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## A Return on Investment: How the Breastfeeding Promotion Act Can Change the Make-Up of the Private Workforce

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# A RETURN ON INVESTMENT: HOW THE BREASTFEEDING PROMOTION ACT CAN CHANGE THE MAKE-UP OF THE PRIVATE WORKFORCE

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## INTRODUCTION

Nina Salyers is a new mother who was called back to work from maternity leave sooner than expected. So, she did what so many working professionals do—she went back to work. Because she is an attorney, going back to work for Nina meant that she would spend the next four weeks in and out of a state courthouse for trial.

As a nursing mother, Nina was forced to use public restrooms to express breast milk for the first couple of weeks of trial. It was not until the judge's clerk, also a new and nursing mother, offered Nina her office that Nina was able to express milk in a private, sanitary, non-bathroom environment. Though Nina was able to use a private space in which she could express milk for the remainder of the trial, so many other women are not afforded a similar safe, sanitary, and private space in which they can express breast milk upon returning to work.

In this Note, I will discuss the nature of breastfeeding, how it impacts women and their children, and the health-related and economic advantages employers could realize from the passage of the full 2009 version of the Breastfeeding Promotion Act (BPA). I will first examine the doctrinal developments of breastfeeding protection and the legislation enacted prior to the passage of the BPA.

Then, I will outline the version of the BPA that was incorporated into the Fair Labor Standards Act (FLSA) through the Patient Protection and Affordable Care Act (PPACA) and introduce the most recently proposed BPA, which would have clarified confusion among employers and the courts about whether breastfeeding and expressing milk sufficiently relate to pregnancy and childbirth so as to qualify as a protected activity under the Civil Rights Act of 1964, as amended. I will also discuss how the courts have historically treated breastfeeding in the workplace to demonstrate that more protection and incentives are needed to secure this right for women because, as it stands, the BPA effectively lacks impetus.

Next, acknowledging that the issues of workplace discrimination and accommodation are distinct, I will assert that the Pregnancy Discrimination Act (PDA) effectively calls for similar workplace accommodations as are required by the Americans with Disabilities Act for breastfeeding workers. Additionally, I will explore whether the PDA even needs to encompass breastfeeding as a medical condition relating to pregnancy in order for breastfeeding to be protected under the law as an extension of sex discrimination.

Lastly, I will propose that granting tax credits to small and mid-size businesses that successfully implement this change is a worthwhile incentive that is modeled after other such programs meant to induce cooperation with existing law. Moreover, I will explain what employers can do to accommodate nursing mothers in the interim before a tax incentive is established. The scope of this Note will be limited to employment in the private sector, as the federal government has its own policies regarding breastfeeding in the workplace and many states have established policies with varying degrees of tolerance.<sup>1</sup>

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1. See JOHN BERRY, U.S. OFFICE OF PERS. MGMT., MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: NURSING MOTHERS IN FEDERAL EMPLOYMENT (2010) ("In accordance with the authority delegated to the U.S. Office of Personnel Management (OPM) by the President on December 20, 2010, and in order to ensure consistent treatment of all civilian employees who are nursing mothers within the Federal workforce, agencies should apply the same benefits to all executive branch civilian employees who are exempt from section 7 of the FLSA, so that all nursing mothers who are civilian employees working in executive branch agencies receive these benefits. . . . An agency should provide a nursing mother employee reasonable break

This Note will explain why federal comprehensive legislation is necessary to incentivize employers to take this step and how the law can be reformed to expand breastfeeding access to women who choose to return to work after giving birth. I argue that employers will not naturally gravitate towards ensuring the rights of employees to breastfeed by creating a space that is not a bathroom in which women can safely and privately breastfeed or express milk during a reasonable break time. Employers may not implement this change with haste even when, as other scholars have argued, clear economic benefits are present in the return on investment in working mothers.<sup>2</sup>

### I. WHAT IS BREASTFEEDING AND WHY DOES IT MATTER?

Breastfeeding occurs when a mother feeds her infant milk produced from the female body.<sup>3</sup> A mother can express her milk by hand or through the use of a breast pump.<sup>4</sup>

The basic needs of working, lactating mothers typically include a private place to express milk, sufficient time to express milk, breastfeeding education for new mothers learning how to breastfeed and for businesses “in establishing appropriate accommodations for lactating employees,” and support within the workplace from a new mother’s fellow employees and her employer.<sup>5</sup> New mothers are returning to work with increasing regularity,<sup>6</sup> and as such, this issue affects mothers, their infant children, their spouses, and their employers. Providing enough space, time, and support for breastfeeding employees is fundamental to the success of our economy because

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time and a space to express milk for 1 year following the birth of the employee’s child. An agency can also extend the time beyond 1 year based on internal agency policy and collective bargaining agreements, or in accordance with relevant state laws that provide the right for greater than 1 year after the child’s birth.”).

2. Brit Mohler, Note, *Is the Breast Best for Business?: The Implications of the Breastfeeding Promotion Act*, 2 WM. & MARY BUS. L. REV. 155, 162 (2011).

3. See Lara M. Gardner, *A Step Toward True Equality in the Workplace Requiring Employer Accommodation for Breastfeeding Women*, 17 WIS. WOMEN’S L.J. 259, 260 (2002); see also *The World Health Organization’s Infant Feeding Recommendation*, WORLD HEALTH ORG., [http://www.who.int/nutrition/topics/infantfeeding\\_recommendation/en](http://www.who.int/nutrition/topics/infantfeeding_recommendation/en) [<http://perma.cc/WY6LG7JV>] (explaining the difference between exclusive and predominant breastfeeding); EQUAL EMP’T OPPORTUNITY COMM’N GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES 15 (2015), [https://www.eeoc.gov/laws/guidance/upload/pregnancy\\_guidance.pdf](https://www.eeoc.gov/laws/guidance/upload/pregnancy_guidance.pdf) (“Lactation, the postpartum production of milk, is a physiological process triggered by hormones.”) [hereinafter EEOC GUIDANCE].

4. Gardner, *supra* note 3, at 261.

5. CTR. FOR PREVENTION & HEALTH SERV., INVESTING IN WORKPLACE BREASTFEEDING PROGRAMS AND POLICIES 5.3 (2009), <https://www.businessgrouphealth.org/pub/f2ffe4f0-2354-d714-5136-79a21e9327ed> [hereinafter INVESTING IN WORKPLACE BREASTFEEDING].

6. JON P. WEIMER, U.S. DEP’T OF AGRICULTURE, THE ECONOMIC BENEFITS OF BREASTFEEDING: A REVIEW AND ANALYSIS 1–2 (2001).

women with children are the fastest-growing segment of the work force.<sup>7</sup> For a large majority of women, returning to work is often cited as one of the primary reasons they discontinue breastfeeding.<sup>8</sup>

A breastfeeding employee will typically need approximately three twenty-minute breaks during a workday, with additional time to walk or travel to the expression room.<sup>9</sup> “Until recently, no federal protection existed for women choosing to breastfeed in the workplace.”<sup>10</sup> Although employer options for supporting new mothers who seek to reintegrate into the workplace are abundant, “many women find that in the absence of a [federal,] legislatively mandated right to breastfeed in the workplace,” the obstacles to continuing to breastfeed after returning to work are discouraging.<sup>11</sup>

## II. BENEFITS OF ALLOWING AND ENCOURAGING WOMEN TO BREASTFEED AND EXPRESS MILK AT WORK

### A. Health Benefits

The U.S. Office on Women’s Health maintains that, “The cells, hormones, and antibodies in breastmilk [sic] protect babies from illness. This protection is unique and changes to meet your baby’s needs.”<sup>12</sup> Research reflects that these protections include a lower risk of contracting diseases such as “[a]sthma; [c]hildhood leukemia; [c]hildhood obesity; [e]ar infections; [e]czema (atopic dermatitis); [d]iarrhea and vomiting; [l]ower respiratory infections; [n]ecrotizing . . . enterocolitis . . . , a disease that affects the gastrointestinal tract in pre-term infants; [s]udden infant death syndrome (SIDS); [and] [t]ype 2 diabetes.”<sup>13</sup>

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7. OFFICE ON WOMEN’S HEALTH, U.S. DEP’T OF HEALTH AND HUMAN SERV., *Supporting Nursing Moms at Work: Employer Solutions*, WOMENSHEALTH.GOV, <http://www.womenshealth.gov/breastfeeding/employer-solutions/index.html> [<http://perma.cc/A9HQJV8S>].

