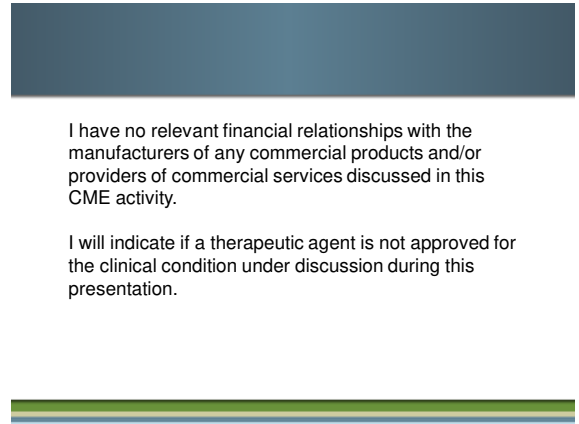




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Objectives

At the conclusion of this panel presentation the participant will be able to:

- Understand basic provisions for expressing breast milk while at work under federal and state laws.
- Be familiar with new proposed legislation.
- Understand potential remedies provided under federal and state law.

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Agenda

- **Federal law**
 - Medical devices = breastpumps
 - Fairness for Breastfeeding Mothers Act
 - FLSA missing...
- **State law**
 - Lactation Accommodation
 - DFEH precedential decision
 - Fair Employment Housing Act
 - Pregnancy Disability Act & Regs
 - California Family Rights Act
 - New Parent Leave Act
 - SB 142 - Proposed New Statute

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IRS: Breast Pumps = Medical Devices

- **Breast pumps are medical devices!**
 - Tax deduction if meet threshold for medical costs based on percentage of adjusted gross income
 - Flexible Spending Account – can pay for them on pretax basis
- **Advocates wrote to IRS to change their mind**
 - AAP and nine other medical groups



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Fairness for Breastfeeding Mothers Act

- **Proposed H.R. 866/S. 528**
- **Applies to public buildings that have a restroom**
- **Required to provide a hygienic lactation room (other than a bathroom).**
 - May be excluded *if no lactation room for employees* who work in the building, and
 - No room could be repurposed as lactation space, or
 - New construction would be required and the cost is unfeasible.



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What the FLSA (Fed Law) Does Not Say....

- **“In close proximity to employee’s work area”**
- **“All employees anywhere are covered”**
 - Salaried (executive, administrative, or professional), and certain other employees (like teachers) not covered by provisions of FLSA section 207....
 - So **not** covered by federal law
 - But **STATE** law still applies
- **“PAID”**
 - Caveat with break time regulations

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State Laws Not Preempted

- 29 states, D.C. and Puerto Rico have laws related to lactation in the workplace
- Approximately **15 states + D.C., Puerto Rico** have BF workplace laws that **require** accommodations for private employers
- 9 states encourage or “permit” “allow” or “encourage” accommodations, some “infant friendly” designation options
- Most detailed and strongest is OR
- OR Senator Jeff Merkley included federal law in Health Care Reform

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California Lactation Accommodation Statute

- **Labor Code sections 1030-1033**
 - Reasonable break time
 - “Shall” if possible run concurrently with any break time already provided to the employee; additional time unpaid
 - Reasonable efforts to find location other than a **bathroom**
 - Close proximity, private, free from intrusion, can only use for lactation for temp location while in use
 - **Agriculture employer – cab of truck/tractor**
 - **Undue hardship provision**
 - **Penalties: \$100 for each violation.**
 - **Became law in 2001; amended 2019**



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2009 DFEH Precedential Decision



- **Acosta Tacos 2009**
 - Mom (25) worked for small employer – 20-30 employees in restaurant
 - Baby is born 1 month premature; Mom returns to work after only 1 month
 - Partner brings baby to work and mom nurses in her car during breaks
 - Fired. Told her she could not breastfeed during her break and call back once she was done breastfeeding
 - Fine: **\$46,645** + interest (back pay, emotional distress, administrative fee)
 - Injunctive relief
- **Key Issue**
 - Clarifies that termination due to lactation is form of discrimination based on sex

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Fair Employment & Housing Act (FEHA)

- Cal. Government Code § 12926 applies to public and private employers, labor organizations and employment agencies with 5 or more employees.
- States it is unlawful to engage in specified discriminatory or retaliatory practices in employment or housing accommodations on the basis of *sex, or gender*.
- Amended in 2012
- “Sex” also includes pregnancy, childbirth, **breastfeeding** or medical conditions related to breastfeeding.

