(B) Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(12) In any action or proceeding under this Section the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