8. WEIMER, *supra* note 6, at 1; *see also* Avital Andrews, *Breastfeeding is the Best Feeding, but U.S. Mothers Are Too Overworked to Provide It*, PACIFIC STANDARD (Sept. 5, 2014), <http://www.psmag.com/health-and-behavior/moms-work-full-time-less-likely-breastfeed-90189> [<http://perma.cc/4TZ33HX9>].

9. INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 5, at 8.16; *see also* DEP’T OF HEALTH & HUMAN SERV., THE BUSINESS CASE FOR BREASTFEEDING: STEPS FOR CREATING A BREASTFEEDING FRIENDLY WORKSITE (2008), <https://www.womenshealth.gov/files/assets/docs/breastfeeding/business-case/business-case-for-breastfeeding-for-business-managers.pdf> [hereinafter BUSINESS CASE FOR BREASTFEEDING].

10. Mohler, *supra* note 2, at 174.

11. *Id.*

12. OFFICE ON WOMEN’S HEALTH, U.S. DEP’T OF HEALTH AND HUMAN SERV., *Why breastfeeding is important*, WOMENSHEALTH.GOV, <http://www.womenshealth.gov/breastfeeding/breastfeeding-benefits.html> [<http://perma.cc/TV77K4HN>] [hereinafter OWH, *Breastfeeding*] (semicolons added).

13. *Id.* (semicolons added).

Breastfeeding can also be beneficial to the health of mothers. “Breastfeeding helps a mother’s health and healing following child-birth.”<sup>14</sup> Mothers who breastfeed generally have a lower risk of contracting “[t]ype 2 diabetes; [c]ertain types of breast cancer; [and] [o]varian cancer.”<sup>15</sup> Furthermore, “[i]f a baby does not breastfeed and the mother does not express milk, the mother’s breasts become overly full and uncomfortable.”<sup>16</sup> In addition, though experts are still looking at the effects of breastfeeding on weight loss, many women reported that it helped them return to their pre-pregnancy weight more quickly.<sup>17</sup>

Mohler also cites numerous health benefits of breastfeeding for both the mother and the child, including specific infant benefits such as higher IQ, “[r]educed likelihood of developing schizophrenia, [and] [l]ess risk of sudden infant death syndrome (SIDS).”<sup>18</sup> Mohler then argues that if the studies touting the benefits of breastfeeding are reliable, it is rational for employers to promote breastfeeding in the absence of a federal mandate because of the positive return on investment.<sup>19</sup> I contend that employers should not be concerned with the health benefits of breastfeeding for children. The issue, rather, should be framed as one relating to an employee’s right to express milk in the workplace in a safe, sanitary, and private non-bathroom location. It is not within the employer’s purview to be concerned with the health of her employee’s baby except as it relates to less time off for the employee.

### *B. Economic Benefits*

Furthermore, breastfeeding benefits society overall because it has the potential to save lives.<sup>20</sup> Research shows that if ninety percent of families breastfed exclusively for six months, nearly 1,000 infant deaths could be prevented.<sup>21</sup> Breastfeeding also saves money.<sup>22</sup> “The United States would also save \$2.2 billion per year [because] medical care costs are lower for fully breastfed infants than never-breastfed

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14. *Id.*

15. *Id.* (semicolons added).

16. INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 5, at 1.1.

17. OWH, *Breastfeeding*, *supra* note 12.

18. Mohler, *supra* note 2, at 160.

19. *Id.* at 167.

20. OWH, *Breastfeeding*, *supra* note 12. It should be noted, however, that formula-feeding can also save lives in some situations where infants cannot tolerate milk of any kind. The Office on Women’s Health also states: “A wide selection of specialist baby formulas now on the market include soy formula, hydrolyzed formula, lactose-free formula, and hypoallergenic formula.” *Id.*

21. *Id.*

22. *Id.*

infants.”<sup>23</sup> “Breastfed infants usually need fewer sick care visits, prescriptions, and hospitalizations.”<sup>24</sup> Most importantly for the purposes of this Note, breastfeeding also aids in the creation of a more productive workforce.<sup>25</sup> Typically, “[m]others who breastfeed miss less work to care for sick infants than mothers who feed their infants formula.”<sup>26</sup> Moreover, “[e]mployer medical costs are also lower.”<sup>27</sup>

In sum, employers should care because:

[w]orkplace breastfeeding programs may help to mitigate health care costs, lost productivity and absenteeism by [r]educing the risk of some short- and long-term health issues for women and children; [d]ecreasing employee absences [in] caring for a sick child; [p]romoting an earlier return from maternity leave; and [i]ncreasing retention of female employees.<sup>28</sup>

It is important to note that not all mothers choose to breastfeed. In fact, for a small number of women and babies it will be impossible because of an infant’s inability to tolerate milk of any kind.<sup>29</sup> Others simply choose to use formula for a variety of reasons including convenience, having to return to work, and a lack of social support.<sup>30</sup> Nevertheless, studies by the Center for Disease Control show that an increasing number of women in the United States do choose to breastfeed.<sup>31</sup> Moreover, in just one year, the number of women who chose to breastfeed their newborns rose from seventy-seven percent to seventy-nine percent.<sup>32</sup> Thus, while federal workplace

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23. *Id.*

24. *Id.*

25. OWH, *Breastfeeding*, *supra* note 12.

26. *Id.*

27. *Id.*

28. INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 5, at 1.2.

29. OFFICE ON WOMEN’S HEALTH, U.S. DEP’T OF HEALTH AND HUMAN SERV., YOUR GUIDETO BREASTFEEDING 4 (2011), <http://www.womenshealth.gov/publications/our-publications/breastfeeding-guide/breastfeedingguide-general-english.pdf>.

30. See Robin Eisner, *U.S. Moms Don’t Breast-Feed Long Enough*, ABC NEWS, <http://abcnews.go.com/Health/story?id=117395&page=1> [<http://perma.cc/5Z5QTXGL>] (“While they disagree on formula issues, breast-feeding advocates . . . agree our society is not accommodating toward breast-feeding. ‘Social support is very important . . . . Breast-feeding when a woman goes back to work is still very difficult in this country.’”).

31. CTR. FOR DISEASE CONTROL, BREASTFEEDING REPORT CARD UNITED STATES 2 (2013) (“The percent of U.S. infants who begin breastfeeding is high at 77%. While there is concern that infants are not breastfed for as long as recommended, the National Immunization Survey data show continued progress has been made over the last ten years. Of infants born in 2010, 49% were breastfeeding at 6 months, up from 35% in 2000. The breastfeeding rate at 12 months increased from 16% to 27% during that same time period.”) [hereinafter BREASTFEEDING REPORT CARD 2013].

32. CTR. FOR DISEASE CONTROL, BREASTFEEDING REPORT CARD UNITED STATES 2 (2014) (“In 2011, 79% of newborn infants started to breastfeed.”) [hereinafter BREASTFEEDING REPORT CARD 2014].



protection would aid the women who choose to return to work after giving birth, and who choose to breastfeed or express milk through a pump while doing so, such protection may not be necessary for all employees.

The decision whether or not to breastfeed is entirely a mother's choice. Since there is a strong correlation between new mothers and the need for stronger breastfeeding accommodations, however, the focus of this Note will remain on those employees who choose to breastfeed because studies demonstrate that more women now choose to breastfeed than in past decades and still face significant social gaps in support and protection in doing so.<sup>33</sup> Women who choose not to breastfeed, however, may face different issues relating to the length of maternity leave, the cost of formula, and the availability of affordable child care services.<sup>34</sup> These topics, while vital to working mothers, are outside the scope of this Note.

