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Commentary

Breastfeeding: The Illusion of Choice

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A B S T R A C T

Background: Breastfeeding is frequently described as a woman's decision, yet this choice is often illusory owing to suboptimal social and structural supports. Despite passage of the Patient Protection and Affordable Care Act (2010) that requires all qualifying employers to provide mothers "reasonable" break time and a private, non-bathroom space to express breast milk, the majority of women in the United States still do not have access to both accommodations.

The Problem: At least three issues may be influencing this suboptimal implementation at workplaces: 1) federal law does not address lactation space functionality and accessibility, 2) federal law only protects a subset of employees, and 3) enforcement of the federal law requires women to file a complaint with the United States Department of Labor.

Recommendations: To address each of these issues, we recommend the following modifications to current law: 1) additional requirements surrounding lactation space and functionality, 2) mandated coverage of exempt employees, and 3) requirement that employers develop company-specific lactation policies.

Conclusions: If the goal is to give women a real choice of whether to continue breastfeeding after returning to work, we must provide the proper social and structural supports that will allow for a truly personal decision. No mother should have to choose between breastfeeding her child and earning a paycheck.

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Research suggests that breast milk is superior to infant formula, protecting infants from a long list of infectious and chronic conditions (Ip, Chung, Raman, Trikalinos, & Lau, 2009). The act of breastfeeding also promotes bonding and security between a mother and her infant, along with reducing a mother's risk of several diseases (Dieterich, Felice, O' Sullivan, & Rasmussen, 2013; Ip, et al., 2009). Still, upon returning to work, many mothers prefer not to breastfeed for a variety of reasons: convenience, time, and functional issues leading to poor milk production or poor latching, to name a few (Payne & Nicholls, 2010).

Although breastfeeding is frequently described as a woman's choice, this choice is often illusory owing to suboptimal social and structural supports. For example, women who breastfeed have been scolded or shamed while nursing in public (Acker, 2009) and/or face numerous obstacles to expressing breast milk when at work (Raju, 2006). Although the United States has made

strides toward improving breastfeeding rates through state and federal legislation (U.S. Department of Labor [DOL], 2010), it remains much more difficult to breastfeed in the United States than it is to provide infant formula, meaning that women may be driven to formula feed despite their breastfeeding intentions.

Federal Legislation to Support Breastfeeding in the Workplace

Signed on March 23, 2010, the Patient Protection and Affordable Care Act (PPACA) of 2010 (2010; P.L. 111–148, 2010) amended section 7 of the Fair Labor Standards Act (FLSA, 29 U.S.C. 207(r)) requiring all qualifying employers to provide "reasonable" break time for mothers to express breast milk. The break can be unpaid, but must be provided any time an employee needs to express breast milk during the nursing child's first year of life. Additionally, the employer must provide a lactation space in the workplace that is not a bathroom and is "shielded from view and free from intrusion by coworkers and the public" (Break Time for Nursing Mothers Provision, 2010). The U.S. DOL (2010) has published guidelines to inform the public about the law, but has stated that it will not make specific rules for employers because of the "variety of workplace environments, work

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schedules, and individual factors that will impact the number and length of breaks required by a nursing mother.” The DOL does, however, implement and enforce the break time requirement, and may consider developing formal regulations in the future if necessary (U.S. DOL, 2010).

Issues with the Fair Labor Standards Act Amendment

Following the 2010 FLSA amendment ([Break Time for Nursing Mothers Provision, 2010](#)), 33 state organizations, 36 state public universities, and 13 private universities revised their lactation policies or developed new ones to match the federal requirements ([Abdulloeva & Eyler, 2013](#)). Yet the amendment’s influence on breastfeeding rates among working women is not currently evident and may take years to show meaningful impact ([Abdulloeva & Eyler, 2013](#)). For example, research suggests suboptimal implementation of the [Break Time for Nursing Mothers Provision \(2010\)](#) 3 years after enactment ([Kozhimannil, Jou, Gjerdingen, & McGovern, 2016](#)). Of note, only 40% of employed women with infants had access to both break time and a private space to express breast milk in 2013, and single mothers and low-income women were significantly less likely to have access to either accommodation, reflecting systematic disparities in the workplace. This is significant, given that women with both adequate break time and a private space to express breast milk are 2.3 times more likely to exclusively breastfeed at 6 months after giving birth ([Kozhimannil et al., 2016](#)).

