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.

Agenda

▪ Federal law
  – Medical devices = breast pumps
  – 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

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

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.
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

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

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

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

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.

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
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; pre-eclampsia; post-partum depression; loss or end of pregnancy; or recovery from loss or end of pregnancy.

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.

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)
- Children bonding.

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

Enforcement

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

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)
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...

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

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?

Other questions: Remedy?

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

Questions & Answers

Thank You

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