Breastfeeding is also a smart environmental choice. Whereas bottles and cans containing formula create more trash and plastic waste, a woman's breast milk is a natural, renewable resource that comes packaged and already warm.<sup>35</sup> Lastly, breastfeeding can help in an emergency. For example, during a natural disaster, breastfeeding can save an infant's life because it protects the "baby from the risks of an unclean water supply. . . . [and] against respiratory illnesses and diarrhea."<sup>36</sup> A mother's milk is also readily available without needing other supplies and, because it is always at the right temperature for her baby, it helps to regulate the baby's body temperature and can keep it from dropping dangerously low.<sup>37</sup>

Mohler cites workplace return on investment as an important *secondary* benefit of breastfeeding.<sup>38</sup> In addition to the many micro-economic benefits for families such as a reduced expenditure on formula and bottles,<sup>39</sup> there are several macroeconomic benefits to breastfeeding. For example, by breastfeeding, mothers likely reduce the likelihood of contracting disease for their children and thus contribute to the reduction of nationwide healthcare costs.<sup>40</sup> Mohler herself concedes that breastfeeding has the potential to reduce "the

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33. Eisner, *supra* note 30.

34. See INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 5, at 1.3.

35. OWH, *Breastfeeding*, *supra* note 12.

36. *Id.*

37. *Id.*

38. Mohler, *supra* note 2, at 162 (emphasis added).

39. OWH, *Breastfeeding*, *supra* note 12 ("Not breastfeeding costs money. Formula and feeding supplies can cost well over \$1,500 each year. Breastfed babies may also be sick less often, which can help keep your baby's health costs lower.") (emphasis removed).

40. *Id.*



need for costly healthcare services that must be paid for by insurers, government agencies, or families.”<sup>41</sup> In fact, she notes that the cost-savings amount to roughly \$3.6 billion.<sup>42</sup> Other sources, however, claim a far greater savings. A study published in 2010 “estimated that if 90% of U.S. families followed guidelines to breastfeed exclusively for six months, the U.S. would annually save \$13 billion from reduced medical and other costs.”<sup>43</sup>

### III. DOCTRINAL DEVELOPMENT OF BREASTFEEDING PROTECTION

The BPA is necessary because preexisting law does not cover the issue at hand. Whereas the Civil Rights Act of 1964 was amended to include the PDA in 1978, the PDA only relates to pregnancy, and medical conditions related to pregnancy.<sup>44</sup> The courts have inconsistently interpreted this definition to exclude breastfeeding.<sup>45</sup> The PDA effectively calls for similar workplace accommodations as are required by the Americans with Disabilities Act as amended (ADAAA) for breastfeeding workers.<sup>46</sup> Additionally, the ADAAA was amended in 2008 to broaden coverage and yet breastfeeding employees still find themselves without clear protection.<sup>47</sup>

#### A. Legislation

In 1978, Congress amended the Civil Rights Act of 1964 to include the Pregnancy Discrimination Act.<sup>48</sup> This Act extended protection of employees against employer discrimination on the basis of “pregnancy, childbirth, or related medical conditions.”<sup>49</sup> It does not, however, protect an employee’s right to express milk at work.<sup>50</sup> Under the ADAAA, “[a]lthough pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its

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41. Mohler, *supra* note 2, at 162.

42. *Id.*

43. U.S. DEPT OF HEALTH & HUMAN SERV., THE SURGEON GENERAL’S CALL TO ACTION TO SUPPORT BREASTFEEDING: FACTSHEET (2011), <http://www.surgeongeneral.gov/library/calls/breastfeeding/factsheet.html> [<http://perma.cc/W9ADHQME>].

44. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

45. *Compare* Allen-Brown v. Dist. of Columbia, 174 F. Supp. 3d 463, 478 (D.D.C. 2016), *with* Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990).

46. EEOC GUIDANCE, *supra* note 3, at 3.

47. *See* Americans with Disabilities Act, 42 U.S.C.A. § 12101 (West 2009).

48. The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . .”).

49. *Id.*

50. *Cf. id.* (failing to specifically address breastfeeding).

own a disability, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the [ADAAA] . . . .”<sup>51</sup> Furthermore,

[i]n applying the ADA as amended, a number of courts have concluded that pregnancy-related impairments may be disabilities within the meaning of the ADA, including: pelvic inflammation causing severe pain and difficulty walking and resulting in a doctor’s recommendation that an employee have certain work restrictions and take early pregnancy-related medical leave; symphysis pubis dysfunction causing post-partum complications and requiring physical therapy; and complications related to a pregnancy in a breech presentation that required visits to the emergency room and bed rest.<sup>52</sup>

Alas, breastfeeding is not covered on this list and has not been afforded protection under the ADA, though the ADA has provided the PDA with its reasonable accommodation and undue hardship framework.<sup>53</sup>

Then in 2009, Oregon Senator Jeff Merkley proposed the Breastfeeding Promotion Act (BPA) as an amendment to the Civil Rights Act of 1964 “to protect breastfeeding by new mothers; to provide for a performance standard for breast pumps; and to provide tax incentives to encourage breastfeeding.”<sup>54</sup> The proposed law included elements of a law that Oregon passed in 2007 under Merkley’s leadership in the state legislature to ensure workers have private areas and breaks to pump breast milk during the workday.<sup>55</sup> Although it had been introduced in five previous legislative sessions, “2009 marked the first time the bill was introduced in the Senate.”<sup>56</sup>

Title II of the BPA of 2009 is the “Credit for Employer Expenses for Providing Appropriate Environment on Business Premises for

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51. EEOC GUIDANCE, *supra* note 3, at 39 (internal citations omitted).

52. *Id.* at 41 (internal citations omitted).

53. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *Pregnancy Discrimination*, <https://www.eeoc.gov/laws/types/pregnancy.cfm> [<http://perma.cc/9X599N25>].

54. Breastfeeding Promotion Act of 2009, H.R. 2819, 111th Cong. (2009).

55. Press Release from U.S. Senator Jeff Merkley, *Merkley Announces Legislation to Make it Easier for Working Moms to Breastfeed* (June 11, 2009), <http://www.merkley.senate.gov/news/press-releases/merkley-announces-legislation-to-make-it-easier-for-working-moms-to-breastfeed> [<http://perma.cc/C3AV72NH>].

56. Mohler, *supra* note 2, at 176; *see also* Public Statement from U.S. Representative Carolyn Maloney, *Breastfeeding* (Jan. 1, 2014), <https://maloney.house.gov/issues/womens-issues/breastfeeding> [<http://perma.cc/Q6YGKR3H>] (“Senator Jeff Merkley (D-OR) introduced a companion bill in the Senate making this the first Congress there was a Senate companion bill of this critically important piece of legislation.”).

Employed Mothers to Breastfeed or Express Milk for their Children.”<sup>57</sup> This portion of the bill calls for the amendment of the Internal Revenue Code.<sup>58</sup> Under this section, the support and credit given to a business for the taxable year would be fifty percent of the “qualified breastfeeding promotion and support expenditures of the taxpayer for such taxable year.”<sup>59</sup> The limit on such support is \$10,000.<sup>60</sup>

Though this tax provision was not repropoed with the 2011 BPA,<sup>61</sup> I call for the reintroduction of this version of the BPA bill with the proposed tax credit, as it will enhance the efficacy of the bill and give the federal government a clear incentivization structure through which to encourage fair working conditions for nursing mothers.

### *B. Historical Treatment of Breastfeeding by Courts*

Several findings and purposes are listed under “Title I—Amendments to the Civil Rights Act of 1964” of the BPA of 2011, a version of the BPA that failed to make it past the Subcommittee on Health, Education, Labor, and Pensions during the 112th Congress.<sup>62</sup> Among them include two especially important findings that go to the essence of the law surrounding discrimination against breastfeeding employees in the workplace. First, “Congress intended to include breastfeeding and expressing breast milk as protected conduct under the amendment made to title VII of the Civil Rights Act of 1964” by the PDA.<sup>63</sup> Next, despite the fact that title VII of the Civil Rights Act of 1964 as amended applies to “‘pregnancy, childbirth, or related medical conditions,’ a few courts have failed to reach the conclusion that breastfeeding and expressing breast milk in the workplace are covered by such title.”<sup>64</sup>

For example, *Barrash v. Bowen* “stands for the narrow proposition that breastfeeding is not a *medical* condition related to pregnancy

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57. Breastfeeding Promotion Act of 2009, H.R. 2819, 111th Cong. (emphasis removed).

