



Episode 54: “New Laws Pump Up Protection for Nursing Employees”

Speakers: Ari Kwiatkowski, Barclay Damon

[Ari Kwiatkowski]: Hi, everyone, this is a *Barclay Damon Live* broadcast where we discuss all things L&E, labor and employment. I’m Ari. Let’s dig in.

[Ari]: Hey, everyone. Welcome to episode 54, “New Laws Pump Up Protection for Nursing Employees.” Last week, we talked about the Pregnant Workers Fairness Act. Today, we’re going to talk about the counterpart or analog to that statute, which is the PUMP Act. Both of those laws were passed at the same time: December 29, 2022, as part of the Consolidated Appropriations Act. So let’s talk about... a little bit about where we were and where we’re going, what these new laws say, and in addition to the PUMP Act, which is a federal law I will also give you an update on the New York labor law, because if you’re an employer in New York State, you know that New York has a pretty broad lactation accommodation policy as is written. But New York made some recent changes that actually expand those protections as well. So we will first dig into the federal laws and then we will do a primer on New York State law. So let’s get right to it.

[Ari]: I think it’s helpful for me to provide a little bit of context. Again, if you’re an employer, you’ve probably been dealing with these issues for quite some time, especially if you’re an employer with over 50 or more employees. And we’ll talk about that in a minute. But back in 2010, Congress passed the Break Time for Nursing Mothers Law. That law amended the Fair Labor Standards Act, which is a federal statute to require employers to provide a reasonable break time to express milk in the...for a nursing child for employees in the workplace for one year after the child’s birth and a private space to do so. So basically, back in 2010, Congress enacted this law, which did require employers to provide employees reasonable break times in a private space other than a bathroom in which to express milk. So this law was groundbreaking at the time. But there were some limitations. You know, the law—and I’m talking about the Break Time for Nursing Mothers Law—did not require employers to provide extra breaks for pumping. But if employees allowed employee break time then the employer had to allow an employee who was lactating or expressing milk to do so using their break time. This was really... this point is really important. This statute actually only applied to nonexempt employees under the Fair Labor Standards Act. So if you have a diverse workforce where you have supervisory, non-supervisory employees, employees who are in administrative or management roles, the prior law only applied to nonexempt employees. So I think that’s super important to point out. And the prior law had a little bit of an exception or carve-out—it applied to employers with less than 50 employees. Unless the employer could establish that the law would impose an undue hardship. So basically, if you had less than 50 employees under the prior law, you could get around the law’s requirements, if you could show undue hardship by having to comply with the law. Obviously, undue hardship, as we talked about, many times on the podcast, is a very fact-specific inquiry. You know, it’s an analysis which considers the size of the employer, the financial...excuse me, financial means of the employer and the nature of the business. So, you know, that’s basically a rundown of the prior federal law. A good start, arguably.

[Ari]: But I think there were some limitations. And as a result of those limitations, enter the PUMP Act. As I mentioned a few minutes ago, this is a new federal law which was enacted or approved at the end of December, and it actually goes into effect April 28 of this year. So we still have a little bit more time if you’re an employer, to kind of take a look at the new law and learn what you need to know. So the PUMP Act, which

stands for Providing Urgent Maternal Protections for Nursing Mothers Act is an amendment to Section 18 D of the Fair Labor Standards Act, and it is enforced by the Department of Labor. And I wanted to mention that a lot of the information that I have gotten to counsel clients on this new law and which I put together for the podcast today came from the DOL's website. The DOL had a fact sheet for the Break Time for Nursing Mothers Law. It's updated that fact sheet. And incorporated what you need to know about the PUMP Act. So highly recommend if you have questions definitely take a look at that fact sheet. It's very helpful.

[Ari]: So let's talk about why the PUMP Act is different than the prior law. And I think the first thing that I need to mention, or one of the first or most significant reasons why it's different is because it applies to exempt and nonexempt employees. So the PUMP Act provides protections for salaried and non-salaried employees. As some examples: nurses, teachers, managers, supervisors, agricultural workers. So it definitely expands the protections that were available under the Break Time for Nursing Mothers Law. And I did want to note briefly that there are some exceptions for airline workers and railroad workers. So those exceptions are specifically noted in the statute. So it's not necessarily all-encompassing, but certainly provides or covers more industries and more employers than the prior law. Another thing I wanted to mention is that this actually expands the time that these protections are available in the workplace. So under the prior law, there was a one-year period after the child's birth. Under the new law, it's a two-year period starting at the time the circumstances related to the need to pump arises. So if you think about that, if you're going one year from the child's birth. It would start right from the birth. And if you're taking a few weeks of maternity leave or 12 weeks or whatever, you know, that's kind of been counted against you. There's this is an expanded period of time. And it really starts at the time the circumstances related to the need to pump arises. So, you know, if you are taking maternity leave, that really could be... the time period could start when you come back from maternity or paternity, familial, familial parental leave.

[Ari]: One thing I wanted to point out about the PUMP Act too, is that it applies or provides protection for employees who work remotely. So it's really interesting. And I should back up and note that, you know, the same it provides the same protections or reinforces it's the same protections under the prior law: A reasonable break time to express milk for a nursing child for one...for two years after the child's birth. And of course, the requirement that it be a private place where the employee can go to express milk is also encompassed with the PUMP Act. So I wanted to point that out. But going back to the topic on remote employees, I think this is important to note, because even though an employee is working remotely under the PUMP Act, they are entitled to the same protections as an employee who would be in the office. So I think that's pretty important, especially in our post or a current COVID world, where I think a lot of employers have really switched to a remote format, at least for part of the time. So definitely wanted to point that out. And if an employee is using time to express milk they either must be completely relieved from duty or paid for the break time. So a little bit different. It's really one or the other. Either you're expressing milk or you're not. If you are, you've got to be paid for the break time. And I should also mention that under the PUMP Act and the prior law, the private space that is provided for an employee to express milk in the workplace cannot be a bathroom. So it has to be a private space. It cannot be a bathroom stall. There has to be a separately designated space.

