



# Workplace Lactation: *New laws and a new context*

Jessica Lee, Staff Attorney

[www.pregnantatwork.org](http://www.pregnantatwork.org)

# What do breastfeeding employees need?



Time



Private,  
clean space



Other reasonable  
accommodations



2.3

Breastfeeding workers with access to both time and space were 2.3 times as likely to meet established breastfeeding goals.<sup>1</sup>

Breastfeeding has been linked to improved near and long-term outcomes:

- For babies (*diabetes, SIDS, asthma, ear infections*)
- For mothers (*heart disease, breast cancer, diabetes*)





# Breastfeeding Litigation Trends

**800** percent

**Increase in the number of breastfeeding related legal claims from 2006-2016 compared to the previous decade.**

A teal-tinted photograph of a woman in a white lab coat looking down at a baby being held by another woman. The woman in the lab coat is on the left, and the woman holding the baby is on the right. The baby is in the center, looking towards the camera. The background is a blurred indoor setting.

# Existing Workplace Lactation Laws

# Federal Law (FLSA): Break Time for Nursing Mothers

Requires employers nationwide to provide overtime eligible employees:



Reasonable unpaid break time, as needed



Functional lactation space that is not a bathroom, free from view and intrusion



For up to one year post-partum

# ●● Break Time for Nursing Mothers: FLSA Coverage Gaps

**Most hourly workers are covered, but the law leaves out thousands of Virginians who are exempt from overtime**

- Doctors and Nurse Practitioners
- Teachers and professors
- Managers and other professionals
- Many other categories of workers.  
Call the Center or 1-800-USA-WAGE for more.



Photo Source: United States Breastfeeding Committee

**Possible exemption for workplaces with fewer than 50 employees, IF undue hardship exists.**

# Title VII (Federal Pregnancy Discrimination Act) and VA Human Rights Act

- Discrimination on the basis of “sex” includes pregnancy, childbirth, and related medical conditions—including lactation.
- Prohibits harassment, firing, refusing to hire, and treating these employees less favorably than others similarly situated.



# Other Virginia Lactation Laws

## Breastfeeding in public:

“A mother may breastfeed in any place where the mother is lawfully present”  
(*Va. Code § 32.1-370. (2015)*)

## State employee accommodations:

State employees are entitled to reasonable break time to express breast milk each time they have need, and a non-bathroom place to do so that is shielded from view and free from intrusion. (*Va. Code. § 2.2-1201. (2019)*)

See guide here: <https://www.dhrm.virginia.gov/docs/default-source/hrpolicy/policyguides/breaks-for-nursing-mothers---resource-guide-5-15-19.pdf?sfvrsn=0>

## For K-12 schools:

Local school boards must adopt a policy setting aside a private, non-restroom location for students and employees to take reasonable breaks to express breast milk.  
(*Va. Code § 22.1-79.6. (2014)*)



# 2020 Workplace Accommodation Law

Va. Code Ann. § 2.2-3909

# ●● Virginia PWFA: Who does it apply to?

- Employers with 5 or more employees
- No profession/industry-wide exemptions
- ALL the employer's employees with known limitations related to pregnancy, childbirth, or related medical conditions, **including lactation.**



## Virginia PWFA: What are accommodations?

“Accommodations” are changes to how, when, or where an employee works in order to allow the employee to keep working *and* meet their health needs.

“Reasonable Accommodations” do this without causing an undue hardship for the employer.





## Pumping breaks, as needed

- Does not need to be paid, unless taken at same time as a paid break, vacation/sick time, salaried flexible time



## Private, functional lactation space that is not a bathroom

- Private = free from view and intrusion
- Need not be a permanent space, no building requirement
- Ideal space is near work area and sink

## Storage

- Milk is best kept cool
- Common refrigerators acceptable (per CDC, OSHA)
- If no refrigerator, permission to bring a cooler



## Changes in job

- Temporary transfer
- Temporary job restructuring
- Modified work schedules



## Childbirth Leave

- No paid leave requirement
- Be careful to provide *at least* the same options as those provided to people with temporary disabilities
- If a burden, consider telework or schedule modifications



# ●● Virginia PWFA: How are they provided?

## Interactive Process

If original accommodation request was not reasonable, what other options are available?

- ✓ Timely
- ✓ Good Faith
- ✓ Interactive
- ✓ Process



# Virginia PWFA: What is an undue hardship?

Accommodations do not need to be provided if they pose an “**undue hardship.**”

Judged in relation to the:

1. nature of the employer's operation, including composition and structure of the employer's workforce;
2. size of the facility; and
3. nature and cost of the accommodations needed.