58. *Id.* § 201(a). The proposed legislation would have specifically affected “Subpart D of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1986 (relating to business related credits).” *Id.*

59. *Id.*

60. *Id.*

61. See Breastfeeding Promotion Act of 2011, H.R. 2758, 112th Cong. (2011) (failing to specifically address the Internal Revenue Code).

62. H.R. 2758—*Breastfeeding Promotion Act of 2011*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/2758/all-actions?r=3&overview=closed#tabs> [http://perma.cc/KS79UJ94] [hereinafter CONGRESS.GOV].

63. Breastfeeding Promotion Act of 2011, H.R. 2758, 112th Cong. § 101(8).

64. *Id.* at § 101(9).

or to childbirth.”<sup>65</sup> In *Barrash*, the court held that the federal government did not violate a collective bargaining agreement nor did it violate the constitutional rights of the plaintiff by denying her six months of maternity leave for breastfeeding.<sup>66</sup> The employer terminated the plaintiff’s employment when she refused to return to work after she had been given five months of leave to breastfeed her child.<sup>67</sup> Notwithstanding the fact that the federal government was the employer in question here, this case would have certainly come out differently had the BPA of 2011 been law and employers were not only mandated to allow employees to express breast milk in a non-bathroom space for a reasonable break time, but also incentivized to make this possible for such employees.<sup>68</sup> In a world in which BPA is law, an employee may not choose to take six months of maternity leave because she would be able to express milk at work during reasonable break times in a non-bathroom area.<sup>69</sup> If her employer nevertheless initiates adverse action against her, then the employee may have some recourse.<sup>70</sup>

Similarly, the court in *Wallace v. Pyro* held that the employer’s denial of the employee’s request for personal leave did not constitute discrimination on the basis of sex, or violate the PDA, where the employee’s request for personal leave was based on her inability to wean her child off of breastfeeding while the child was only six weeks old.<sup>71</sup> One year later, the Sixth Circuit Court of Appeals upheld this decision holding that because plaintiff could not establish that breastfeeding was a medical necessity, the PDA did not apply: “[n]either Title VII, nor the [PDA] intended to make it illegal for an employer to deny personal leave to a female worker who requests it to accommodate child-care concerns [such as breastfeeding].”<sup>72</sup> Even though the plaintiff’s circumstances were uniquely female because

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65. *Notter v. N. Hand Prot.*, 89 F.3d 829, 1996 WL 342008, at \*1, \*5 (4th Cir. 1996) (citing *Barrash v. Bowen*, 846 F.2d 927, 931 (4th Cir. 1988)).

66. *Barrash*, 846 F.2d at 930.

67. *Id.*

68. See Reasonable Break Times for Nursing Mothers Request for Information Notice, 75 Fed. Reg. 80073 (Dec. 21, 2010) [hereinafter Reasonable Break Times].

69. See Breastfeeding Promotion Act of 2011, H.R. 2758, 112th Cong. § 101(b)(2) (2011).

70. See *infra* Section IV.A.2; see also Mohler, *supra* note 2, at 155.

71. *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 868, 870 (W.D. Ky. 1990), *aff’d* 951 F.2d 351 (6th Cir. 1991). Cf. *Barnes v. Hewlett-Packard Co.*, 846 F. Supp. 442, 445 (D. Md. 1994) (finding that medical conditions of the newborn child are not childbirth-related medical conditions within the meaning of the Pregnancy Discrimination Act).

72. *Wallace*, 789 F. Supp. at 870; see also Melissa Martin, *Breastfeeding in the Workplace: Accommodating Women and Benefiting Employers*, TRACE: TENN. RESEARCH AND CREATIVE EXCH. 1, 5, 6 (2011).

only females can become pregnant and choose to breastfeed, the court refused to find impermissible gender discrimination.<sup>73</sup>

“Additionally, the court looked at the legislative history of the PDA to conclude that the PDA was not intended to cover breastfeeding, which the court found sufficiently unrelated to pregnancy and ‘related medical conditions.’”<sup>74</sup> “[T]he Family Medical Leave Act of 1993 would likely have covered this plaintiff for [up to] twelve weeks” had it been passed at this time.<sup>75</sup> The *Wallace v. Pyro* decision still stands for the proposition that Title VII and the PDA do not ordinarily cover absences for breastfeeding.<sup>76</sup> In enacting the PDA, however, “Congress unequivocally rejected the holding and logic of *General Electric Co. v. Gilbert*, which held that Title VII did not protect against workplace discrimination based on pregnancy.”<sup>77</sup> Thus, the courts are demonstrably inconsistent with their interpretation of the PDA and with the legislative intent of the PDA. This contradiction lends itself to the proposition that both employers and employees need clear, uniform guidance on the issue of breastfeeding in the workplace as a protected activity.

### C. Recent Developments

“Until recently, no federal protection existed for women choosing to breastfeed in the workplace.”<sup>78</sup> Yet Mohler contends that “the appropriate measure for workplace breastfeeding support is exactly as it stands—federal support in the form of equitable relief for those obstructing a woman’s right to breastfeed, with financial support left to an employer’s individual discretion.”<sup>79</sup>

Mohler’s argument rests on the premise that if breastfeeding is as beneficial to the mother and child as some studies show, then women will naturally elect to breastfeed and express milk at work in order to continue to feed their child breast milk.<sup>80</sup> Accordingly, employers are expected to follow in creating a place for women to

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73. See *Wallace*, 789 F. Supp. at 870.

74. Martin, *supra* note 72, at 6 (quoting *Wallace*, 789 F. Supp. at 870).

75. *Id.* at 6.

76. *Id.*

77. Diana Kasdan, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309, 310 (2001) (internal footnotes omitted) (citing *Gen. Electric Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976) (holding that a “disability-benefits plan does not violate Title VII because of its failure to cover pregnancy-related disabilities”).

78. Mohler, *supra* note 2, at 174.

79. *Id.* at 155.

80. *Id.* at 182.

express milk for those employees.<sup>81</sup> Creating such a space or allowing for the use of a preexisting space for expressing milk will benefit employers economically in the long run if, in fact, infants become sick less often when they are breastfed.<sup>82</sup> This in turn will result in working mothers taking less time off of work to care for their children.<sup>83</sup> For a great number of working mothers, however, the transition back into the work force while continuing to breastfeed is not always so seamless.<sup>84</sup> In fact, “[w]orking outside the home is related to a shorter duration of breastfeeding, and intentions to work full time are significantly associated with lower rates of breastfeeding initiation and shorter duration.”<sup>85</sup> It should be noted, too, that “[l]ow-income women, among whom African American and Hispanic women are overrepresented, are more likely than their higher-income counterparts to return to work earlier and to be engaged in jobs that make it challenging for them to continue breastfeeding.”<sup>86</sup>

In *Notter v. N. Hand Protection*, things start to look up.<sup>87</sup> In this case, plaintiff brought a Title VII sex discrimination case against her employer alleging that she had been discriminated against based on pregnancy, childbirth, or related medical conditions.<sup>88</sup> When plaintiff became pregnant, she was scared to tell her employer and when she did tell him, he responded with a series of insensitive and belittling questions: “[Employer] then asked [plaintiff] if she had been using birth control, if she knew who the father was, if she knew where the father was, and what her parents thought about her being pregnant and unmarried.”<sup>89</sup> Moreover, even though plaintiff had consistently received glowing marks on her performance evaluations, the evaluation immediately following the revelation of her pregnancy included the comment that she was an “expectant *unwed* mother.”<sup>90</sup>

The Fourth Circuit Court of Appeals ultimately upheld the jury verdict in favor of plaintiff noting that the “[employer’s] attitude is precisely what the [PDA] was intended to combat. ‘[T]he assumption that women will become [pregnant] and leave the labor force leads

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81. *Id.*

82. *Id.* at 162.

83. *Id.* at 162–63.

84. U.S. DEP’T OF HEALTH AND HUMAN SERV., CTR. FOR DISEASE CONTROL AND PREVENTION, THE CDC GUIDE TO BREASTFEEDING INTERVENTIONS 7 (2005) [hereinafter CDC GUIDE].

85. *Id.* (footnote omitted).

86. *Id.* (footnote omitted).

87. I refer here to the unpublished decision *Notter v. N. Hand Prot.*, 89 F.3d 829, 1996 West 342008, at \*1, \*5 (4th Cir. 1996).

