

## **Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act H.R. 3110**

### **Q&A**

- 1. What are the key provisions of the PUMP for Nursing Mothers Act (as reported out of committee in May 2021) and how does the bill support and protect nursing mothers at work?**
  - Since 2010, the federal Break Time for Nursing Mothers law has outlined the simple workplace accommodations nursing mothers need in order to protect their milk supply and support optimal nutrition of their infants and young children. It requires employers to provide break time and a private space for mothers to pump breast milk at work.
  - Unfortunately, nearly 9 million working women of childbearing age were inadvertently excluded from the law, due to its placement within the overtime subsection of the Fair Labor Standard Act (FLSA).
  - The PUMP Act corrects this by pulling these accommodation descriptions out of the current subsection. Doing this makes it easier to interpret and more equitable to implement. This change would support working mothers in sectors such as education, nursing, agriculture, and transportation, allowing them to access the reasonable break time and private, non-bathroom space to express breast milk already provided to most workers.
  - The PUMP Act supports the health of nursing mothers and infants by allowing mothers to express breast milk at work for up to 2 years.
  - The PUMP Act safeguards nursing mothers' economic security by clarifying that they will receive at least minimum wage if they continue to work while they are expressing milk (as required by current law) and that they can seek appropriate remedies for violations of the law.
  - The PUMP Act ensures that more women can express milk at work by including those who adopt, act as surrogates, or suffer a stillbirth.
  - The PUMP Act continues to cover all employers of all sizes but changes the "undue hardship" appeal so that it applies to employers with fewer than 25 (instead of 50) employees.
  - The PUMP Act ensures fairness for employers by requiring employees to inform their employers about inadequate space to express breast milk 10 days before they file suit for violating the requirement as well as directing the Department of Labor to issue guidance to assist employer compliance.
  
- 2. Will the PUMP Act result in runaway litigation over minor, technical violations?**
  - No. The PUMP Act ensures nursing mothers receive the break time and space they need to express milk but also gives employers the flexibility to identify solutions that work for their specific business environment and does not burden the business. That is why the U.S. Chamber of Commerce champions the passage of the PUMP Act.

- At the state level, there are currently four (4) break time and space laws—similar to the PUMP Act—that allow nursing mothers to bring private lawsuits for violations. Over the entire course of the combined 47-year history that these four laws have been on the books, nursing mothers brought *a grand total of six (6) cases*. The annual likelihood that a private employer will be sued under such a law is 0.0002%.<sup>1</sup>
- The PUMP Act doesn't open the door to “technical violations” or “gotcha” litigation. The concept of shielding a nursing mother from view is not technical or complex and it is, in almost all cases, readily achievable and inexpensive. For example, an employer can tape butcher paper over windows, provide a “pop up” tent, draw a curtain or, for transportation workers, place visors in a vehicle.
- The PUMP Act contains safeguards for employers. It allows small employers to assert undue hardship when it is genuinely not feasible to provide break time and space. Additionally, before filing a lawsuit for a failure to provide adequate space, an employee must inform the employer of the failure and provide 10 calendar days to come into compliance.
- Employers of all sizes are already familiar with the existing legal requirements covering approximately 27 million employees, in place since 2010, to provide break time and private space for nursing mothers.

### 3. Will the PUMP Act be impossible for certain industries, like agriculture, transportation, and airlines to implement?

- No. The PUMP Act does not impose a “one size fits all” approach. The opposite is true. The bill allows employers to be flexible and to meet nursing mothers’ needs in a manner appropriate for their industry. That is why the U.S. Chamber of Commerce supports the PUMP Act.
- The PUMP Act does *not* require employers to provide nursing mothers a permanent designated pumping space or even a room with four walls (though such rooms, like a clean spare closet, are often available). It only requires “a place, other than a bathroom, that is shielded from view and free from intrusion”—a broad, flexible standard that can be tailored to the individual needs, realities, and constraints of each business.

For instance:

- Agricultural employers can provide inexpensive pop-up tents or allow pumping in company field vehicles.
- Transportation employers can provide windshield visors to cover company vehicle windows.
- Airlines can permit nursing crewmembers to pump during existing rest periods or breaks using wearable, hands-free breast pumps at their assigned duty stations or empty duty

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<sup>1</sup> See LIZ MORRIS & JESSICA LEE, CTR. FOR WORKLIFE LAW, COMPLIANCE OR COMPLAINTS? THE IMPACT OF PRIVATE ENFORCEABILITY OF LACTATION BREAK TIME AND SPACE LAW 3 (2021), <https://worklifelaw.org/wp-content/uploads/2021/06/Compliance-or-Complaints-Lactation-Litigation-Report.pdf>.

stations or in existing curtained areas, or can provide additional ways to screen for privacy (e.g., covers or portable curtains). In between flights, flight crew can use airport lactation spaces.