## High Bar for Lactation Accommodation Exemptions:

- Most lactation accommodations are simple and cheap
- “The fact that the employer provides or would be required to provide a similar accommodation to other classes of employees shall create a rebuttable presumption that the accommodation does not impose an undue hardship on the employer.”

## Follow through with the interactive process:

The best tool for avoiding liability *and* supporting workers is a good faith, timely, conversation to identify options that work.



## Virginia PWFA: Other Requirements

1. No retaliation for requesting accommodations
2. No denying opportunities because of need (real or presumed) to make accommodations
3. No forced leave
4. Include the policy in your handbook (if any)
5. Inform your employees (1<sup>st</sup> day of work and within 10 days of providing notice of pregnancy)



## Law provides for agency enforcement:

Employee can file a complaint with the Division of Human Rights or a local human rights or human relations agency

**Employees** with complaints: [https://www.oag.state.va.us/files/DHR/DHR-COMPLAINT%20-FORM-2020-06-30\\_fillable.pdf](https://www.oag.state.va.us/files/DHR/DHR-COMPLAINT%20-FORM-2020-06-30_fillable.pdf)

**Employers** with questions: contact the Office of the Attorney General, Division of Human Rights' at (804.225.2292) or visit (<https://www.oag.state.va.us/programs-initiatives/human-rights> )

## Right to file suit:

Courts may award compensatory damages, back pay, other equitable relief, reasonable attorney fees and costs and may grant as relief any permanent or temporary injunction, temporary restraining order, or other order.

## Virginia PWFA: Common Mistakes

- Not paying a working employee
- Making assumptions to employee's detriment
- Failing to ensure break time coverage, availability of shared space
- Comments about employee's breastfeeding or family
- Following the "old" rules
- Not asking for help!

A teal-tinted photograph of a doctor examining a baby held by a smiling woman. The doctor is on the left, looking down at the baby. The woman is on the right, smiling and holding the baby. The baby is in the center, looking towards the camera. The background is a blurred indoor setting.

# COVID-19 Impact and Laws for Parents

# Impact of COVID-19 Crisis: New Regulations

**§16VAC25-220, Emergency Temporary Standard**

**Infectious Disease Prevention:**

**SARS-CoV-2 Virus That Causes COVID-19**

As Adopted by the

Safety and Health Codes Board

on July 15, 2020



Available at: <https://www.doli.virginia.gov/wp-content/uploads/2020/07/COVID-19-Emergency-Temporary-Standard-FOR-PUBLIC-DISTRIBUTION-FINAL-7.17.2020.pdf>

# ●● Impact of COVID-19 Crisis: New Regulations

*Common spaces addressed on pages 19-20:*

- Controlled access to common spaces
- Signage indicating occupancy, distancing requirements, cleanliness
- Regular disinfecting (by employees or employer)
- Mask requirements, where distancing not feasible

§16VAC25-220, Emergency Temporary Standard

Infectious Disease Prevention:

SARS-CoV-2 Virus That Causes COVID-19

As Adopted by the

Safety and Health Codes Board

on July 15, 2020



## ●● Impact of COVID-19 Crisis: Individuals

- Stress and vulnerability
- High demand for PPE and other accommodations
- Readjusting to pumping after WFH
- Increased concern about contamination
  - More time needed to clean
  - Demand for isolated space
  - What are best practices?



# Legal Impact of COVID-19 Crisis

Have legal rights changed?

- Reasonable and undue burden tests the same, but context has changed.
- Don't forget interactive process
- If in doubt, ask for help

Meeting increased space demands

- Temporary rooms
- Staggered and flex schedules
- Employee solutions
- Who is setting tone? Is there a policy?



 **Want to know more? Contact us!**

**For follow up questions call 415-565-4640 or email presenter at [leejessica@uchastings.edu](mailto:leejessica@uchastings.edu)**

**Free legal hotline for COVID-19 related issues:  
415-851-3308 or email [COVID19Helpline@worklifelaw.org](mailto:COVID19Helpline@worklifelaw.org)**

**Resources and practical tips for employers:**  
[www.pregnantatwork.org/employers/](http://www.pregnantatwork.org/employers/)

**Resources and practical tips for employees:**  
[www.pregnantatwork.org/Breastfeeding-Workers](http://www.pregnantatwork.org/Breastfeeding-Workers)

**Legal resources and practical tips for students  
and college administrators:**  
[www.ThePregnantScholar.org](http://www.ThePregnantScholar.org).