88. *Id.* at \*1.

89. *Id.* at \*2.

90. *Id.* (emphasis added).



to the view of women as marginal workers, and is at the root of discriminatory practices which keep women in low-paying and dead-end jobs.’”<sup>91</sup> In this case, the court properly acknowledged the implicit bias of the employer’s questions, the fact that this could only happen to a woman because only women can become pregnant and thus fits properly within the scope of Title VII and the PDA, and lastly, that the PDA was meant to prohibit this very behavior.<sup>92</sup>

In *E.E.O.C. v. Houston Funding II, Ltd.*, the EEOC brought action against the employer on behalf of a female former employee, alleging that the employer unlawfully discharged the employee “because she was lactating and wanted to express milk at work.”<sup>93</sup> The defendant-employer argued that “Title VII does not cover ‘breast pump discrimination.’”<sup>94</sup> The United States District Court for the Southern District of Texas granted summary judgment to the employer, “finding that, even if [the employee’s] allegations were true, ‘[f]iring someone because of lactation or breast-pumping is not sex discrimination,’ and that lactation is not a related medical condition of pregnancy.”<sup>95</sup> The EEOC appealed.<sup>96</sup>

On appeal, the Fifth Circuit Court of Appeals considered the issue *de novo*.<sup>97</sup> The Fifth Circuit held that “the EEOC’s argument that Houston Funding discharged [the employee] because she was lactating or expressing milk states a cognizable Title VII sex discrimination claim.”<sup>98</sup> The court added: “Moreover, we hold that lactation is a related medical condition of pregnancy for purposes of the PDA. . . . It is undisputed in this appeal that lactation is a physiological result of being pregnant and bearing a child.”<sup>99</sup> Thus, in 2013 the Fifth Circuit clarified that lactation relates to pregnancy, and

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91. *Id.* at \*7 (quoting H.R. Res. No. 948, 95th Cong. 2d Sess. 3 (1978), reprinted in 1978 U.S.C.A.N.N. 4749, 4751). *But see Notter*, 1996 WL 342008 at \*12 (Wilkins, J., dissenting) (ignoring strong evidence of intentional sex discrimination simply because employee was given a positive evaluation during her pregnancy: “While evidence of an employer’s reaction properly may be considered as relevant evidence of an intent to discriminate, [employer’s] reactions to the announcement of [plaintiffs] pregnancy, as well as [employer’s] reference to [employee] as an unwed mother is counterbalanced by the undisputed facts that [employer] did not terminate [employee] immediately and in fact awarded [employee] the highest performance evaluation that she received during her employment with [employer] months after he learned of her pregnancy . . .”).

92. *Id.* at \*8.

93. *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 426 (5th Cir. 2013) (distinguishing *Wallace v. Pyro*, 789 F. Supp. 867 (W.D. Ky. 1990)).

94. *Id.* at 427.

95. *Id.*

96. *Id.*

97. *Id.* at 427.

98. *Id.* at 428.

99. *Houston Funding II, Ltd.*, 717 F.3d at 428.



that an employee who seeks to express milk at work upon returning from maternity leave cannot be terminated for that reason.<sup>100</sup> Any such termination would constitute a violation of the PDA.<sup>101</sup>

In recognition of the contribution of female employees to the workforce, one law firm, Steptoe & Johnson LLP, published a letter advising their clients and other employers to accommodate breastfeeding employees, regardless of the lack of “federal statute that specifically addresses breastfeeding in the workplace or accommodations in the workplace for breastfeeding women” at the time.<sup>102</sup> The letter advises clients to “proceed with caution when implementing any rules regarding breastfeeding or expressing milk in the workplace” because “the fact is that many breastfeeding mothers are also employees in the workforce.”<sup>103</sup> In 2004, statistics illustrated that over fifty percent of mothers with children less than a year old are members of America’s workforce.<sup>104</sup> The letter suggested that possible solutions to the issue of lack of space for returning mothers include, for example, “installing a lock on [a female employee’s] office door [if she wishes to express breast milk] to make her feel more secure and to avoid any embarrassing interruptions.”<sup>105</sup> This marks a progressive shift toward the full inclusion of working mothers in the workforce.

Furthermore, Steptoe highlights the fact that “[t]he laws in the individual states that have taken legislative initiatives to protect breastfeeding employees have touted the advantages to employers, not just mothers and infants.”<sup>106</sup> Those benefits, “among other things . . . [include] less absenteeism by nursing mothers, lower medical costs, and higher productivity.”<sup>107</sup> In other words, the letter advises employers to “work together to find a space that accommodates her needs while avoiding disruption to [their] workplace[s],”<sup>108</sup> an absolutely achievable goal that has yet to be realized across the board today. When employers realize the balance that can be struck between workplace productivity and employee privacy, they will be able to achieve a mutually beneficial business environment that results in loyal, and more productive, employees.<sup>109</sup>

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100. *See id.*

101. *See* The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

102. Steptoe, Johnson PLLC, *You mean now I have to worry about breastfeeding working mothers? What next?* (Larry J. Rector ed., Oct. 2004), <https://next.westlaw.com> (search for 10 No. 4 W. Va. Emp. L. Letter) [hereinafter *Breastfeeding Working Mothers Letter*].

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*; *see also* Mohler, *supra* note 2, at 163.

108. *Breastfeeding Working Mothers Letter*, *supra* note 102.

109. *See* CDC GUIDE, *supra* note 84, at 8.

Though the courts have demonstrated, albeit inconsistently and very slowly, an evolving jurisprudence with regard to sex discrimination as it includes pregnancy and thus, breastfeeding, there is still no clear guidance on the issue of breastfeeding in the employment context.<sup>110</sup> Steptoe's letter signals a critical step forward in the advice doled out to employers by some law firms, but not necessarily a sweeping change in employer policies. Accordingly, the need for a federal comprehensive scheme that incentivizes businesses to comply with the BPA and clarifies once and for all that breastfeeding is a medical condition related to pregnancy as a matter of fact, and is thus included within the scope of protection of the PDA, is palpable.

#### IV. BREASTFEEDING PROMOTION ACT: PASSED AND PROPOSED

##### A. *Patient Protection and Affordable Care Act*

###### 1. *Incorporation of the Breastfeeding Promotion Act into the Fair Labor Standards Act*

In 2010, President Barack Obama signed the Patient Protection and Affordable Care Act (PPACA) into law.<sup>111</sup> This incorporated portions of the 2009 BPA into the FLSA to require employers to provide reasonable break time for an employee to express milk (though the employer is not required to compensate the employee for this time) and a place to express milk that is not a bathroom.<sup>112</sup> The Act, however, may not apply to employers if they employ fewer than fifty employees and if the provisions would place an "undue hardship," defined as a "significant difficulty or expense," on the employer.<sup>113</sup> This loophole exposes many employees to the risk that their employers will not comply with the law if the employer can show that compliance is too expensive and therefore qualifies as an undue hardship.<sup>114</sup>

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110. *Breastfeeding Working Mothers Letter*, *supra* note 102.

111. Patient Protection and Affordable Care Act, 42 U.S.C.A. § 18001 (2010). *Accord* Lindsey Murtagh & Anthony D. Moulton, *Strategies to Protect Vulnerable Populations: Working Mothers, Breastfeeding, and the Law*, 101 AM. J. PUB. HEALTH 217, 221 (2011) [hereinafter *Working Mothers, Breastfeeding, and the Law*] ("Section 4207 is significant for 2 principle reasons. First, from the public health perspective, it is likely to improve eligible mothers' ability to express milk, which means that their children are likely to enjoy better health, the central goal of breastfeeding, as a result. Second, from the legal perspective, Section 4207 is the first federal law to require accommodation for mothers who wish to continue breastfeeding while working outside the home.").

