

## **EMPLOYERS' OBLIGATIONS TO BREASTFEEDING EMPLOYEES**

Through legislation, the Washington State Legislature has chosen to promote lactation policies for a long list of stated reasons, including the Surgeon General's summons to all sectors of society and government to help redress the low breastfeeding rates and duration in the United States. The Legislature's promotion of lactation comes in large part in the form of a voluntary lactation program. An employer in Washington State may use the designation of "infant-friendly" on its promotional materials if the employer has an approved workplace lactation policy. RCW 43.70. The Department of Health is responsible for approval of the policy. In order to be approved, the policy must include at least the following:

- Flexible work scheduling, including scheduling breaks and permitting work patterns that provide time for expression of breast milk;
- 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 specified for breastfeeding or expressing breast milk; and
- A convenient, hygienic refrigerator in the workplace for storage of the mother's breast milk.

While the lactation program outlined in the statutory scheme above is voluntary, there are other legal issues relating to lactating women that are mandatory for employers. Some of these issues are addressed below.

### **A. Public Breastfeeding and Expression of Breast Milk**

Breastfeeding and the expression of breast milk are both specifically exempt from the indecent exposure laws. RCW 9A.88.010. Therefore, a woman who breastfeeds her child at a work function or at her workplace is protected by the law. She may even bring a charge of sexual harassment or discrimination if her employer tries to stop her from breastfeeding or expressing breast milk while she is at work.

Likewise, if other employees make sexual comments about her breasts because she is breastfeeding or while she is breastfeeding, the breastfeeding employee may make a sexual harassment claim.

On the other hand, some employers may find that breastfeeding in the lobby does not fit into the work environment, either because of client concerns or because the employer does not trust the rest of its employees not to harass a woman breastfeeding in the lobby. This is the type of situation in which an employer should seriously consider a special, private, comfortable room for breastfeeding. That way the nursing mother can still nurse her child and the employer can avoid a situation that might otherwise be uncomfortable.

## **B. Application of the Disability Laws to Breastfeeding Mothers**

Breastfeeding, in and of itself, does not constitute a disability. However, a woman who is breastfeeding her child needs time during regular intervals in a normal workday to express breast milk. Without this opportunity, she will suffer pain in her breasts, and likely obtain a plugged milk duct or breast infection, both of which can be very serious and are likely to recur. If a woman was to develop a disabling condition as a result of being unable to express breast milk, her condition would need to be accommodated like any other medical condition. It is unlikely that a disabling condition associated with an infection or clogged duct would constitute a disability under the Americans with Disabilities Act (ADA) because the ADA only covers permanent disabilities. However, state disabilities law and the Family Medical Leave Act do cover temporary conditions. In this context, so long as expressing breast milk does not prevent an employee from performing the essential functions of the job, and so long as she is otherwise capable of performing those functions, providing the time and space to express breast milk as necessary could be a reasonable accommodation. This is an untested area of the law. However, based on the decisions that exist under the disabilities laws, this is not a far-fetched scenario.

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*This brief article is a broad summary only. It lacks specificity about the law and about the effects of different fact patterns, and thus shall not be applied without consulting an attorney. It also focuses on Washington State law and federal law, and the laws of other jurisdictions may vary materially. The information set forth in this article is a broad and general overview of complex topics, and is not legal advice. It also does not take into account any changes to the law or in interpretations of the law that may have occurred since it was written. For more information, contact Karen Sutherland at [ksutherland@omwlaw.com](mailto:ksutherland@omwlaw.com)*