Although the [Break Time for Nursing Mothers Provision \(2010\)](#) is a step in the right direction, the majority of women (60%) still do not have access to both break time and a private space to express breast milk ([Kozhimannil et al., 2016](#)). At least three issues may be influencing this suboptimal implementation at workplaces:

1. Although the PPACA states that workplace lactation spaces must be private and may not be bathrooms, *the law does not address lactation space functionality and accessibility*. The lack of such standards may mean that not all women are provided adequate or nearby locations to express breast milk at work, potentially leading to unsafe or unhygienic practices and/or premature weaning. Without specific guidelines, many workplaces offer a room that is simply a space. For example, in a New Jersey-based study completed soon after enactment of the [Break Time for Nursing Mothers Provision \(2010\)](#), about 50% of employers provided no amenities such as a refrigerator, sink, or access to a breast pump ([Bai, Gait, & Wunderlich, 2015](#)). The lack of such amenities decreases the usefulness of the room.
2. Currently, *federal law only protects employees who are not exempt from the FLSA’s overtime pay requirements (Table 1)*. Thus, exempt employees are not covered. Additionally, small companies (<50 employees) may apply for exemption from the requirements if compliance would impose an undue hardship. Because 37.5% of employers in the United States fall into this small-business category ([Abdulloeva & Eyler, 2013](#)), these exemptions can affect millions of women.
3. *Enforcement of the federal law requires women to file a complaint with the DOL*. Employees are recommended to communicate their lactation needs with their employers to learn about the employer’s level of support (U.S. Department of Health and Human Services, 2008). Yet many women are afraid of expressing their needs, worrying about the potential for negative workplace dynamics partially owing to the

Table 1

Employee Groups Exempt from the Fair Labor Standards Act (FLSA) Overtime Pay Requirements

- Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and certain skilled computer professionals (as defined in the Department of Labor’s regulations).
- Employees of certain seasonal amusement or recreational establishments.
- Employees of certain small newspapers and switchboard operators of small telephone companies.
- Employees engaged in fishing operations.
- Employees engaged in newspaper delivery.
- Casual babysitters and persons employed as companions to the elderly or infirm.
- Certain commissioned employees of retail or service establishments.
- Auto, truck, trailer, farm implement, boat, or aircraft salespersons employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers.
- Auto, truck, or farm implement parts-clerks and mechanics employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers.
- Railroad and air carrier employees, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans.
- Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations.
- Domestic service workers who reside in their employers’ residences.
- Employees of motion picture theaters.
- Farmworkers.

Source: U.S. Department of Labor, Office of the Assistant Secretary for Policy. (2009). Wages and hours worked: Minimum wage and overtime pay. Retrieved from <http://www.dol.gov/compliance/guide/minwage.htm#ftn1>. Accessed: May 18, 2016.

notion of ‘special treatment’ ([Bai, Wunderlich, & Weinstock, 2012](#)). Likewise, although the DOL keeps complaints and complainants confidential ([Wage and Hour Division, nd](#)), a woman fearing employer retaliation and job loss may be hesitant to initiate an investigation.

Recommendations

To address each of these issues in turn, we recommend the following modifications to current law.