112. The Fair Labor Standards Act of 1938, 29 U.S.C. § 207(r)(1)–(4) (2010).

113. *Id.*

114. *Cf.* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *The Americans with Disabilities Act: A Primer for Small Business*, <http://www.eeoc.gov/eeoc/publications/adahandbook.cfm>

After a portion of the BPA was incorporated through the PPACA into the FLSA, the Department of Labor (DOL) released a notice to the public requesting information about the length of a reasonable break time for nursing mothers as it “considers how best to help employers and employees understand the requirements of the break time for nursing mothers law.”<sup>115</sup> It is important to note that “[w]hile employers are not required under the FLSA to provide breaks to nursing mothers . . . they may be obligated to provide such breaks under state laws.”<sup>116</sup> For example, the Virginia Human Rights Act specifies that “[n]o employer employing more than five but less than 15 persons shall discharge any such employee on the basis of . . . sex, pregnancy, childbirth or related medical conditions, including lactation. . . . For the purposes of this section, ‘lactation’ means a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.”<sup>117</sup>

In addition, in 2002 the Virginia General Assembly passed a House Joint Resolution that “[encourages] employers . . . to recognize the benefits of breast-feeding” and to provide unpaid break time and appropriate space for “employees who need to breast-feed or express [their] milk for their infant children.”<sup>118</sup>

Furthermore, “[t]he [DOL] encourages employers to provide break time for all nursing mothers including those who may not be covered under the FLSA.”<sup>119</sup> Thus, if an employer already provides compensated break time, “an employee who uses that break time to express milk must be paid in the same way that other employees are compensated for break time.”<sup>120</sup> Lastly, the DOL requested comment on the following key issues: unpaid break time, reasonable break time, space for expressing breast milk, notice, relationship to the Family Medical Leave Act (FMLA), enforcement, and compliance assistance.<sup>121</sup>

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#appendixa [<http://perma.cc/8FGJLWKC>]. As a practice tip, the EEOC recommends that employers “take advantage of tax credits, such as the Small Business Tax Credit” to offset the cost of accommodations. *Id.* Though the EEOC espoused this advice in the Americans with Disabilities Act (ADA) context, it applies by analogy to the BPA here. *See also infra* Section V.B. for a discussion on the adoption of a similar tax structure to encourage business to accommodate breastfeeding employees.

115. Reasonable Break Times, *supra* note 68, at 80073.

116. *Id.* at 80074.

117. VA. CODE ANN. § 2.2-3903(B) (2014).

118. H.R.J. 145, 2002 Sess. (Va. 2002), <http://leg1.state.va.us/cgi-bin/legp504.exe?021+ful+HJ145ER> [<http://perma.cc/Q52SBAKP>]. Note that “encouragement” is not the same as a mandate, and that the provision similarly lacks enforcement power, though it was passed well before national legislation stating much the same in 2010.

119. Reasonable Break Times, *supra* note 68, at 80074.

120. *Id.* at 80075.

121. *Id.* at 80074–78.

Enforcement and compliance are the two most important areas for comment. Though the DOL has not yet issued its final guidance on this topic, it maintains that employers do, in fact, have to comply with the law while the Request for Information is pending, reiterating that the law became effective when the PPACA was signed on March 23, 2010.<sup>122</sup>

## 2. *Enforcement & Compliance*

Wage and Hour Division (WHD) investigators of the DOL carry out enforcement of the FLSA, including the break time for nursing mothers provision.<sup>123</sup> If an investigator finds a violation, “they . . . may recommend changes in employment practices to bring an employer into compliance.”<sup>124</sup> The WHD website outlines the procedures an employee may take if she would like to file a complaint “because she believes her employer has violated the break time for nursing mothers requirement under the FLSA.”<sup>125</sup> According to the Request for Information:

To the extent possible, WHD intends to give priority consideration to complaints received by the agency alleging that an employer is failing to provide break time and a space to express milk as required by law to allow expeditious resolution of the matter in order to preserve the employee’s ability to continue to breastfeed and express milk for her child.<sup>126</sup>

Though the DOL is taking a proactive approach to the implementation of this new incorporation into the FLSA, “[t]he FLSA does not specify any penalties if an employer is found to have violated the break time for nursing mothers requirement.”<sup>127</sup> In the majority of cases, “an employee may only bring an action for unpaid minimum wages or unpaid overtime compensation . . . associated with the failure to provide such breaks.”<sup>128</sup> “Because employers are

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122. U.S. DEPT OF LABOR, WAGE AND HOUR DIV., *Questions and Answers—Department’s Request for Information (RFI) on the FLSA’s Break Time for Nursing Mothers Provision* [hereinafter WHD, *Questions and Answers*], <http://www.dol.gov/whd/nursingmothers/faqsRFI.htm> [<http://perma.cc/2M8TFLXD>].

123. Reasonable Break Times, *supra* note 68, at 80078.

124. *Id.*

125. *Id.* (“[S]he should call the toll-free WHD number 1-866-487-9243 and she will be directed to the nearest WHD office for assistance. The WHD Web site at <http://www.dol.gov/wecanhelp/howtofilecomplaint.htm> provides basic information about how to file a complaint and how the WHD will investigate complaints.”) (emphasis removed).

126. *Id.*

127. *Id.*

128. *Id.*

not required [to pay their] employees for break time to express milk,” however, “there will not be any unpaid minimum wage or overtime compensation associated with” the broken law at issue here.<sup>129</sup> Nonetheless, the DOL may seek injunctive relief in federal district court for reinstatement and lost wages on behalf of the employee if the employer refuses to comply with the requirements.<sup>130</sup> The framework leaves little in the way of administrative relief yet provides the right to bring suit for injunctive relief in the worst-case scenario.

In terms of compliance assistance, “[t]he Department is [still] determining how best to provide assistance to employees as well as to employers seeking to comply with the new break time for nursing mothers requirement.”<sup>131</sup> The DOL is interested in hearing what the public thinks about this law.<sup>132</sup> Specifically, it wants to know “the kinds of information and resources that would be most helpful to employers and employees as they seek to comply with the requirements of the law and to exercise the break time right provided under the law.”<sup>133</sup>

The incorporation of the BPA into the FLSA marks a shift towards the full inclusion of working mothers into the labor force. It does, however, leave significant gaps in coverage and compliance and enforcement, for which the DOL is still seeking public input seven years after the enactment of the PPACA.<sup>134</sup> This gap can be filled with the passage of a federal law that properly defines breastfeeding and provides structured incentives through which businesses could successfully implement the BPA provisions.

## V. PROPOSED SOLUTIONS

The U.S. Breastfeeding Committee highlights the need for an implementation strategy that would “help employers comply with federal law that requires employers to provide the time and a place

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129. Reasonable Break Times, *supra* note 68, at 80078.

130. *Id.*; *see also* The Fair Labor Standards Act of 1938, 29 U.S.C. § 217 (2010).

131. Reasonable Break Times, *supra* note 68, at 80078. *See also* WHD, *Questions and Answers*, *supra* note 122 (“Until the Department issues final guidance, the Department’s enforcement will be based on the statutory language and the guidance provided in WHD Fact Sheet #73 and the associated FAQs.”).

132. Reasonable Break Times, *supra* note 68, at 80078.

133. *Id.* (“The Department has established a website that provides a compilation of resources that employers, employees, lactation consultants, and other interested stakeholders might find useful as they seek to develop workplace lactation programs. *See* <http://www.dol.gov/whd/nursingmothers>.”).

134. *See* WHD, *Questions and Answers*, *supra* note 122.

for nursing mothers to express breast milk.”<sup>135</sup> Mohler contends that the law is exactly as it should be because it has the backing of the federal government but leaves ultimate choices about implementation to individual businesses, but this view misses the point.<sup>136</sup> Mohler asserts that making it easier for breastfeeding employees to express milk at work is the rational thing for employers to do if the benefits of breastfeeding are really as pronounced as many studies have shown.<sup>137</sup> Despite the almost unanimous consensus regarding the benefits of breastfeeding,<sup>138</sup> however, many businesses do not comply with pre-existing law to create a non-bathroom area in which employees can express milk and a reasonable break time during which to do so.<sup>139</sup>

Simply because the proposal is rational, it does not mean employers will automatically comply.<sup>140</sup> Cost considerations may prevent an employer from building a new space in which women can express milk.<sup>141</sup> Similarly, an employer may not employ enough women to justify this cost in certain male-dominated industries, such as the construction industry.<sup>142</sup> Accordingly, additional protection for employees who seek to express milk at work is needed.