[Ari]: Now if you're an employer and you don't have an extra office and extra room available, you might be wondering. Well, how can I comply with the law? I think one way you can look at it is you can use a space that is not specifically designated for expressing milk in the workplace 100% of the time. But you have to ensure that while an employee is using it for that purpose, that is the exclusive purpose for which it is used at that time. So if an employee is using the space to express milk then everyone has to be aware of that and nobody can interfere with that. So I just wanted to note that as well. So I think that's a good rundown of the new federal law and the federal protections that are available for employees who are expressing milk or have the need to pump in the workplace.

[Ari]: I wanted, though, to also note that New York State has enacted some amendments that are consistent with the PUMP Act, but also actually provide more expansive protections. And if you're an employer in New York State, this probably comes as no surprise to you. So New York recently at the beginning of this year made some amendments to the labor law or Section 206 C of the labor law. And prior to the amendment, the law was very

similar to the Break Time for Nursing Mothers Law. These new amendments, I should note, go into effect June 7 of this year. So there's a little bit of time for employers to again, take a look, educate yourself on what the law is, listen to this podcast, and try to figure out exactly what you need to do that you may not already be doing. So this amendment really provides expanded protections for employees who are expressing milk in the workplace. It is similar to the PUMP Act, but I'll tell you how it's different. So as opposed to providing the two-year timeframe under the PUMP Act, the amendment to the labor law provides up to three years following the child's birth. And I should note that under all of the laws that we've talked about today, this applies to the requirements applied to any time an employee needs to express milk in the workplace. So this isn't a one-a-day kind of thing. These are the requirements and the accommodations that the employee must be afforded every time they need to pump. So I wanted to point that out.

[Ari]: So let me tell you about some of the additional protections that this amendment to the labor law affords to employees who are pumping or have the need to express milk in the workplace. So the law provides that employers must provide a private lactation space that is in close proximity to the employee's work area, is near clean, running water, is well-lit, is shielded from view, free from intrusion from other persons in the workplace or the public and that contains a chair, a working surface, and an electrical outlet. So obviously, under the New York amendments there are some additional protections that ...or employers or accommodations that employers must provide employees. And the amendment to the labor law is very specific as to what those are.

[Ari]: So again, if the space is not exclusively used for pumping, it can't be used for pump...for another purpose while an employee is using it for that purpose. Pretty straightforward. Another protection or accommodation afforded by the amendment is...relates to refrigeration. So the new amendments don't say that if you don't have refrigeration or fridges in the workplace, you don't need to...you don't need to run out and buy them for lactating employees. But if you do provide refrigeration in the workplace, so you provide refrigerators for your employees' lunches, drinks, things like that, then there must be a designated space for breast milk. So that's something definitely to keep in mind. If you have the means, the ability, you might want to consider putting a small fridge or a mini fridge in the lactation space, excuse me, if it's possible.

[Ari]: So one other I think significant difference between the federal laws we discussed and the New York law is actually... under the New York law, there is no exemption from providing breaks to an employee based on undue hardship. So even if you could establish undue hardship under the New York law, that doesn't mean that you're completely off the hook. Undue hardship can be asserted for a reason not to provide a separate room or space for pumping employees. But it cannot be a reason to not allow employees to take reasonable breaks to pump. So there is an undue hardship exception kind of, but it is different from the one provided by the federal laws. And I did want to mention that the law directs the commissioner of the Department of Labor to develop a model lactation policy. So that will be forthcoming. I think that there was a time period, maybe it was 60 days, for the DOL in New York to issue guidance. So we'll see what they say about that. We'll see what that policy looks like. If you're in New York, you may already have a lactation accommodation policy. So but I wanted to note that the commissioner of the Department of Labor is supposed to issue one under the amendments.

[Ari]: And I did want to point out that there is also some new requirements with respect to dissemination of the policy, which is forthcoming, specifically, you have to disseminate the policy upon hiring and annually thereafter if you're an employer. And to employees who come back to work following the birth of the child. So if you have somebody, you give them the policy in January, they give birth in June, they come back in October. That's pretty generous, but maybe September, August, you need to give that employee a copy of the policy when they come back to the workplace.

[Ari]: So I hope that this rundown and summary has been helpful. I think it's a good explanation of the changes to the state and federal law as it relates to accommodations for pregnant workers. You know, I think that we definitely anticipate guidance or additional guidance being issued both by the US DOL and the New

York State DOL. But in the meantime, I just wanted to hop on here and give you guys a quick solo episode to let you know, these are important changes. You know, last week we talked about. A couple of weeks ago, we talked about the Pregnant Workers Fairness Act. We're talking about the PUMP Act. And I think these are just really important changes for us to note moving forward. So thank you so much for tuning in guys. We really appreciate it. You know, again, you can access the podcast on our website on LinkedIn. Thank you so much for the support and I'll see you guys in a couple of weeks.

[Ari]: The Labor & Employment Podcast is available on [barclaydamon.com](https://www.barclaydamon.com), YouTube, and all your favorite podcast streaming platforms. Like, follow, share, and continue to listen. Thanks.

Disclaimers:

This material is for informational purposes only and does not constitute legal advice or a legal opinion, and no attorney-client relationship has been established or implied.

Barclay Damon Live podcast transcripts and captions are automatically generated through artificial intelligence, and the texts may not have been thoroughly reviewed. The authoritative record of Barclay Damon Live programming is the audio file.

Thanks for listening.