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Pregnancy Disability Leave (PDL)



- Government code section 12945 applies to employer with five or more employees; no minimum eligibility for employee
- Provides leave for up to 4 months (**17 1/3 weeks**) in the event of pregnancy, childbirth, loss of pregnancy, and related physical or mental conditions.
- Employers may not force employees on leave
- Includes right to reasonable accommodations
- Intermittent few hours off every day, or taking a few days or weeks off at a time

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PDL Regulations

Definitions 2 CCR § 11035

- A "condition related to pregnancy, childbirth, or a related medical condition,"
 - Physical or mental condition intrinsic to pregnancy or childbirth that **includes, but is not limited to, lactation**. Generally **lactation** without medical complications is not a disabling related medical condition requiring PDL, **although it may require transfer to a less strenuous or hazardous position or other reasonable accommodation**.
- A "related medical condition" is any medically recognized physical or mental condition related to pregnancy, childbirth, or recovery from pregnancy or childbirth.
 - This term includes, but is not limited to, **lactation-related medical conditions such as mastitis**; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; loss or end of pregnancy; or recovery from loss or end of pregnancy.

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California Family Rights Act (CFRA)

- Applies to employers of 50 or more employees; within 75 mile radius; employee who worked 1250 hours in last 12 months
- Provides 12 weeks job-protected leave for the birth of a child, for placement of a child for adoption or foster care (and other covered events)
- Pregnancy is not covered or considered a serious health condition under the CFRA. This leave can be used by an employee **only following the birth** of a child for bonding.



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New Parent Leave Act (NPLA)

- Applies to employers with 20 - 49 employees, within 75 mile radius; employee who worked 1250 hours in previous 12 months
- Provides 12 weeks job-protected leave for the birth of a child, for placement of a child for adoption or foster care (and other covered events)
- Child/ren bonding.



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Senate Bill 142 (California 2019)

- Requires California building standards to change in order install designated lactation spaces
- Lactation spaces required would be based on the number of employees (ie: 1 space for 50-150 employees, 2 spaces for 151-300 employees)
- Lactation room or location that includes prescribed features such as access to sink & refrigerator
- Substantially amends Labor Code sections 1030-1033



http://www.modern-mavens.com/annum-lacta-lactation-room/

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Enforcement

- **Government Agencies –**
Ca state DLSE, Fed DOL
- **ACLU**
- **Private right of action - lawsuits**



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Cases

- **2016 Report: 800% increase in lawsuits over the prior decade**
- **KFC - \$1.5 million in punitive damages**
- **Avon - Class Action, irony**
- **Delta flight attendant – no where to pump (settled)**
- **Dollar Tree – mom closed store to pump and picture went viral (not a case)**

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So What Are Employers Doing?

- National policies are being implemented
- Trying to find solutions to comply – that's a good thing!
- Asking the right questions...
- The biggest issues...



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Employer Questions: Location

- **Given constraints:**
 - Security camera's in manager's office
 - Break rooms shared by all
 - Fast-food restaurants without offices
 - Contractors sent to other locations
 - Spaces that are 'under construction'
 - Campuses with multiple buildings, but only one designated mother room
 - Employees working in multiple locations
 - is a space needed everywhere?
 - Change the temporary space every day



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Employer Questions: Break Time

- **How to provide Break Time given constraints:**
 - Employers with only one person scheduled at a time during the day (usually retail). Do we have to increase payroll and hire more people to cover breaks for lactation accommodation?
 - If regular paid break already taken, do we have to provide another one for expressing breast milk? Paid?
 - Can we mandate employees use their normally scheduled break to pump?
 - How long do we have to provide for breaks?
 - Less than 20 minutes, do we have to pay for it? Some state follows federal law....
 - What if break time would seriously disrupt normal business operations? Are there any exceptions to the law?
 - How much of the break do we have to pay to be in compliance with state & federal law?

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Other questions: Remedy?

- Location is insufficient? Embarrassing? Unhealthy?
- Failing to give breaks?
- Milk become insufficient?
- Termination/resignation because accommodation is too difficult/long/disruptive?

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Questions & Answers



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Thank You

Mendy Mattingly
Attorney

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