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135. *Employment*, U.S. BREASTFEEDING COMM., <http://www.usbreastfeeding.org/p/cm/ld/fid=106> [<http://perma.cc/KZV84DK7>]. See *About Us*, U.S. BREASTFEEDING COMM., <http://www.usbreastfeeding.org/p/cm/ld/fid=5> [<http://perma.cc/AQN6LN5C>] (noting that “The United States Breastfeeding Committee (USBC) is an independent nonprofit organization that was formed in 1998 in response to the Innocenti Declaration of 1990, of which the United States Agency for International Development was a co-sponsor. Among other recommendations, the Innocenti Declaration calls on every nation to establish a multi-sectoral national breastfeeding committee comprised of representatives from relevant government departments, non-governmental organizations, and health professional associations to coordinate national breastfeeding initiatives. The USBC is now a coalition of more than 50 organizations that support its mission to drive collaborative efforts for policy and practices that create a landscape of breastfeeding support across the United States.” (emphasis omitted) (internal hyperlinks omitted)).

136. Mohler, *supra* note 2, at 184.

137. Mohler, *supra* note 2, at 167.

138. See NAT’L CTR. FOR DISEASE CONTROL & PREVENTION, DOES BREASTFEEDING REDUCE THE RISK OF PEDIATRIC OVERWEIGHT 1 (2007) [hereinafter CDC PEDIATRIC OVERWEIGHT] (footnotes omitted), [https://www.cdc.gov/nccdphp/dnpa/nutrition/pdf/breastfeeding\\_r2p.pdf](https://www.cdc.gov/nccdphp/dnpa/nutrition/pdf/breastfeeding_r2p.pdf).

139. See CDC GUIDE, *supra* note 84, at 7 (“Barriers identified in the workplace include a lack of flexibility for milk expression in the work schedule, lack of accommodations to pump or store breast-milk, and concerns about support from employers and colleagues . . .”).

140. See *Working Mothers, Breastfeeding, and the Law*, *supra* note 111, at 218 (“Women frequently attribute early weaning to unsupportive work environments.”) (citation omitted).

141. See Reasonable Break Times, *supra* note 68, at 80075.

142. *Working Mothers, Breastfeeding, and the Law*, *supra* note 111, at 218 (“Professional women have significantly greater success in breastfeeding than do women in such occupations as retail sales, administrative support, and construction trades.”) (citations omitted).



A. *The Breastfeeding Promotion Act of 2011*

The last time the BPA was proposed was the 2011–2012 Congress and it was proposed in both the House and the Senate.<sup>143</sup> The purported purpose of the bills was “to protect breastfeeding by new mothers and to provide for reasonable break times for nursing mothers.”<sup>144</sup> The House bill did not make it past the Subcommittee on Health, Employment, Labor, and Pensions.<sup>145</sup> The Senate Bill similarly never saw the Senate floor.<sup>146</sup> The rationale offered for the reproposal of the BPA is that “[a]lthough title VII of the Civil Rights Act of 1964, as so amended, applies with respect to ‘pregnancy, childbirth, or related medical conditions’, a few courts have failed to reach the conclusion that breastfeeding and expressing breast milk in the workplace are covered by such title.”<sup>147</sup>

Accordingly, the underlying purpose of this bill is “to promote the . . . well-being of infants whose mothers return to the workplace after childbirth; and [] to clarify that breastfeeding and expressing breast milk in the workplace are protected conduct under the amendment made by the . . . ‘Pregnancy Discrimination Act.’”<sup>148</sup> In addition, the BPA would have amended the language of Title VII to include lactation or “a condition that may result in the feeding of a child directly from the breast or the expressing of milk from the breast.”<sup>149</sup> The PDA states: “The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . .”<sup>150</sup>

Arguably, Congress intended a broad interpretation of the “not limited to” language of the PDA.<sup>151</sup> For this reason “[a]ccording to the House Report, the PDA was meant to clarify that the protections of Title VII ‘extend[] to the *whole range of matters concerning the*

143. Breastfeeding Promotion Act of 2011, H.R. 2758, 112th Cong. (2011); Breastfeeding Promotion Act of 2011, S. 1463, 112th Cong. (2011).

144. Breastfeeding Promotion Act of 2011, S. 1463.

145. CONGRESS.GOV, *supra* note 62.

146. S. 1463—*Breastfeeding Promotion Act of 2011*, CONGRESS.GOV, <https://www.congress.gov/bills/112th-congress/senate-bill/1463?q=%7B%22search%22%3A%5B%22s+1463%22%5D%7D&r=3> [http://perma.cc/P6TK5YXK].

147. Breastfeeding Promotion Act of 2011, S.1463, 112th Cong. § 101(a)(9) (2011); *see also supra* Section IV.B.

148. *Id.* at § 101(b)(1)–(2).

149. *Id.* at § 102.

150. The Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (1978).

151. Kasdan, *supra* note 77, at 336–37 (2001) (“The emphasis on pregnancy disability in the legislative history and in the second clause of the PDA is best understood as a floor that Congress established in response to *Gilbert*, not as the ceiling of the PDA.”) (internal citations omitted).



*child-bearing process.*”<sup>152</sup> Moreover, the Senate “explained that the new language defining sex discrimination was meant ‘to include these physiological occurrences peculiar to women.’”<sup>153</sup> Common sense dictates that breastfeeding is unmistakably a “‘physiological occurrence’ within the ‘whole range of matters’ relating to” pregnancy.<sup>154</sup>

Congress expressly included an abortion exemption to the PDA.<sup>155</sup> In doing so, it exempted “application of Title VII to a specific condition arising from pregnancy (abortion).”<sup>156</sup> Consequently, “if Congress wanted to exclude the physiological occurrence of breastfeeding, nonmedical conditions of pregnancy, or other post-childbirth conditions, it would have done so in a similarly explicit and straightforward fashion.”<sup>157</sup> Without such an express edict, and taking into account the legislative history of the PDA, “it defies the statutory and congressional intent to read this exclusion into the [PDA].”<sup>158</sup> To limit the scope of the PDA to a narrow definition of “medical conditions of pregnancy ignores its broader goal of promoting the advancement of women in the workplace.”<sup>159</sup> The PDA “aims to prevent all forms of sex discrimination against women, not just discrimination against women temporarily ‘disabled’ by pregnancy.”<sup>160</sup>

### *B. The Tax Credit & New Proposal*

A federal comprehensive scheme is necessary to incentivize employers to encourage and promote breastfeeding or expressing breast milk in the workplace.<sup>161</sup> This has been demonstrated in the

152. *Id.* at 337 (citing H.R. Rep. No. 95-948, at 5 (1978) (emphasis added), reprinted in 1978 U.S.C.C.A.N.).

153. *Id.* at 337 (citing S. Rep. No. 95-331, at 4 (1977)).

154. *Id.* at 337.

155. The Pregnancy Discrimination Act of 1978, Pub. L. 95-555 (“This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.”).

156. Kasdan, *supra* note 77, at 337.

157. *Id.* at 337–38 (citing Norman J. Singer, 2A Statutes and Statutory Construction § 47:23, at 317 (6th ed. 2000)) (“[T]he enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded.”).

158. *Id.* at 338 (internal citation omitted).

159. *Id.*

160. *Id.* (internal citations omitted).

161. *Cf. Working Mothers, Breastfeeding, and the Law*, *supra* note 111, at 222 (“With more than one third of all mothers of children younger than 2 years working full time outside the home, the United States is more likely to improve its low breastfeeding rates if it seeks the help of legislation. Congress took an important step in that direction with enactment of the Fair Labor Standard Act’s reasonable break time provision. . . . The

repeated proposal of the BPA; by the fact that numerous courts have refused to recognize a woman's right to breastfeed or express breast milk at work following maternity leave, not recognizing that these acts are not disconnected from pregnancy itself; and because state law fails to provide full protection to breastfeeding mothers in the workplace.<sup>162</sup>

Mohler argues that if rational, profit-seeking employers understand the potential return on investment when they implement policies that make returning to work easier for a new mother by "invest[ing] in breastfeeding promotion even in the absence of the legislative credit[.]" then the tax credit is unnecessary.<sup>163</sup> In fact, she asserts that the credit provides "no *additional* incentive for the employer to spend any more than would be reasonably profitable."<sup>164</sup> Mohler also questions the very studies that illustrate the benefits of breastfeeding that she effectively relies on throughout her Note.<sup>165</sup> Regardless of whether the studies show that breastfeeding produces the health benefits for infants that it touts, it should be a woman's choice to breastfeed or not breastfeed as she reintegrates into the work force. She should not be barred from doing so because her employer refuses to accommodate her need to express milk because of temporal or spatial limitations.