1. *Additional requirements surrounding lactation space and functionality*. Although milk expression is not a high-maintenance activity, there are several basic needs—beyond privacy and a non-bathroom space—that should be required by law. For example, the definition of “a place, other than a bathroom” needs further clarity and uniformity. As supported by both the DOL and U.S. Department of Health and Human Services, each lactation space should, at a minimum, include a locking door, comfortable chair, small table or shelf for a breast pump, and electrical outlet. Spaces should be located near both the employee’s workspace and a source of hot and cold water where the employee can wash hands and pump parts ([Andrews, 2012](#); U.S. Department of Health and Human Services, 2008). Such policies are already in place in 12 states, with Indiana’s policy also requiring that employers provide a refrigerator for nursing mothers to store breast milk ([Abdulloeva & Eyler, 2013](#)).
2. *Mandated coverage of exempt employees*. All employees deserve the right to express breast milk for their babies while at work, and thus current law should cover all working women. In fact, if passed, the [Supporting Working Moms Act](#)

of 2015 (2015; H.R. 4113/S. 2321) would extend the right to break time and a private lactation space during the workday to executive, administrative, and professional employees (including teachers), all of whom are currently exempt from the *Break Time for Nursing Mothers Provision* (2010). As an added benefit, mandating coverage of exempt employees can help to provide worksite amenities that support clients, customers, patients, students, and other visitors who are not employed by the company but face barriers to pumping at workplaces (Dinour, Pope, & Bai, 2015; Haight & Ortiz, 2014; Taylor, MacNamara, Groskin, & Petras, 2013).

3. *Require that employers develop company-specific lactation policies.* One model for this is found in the 2004 Child Nutrition and WIC Reauthorization Act, which mandates that all school districts receiving federal funding for their food programs create and implement a school wellness policy. This law requires that wellness policies be developed by a committee of specific stakeholders and include nutrition guidelines for foods and beverages sold on campus, nutrition education, physical activity, and implementation and evaluation plans (*Child Nutrition and WIC Reauthorization Act of 2004, 2004*). As a result of this law, by the start of the 2010/2011 school year, most students were in a district with a policy that includes goals for nutrition education (95%), guidelines for school meals (91%), and physical activity goals (90%; (Chriqui et al., 2013)).

In a similar manner, employers should be required to develop company-specific lactation policies that include, at a minimum, break time and lactation room options, lactation support programs, and implementation and evaluation plans. To facilitate policy development, employers can refer to the Surgeon General's Call to Action to Support Breastfeeding (U.S. Department of Health and Human Services, 2011), the Business Case for Breastfeeding (Garvin et al., 2013), and the Office on Women's Health, U.S. Department of Health and Human Services (2014), which suggest creative solutions such as outdoor and mobile lactation areas (e.g., tents) and temporary or "floater" employees to replace lactating mothers while on breastfeeding breaks. Another model from Corporate Lactation Programs provides private locker rooms, breast pumps, two hour-long break times, and breastfeeding classes. Evaluation indicates that these programs increase breastfeeding durations (Ortiz, McGilligan, & Kelly, 2004). Other supports, such as lactation consultants and support groups, can further improve breastfeeding duration and overall experience in the work environment (Surgeon General's Call to Action to Support Breastfeeding, 2011).

In conjunction with employer-specific lactation policies, visible and accessible posters or documentation of these policies should be on display at all times. Signage should include how women can contact the DOL if they are not being granted their federally mandated breastfeeding rights at work. According to the DOL, employees are protected and may contact the DOL if further issues persist after the complaint is made (personal communication, DOL NJ Southern Division, April 29, 2016). Unfortunately, investigators take an average of 30 to 60 days to acknowledge and take action on any type of complaint received, although quicker reaction times may occur if the complainant states she is unable to express milk and her child is suffering (personal communication, DOL NJ Southern Division, April 29, 2016).

Conclusion

According to Pendleton (2015), the 2 years after enactment of the PPACA was marked by a 34% increase in breast pump sales for Medela, the leading breast pump company. This increase may be indicative of more working mothers expressing milk, as well as a shift from mothers purchasing or borrowing breast pumps second-hand (a discouraged practice) to women obtaining new pumps through their health insurance. With some 2017 Presidential hopefuls promising repeal and elimination of the PPACA, it is essential that states and employers adopt their own lactation policies to avoid losing the progress made over the last decade. Likewise, enacting federal bills such as the ones described above can mitigate any effects of a change in government leadership. If we want to give women a real choice of whether to continue breastfeeding after returning to work, we must provide the proper social and structural supports that will allow for a truly personal decision. No mother should have to choose between breastfeeding her child and earning a paycheck.

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