- The majority of states require employers to provide accommodations to lactating workers, without industry carve-outs. Employers have already developed innovative solutions that respond to workplace needs. For instance, one city permits municipal employees to stop along their driving routes to use local fire stations' lactation spaces.
- The PUMP Act requires the U.S. Department of Labor to provide employers with guidance about innovative and inexpensive ways to support nursing mothers under the law. In addition, substantial federal and state guidance, from New York to Texas, already exists about how different industries can support nursing mothers, ensuring no business has to reinvent the wheel.<sup>2</sup>

4. **Does the Amendment in the Nature of a Substitute (“ANS”) offered by the minority during the Committee markup solve the problems with the current Break Time for Nursing Mothers law?**

- Although it was very encouraging to hear some members of Congress reiterate the importance of supporting breastfeeding and nursing mothers in the workplace, unfortunately the Republican ANS offered during the PUMP Act markup **does not** fix the two primary problems that the PUMP Act addresses: the exclusion of millions of nursing mothers and the inability of nursing mothers to remedy violations of the law.
- The minority ANS does not close the loophole in the 2010 Break Time for Nursing Mothers law, which left nearly nine million employees uncovered.
  - The bill continues to exclude millions of employees—including our nation's frontline agricultural and transportation workers—allowing just executive, administrative, and professional (“EAP”) employees to be protected under the law. In a time when our frontline workers have sacrificed so much, there is no principled reason why they should have fewer protections than executives who likely earn more and have greater access to flexible workplace arrangements.
- The minority ANS does not fix the inadvertent gap in remedies caused by the Break Time for Nursing Mothers Act's placement in FLSA's overtime provisions—a gap one federal judge called an “absurdity.”<sup>3</sup> By contrast, the PUMP Act provides meaningful remedies, which will incentivize employer compliance: one study found that the most meaningful kind of law to boost breastfeeding rates was workplace lactation laws that include enforcement provisions.<sup>4</sup>

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<sup>2</sup> See Office on Women's Health in the U.S. Department of Health and Human Services, Lactation break time and space in all industries (2018), <https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries>.

<sup>3</sup> *Hicks v. City of Tuscaloosa*, No. 7:13-cv-02063-TMP, 2015 WL 6123209, at \*28–29 & n.14 (N.D. Ala. Oct. 19, 2015) (describing FLSA as “toothless[]” and “virtually useless in almost all practical application”).

<sup>4</sup> Smith-Gagen et. al., *The Association of State Law to Breastfeeding Practices in the U.S.*, 18(9) MATERNAL & CHILD HEALTH J. 2034, 2039–40 (Nov. 2014),

## 5. Will the PUMP Act burden small businesses?

No. Businesses *of all sizes are already* subject to the requirements of the Break Time for Nursing Mothers law. Under current law, businesses with fewer than 50 employees must provide lactation break time and space but can claim an “undue hardship” exemption in cases where compliance would impose significant difficulty or expense. The PUMP Act would make the undue hardship exemption available only to businesses with 25 or fewer employees, but the requirement and flexibility still apply to all employers. This change was negotiated with business stakeholders in exchange for business-friendly changes discussed above.

- Because providing break time and space is typically low-cost or cost-free, and flexible solutions exist in all industries, true undue hardship is exceedingly rare. The PUMP Act would direct the Department of Labor to issue employer guidance on how to comply in all industries, as negotiated by the Chamber of Commerce, to ensure employers are knowledgeable about the options available to them.
- The recollection of Department of Labor officials is that there have been no complaints filed with the agency in the last ten years where an undue hardship existed;<sup>5</sup> workable solutions were available in all cases. In fact, the primary goal of lowering the employee threshold is to address the commonly held but incorrect perception that it is infeasible for small businesses to comply, or that they are wholly exempted from the law’s requirements. Correcting these misperceptions benefits employers too.

## 6. Does the PUMP Act violate nursing mothers’ privacy by requiring employers to monitor employees while they are pumping?

- No. The PUMP Act would *expand* protections for millions of nursing mothers to use a *private* space to pump in the workplace.
- Regarding working while pumping, the PUMP Act *does not change current law* and merely provides *clarification* about how employers can ensure compliance with wage and hour laws for breastfeeding employees. Under current law, an employer must pay minimum wage and overtime for all hours worked, even if the employee is expressing breast milk while continuing to work (e.g., at a desk job, or while wearing a hands-free pumping device). This has been the law for more than a decade. Employers have a multitude of ways to keep track of when an employee is working, including for completely remote employees.

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<sup>5</sup> E-mail from Dep’t of Lab. to Senate Off. (May 3, 2021) (on file with authors).