There are many examples of the federal government providing tax credits to implement preexisting law when the law alone failed to generate change. For example, the Small Business Tax Credit provides a non-refundable credit for small businesses that incur expenses for the purposes of providing access to persons with disabilities.<sup>166</sup> Another such tax credit, The Barrier Removal Tax Deduction, "encourages business of *any size* to remove architectural and transportation barriers to the mobility of persons with disabilities and the elderly."<sup>167</sup> When claiming this deduction, businesses may claim up to \$15,000 per year for qualified expenses.<sup>168</sup>

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resulting new legal landscape presents public health professionals with an array of policy options to consider in moving toward the goal of accommodating the lactation (feeding as well as breastmilk [sic] expression) needs of all working mothers.").

162. Mohler, *supra* note 2, at 175.

163. *Id.* at 182.

164. *Id.*

165. *Id.* at 183.

166. INTERNAL REVENUE SERVICE, *Tax Benefits for Businesses Who Have Employees with Disabilities* [hereinafter *Tax Benefits for Businesses*], <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Tax-Benefits-for-Businesses-Who-Have-Employees-with-Disabilities> [<http://perma.cc/WFQ4L6U4>] ("An eligible small business is one that earned \$1 million or less or had no more than 30 full time employees in the previous year; they may take the credit each and every year they incur access expenditures. Refer to Form 8826, Disabled Access Credit (PDF), for information about eligible expenditures.").

167. *Id.* (emphasis added).

168. *Id.*

Similarly, Title II of the 2009 BPA would have amended the Internal Revenue Code to permit credits for “employer expenses incurred to facilitate” breastfeeding in “an amount equal to [fifty] percent of the qualified breastfeeding promotion and support expenditures of the taxpayer for such taxable year” and only up to \$10,000.<sup>169</sup> This Title was intended to provide a credit for employer expenses for providing an appropriate environment at work for employed mothers to breastfeed or express milk.<sup>170</sup> Moreover, employers could receive a tax credit for purchased items such as breast pumps and other similar equipment, as well as consultation services and other tangible personal property.<sup>171</sup>

Current laws fail to adequately incentivize employers to provide appropriate spaces for women to express breast milk while at work.<sup>172</sup> To remedy this, the federal government should adopt a law that expressly defines breastfeeding as a medical condition related to pregnancy and a tax structure similar to the Small Business Tax Credit.<sup>173</sup> Because the credit amount is relatively minimal (a maximum of \$10,000 per qualifying employee),<sup>174</sup> it may not be a meaningful incentive to large businesses. A large business may nevertheless be inclined to provide breastfeeding facilities in any event to attract and retain female employees of child-bearing age. Limiting the credit to small businesses or employers, who might find the credit to be more of an incentive, would reduce the potential impact on federal revenue while concentrating the tax benefit on employers who are most likely to respond to it.<sup>175</sup>

### *C. What Individual Employers Can Do in the Interim*

On an individual level, employers can take various steps to ensure that employees returning from maternity leave have the accommodations they need to assimilate back into the workplace. For example, employers can write and implement corporate policies to support breastfeeding women.<sup>176</sup> In addition, employers could allow flexible schedules “to support milk expression during work; give[] mothers options for returning to work, such as teleworking, part-time work, and extended maternity leave; provide[] on-site or near-site child care; provide[] high-quality breast pumps; and offer[]

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169. Breastfeeding Promotion Act of 2009, S. 1244, 111th Cong. § 201 (2009).

170. *Id.*

171. *Id.*; Mohler, *supra* note 2, at 178.

172. See Mohler, *supra* note 2, at 178 (explaining legal incentives).

173. *Tax Benefits for Businesses*, *supra* note 166.

174. *Id.*

175. See *id.* (detailing the limits of the incentive).

176. CDC GUIDE, *supra* note 84, at 7.

professional lactation management services and support.”<sup>177</sup> This will not only aid in the efficiency of work completion, but will also aid in employee satisfaction and, over time, employee longevity.<sup>178</sup>

The essential elements of a successful workplace lactation program are space, time, and support.<sup>179</sup> The ideal workplace would include a “Nursing Mother Room (NMR)” that is “centrally located with adequate lighting, ventilation, privacy, seating, a sink, an electrical outlet, and possibly a refrigerator.”<sup>180</sup> “Workplace support programs can be promoted to employers” themselves, and more precisely, “managers of human resources, employee health coordinators, insurers, and health providers serving many of a particular organization’s employees.”<sup>181</sup>

There are several examples of successful workplace programs.<sup>182</sup> For instance, in 1998, “the Oregon Department of Human Services Health Division developed the Breastfeeding Mother Friendly Employer Project to recognize employers who are already breastfeeding friendly and to encourage other Oregon employers to support breastfeeding in the workplace.”<sup>183</sup> If the employer can demonstrate that they meet the Breastfeeding Mother Friendly Employer Project criteria, the division gives those employers a certificate and publishes a list of these employers each year.<sup>184</sup>

Another such example includes Mutual of Omaha, a business that has implemented a lactation program.<sup>185</sup> The company “provides a series of classes on breastfeeding for its pregnant employees.”<sup>186</sup> Furthermore, “[p]renatal classes are designed to support the company’s strategic objectives of health and wellness for all its pregnant employees and their families.”<sup>187</sup> This particular program is “tailored

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177. *Id.*

178. *Id.* at 8 (analyzing the effectiveness of a corporate lactation program in California, the CDC found that “[a]bout 75% of mothers in the lactation programs continued breastfeeding at least 6 months, although nationally only 10% of mothers employed full-time who initiated breast-feeding were still breastfeeding at 6 months. . . . Measures of participant satisfaction and perceptions show a positive impact of workplace support programs on the mother’s work experience. Further, several studies indicate that support for lactation at work benefits individual families as well as employers via improved productivity and staff loyalty; enhanced public image of the employer; and decreased absenteeism, health care costs, and employee turnover.”).

179. *Id.*

180. *Id.*

181. *Id.* at 9.

182. CDC GUIDE, *supra* note 84, at 9.

183. *Id.*

184. *Id.*

185. *Id.* at 10.

186. *Id.*

187. *Id.*

to assist breastfeeding employees as they transition from maternity leave [back] to work.”<sup>188</sup>

While such programs may lead to initial employer expenditure, a small business tax incentive would remedy this by allowing companies to write part of such costs off as a tax break.<sup>189</sup> In addition, studies strongly suggest that employers will reap the invaluable benefits of retaining their breastfeeding employees and potential employees of child-bearing age who are considering a family, increasing job productivity, and increasing workplace satisfaction.<sup>190</sup>

### CONCLUSION

The general scientific consensus is that breastfeeding is healthy for both mothers and their infant children.<sup>191</sup> The question that remains is how the law can be reformed to expand breastfeeding access to women who choose to return to work after giving birth. An employer's inquiry into the health benefits for the child is beyond the purview of an employer. Simply because the decision to encourage women to breastfeed or express milk at work is rational, it does not mean 1) that employers will do it (otherwise they already would have) or 2) that it is “an unnecessary financial drain on the United States treasury.”<sup>192</sup> Throughout American history, a plethora of irrational ideologies crept their way into national policies thus requiring the passage of the Civil Rights Act of 1964, as amended. If a rational, profit-seeking business wanted to increase its revenue, it would not keep anyone out of the work force, including nursing mothers who seek to return to work.

Current laws fail to adequately incentivize employers to provide appropriate spaces for women to express breast milk while at work. To remedy this, the BPA should be repropose so that the federal government can clarify once and for all that breastfeeding and expressing milk fall within the scope of protection afforded by the PDA. In addition, the federal government should adopt the tax structure laid out in Section V.B. because it would allow small to mid-size businesses to write off expenditures related to the allowance and encouragement of expressing milk while at work. Such an adoption also has the potential to change the national dialogue surrounding breastfeeding—to demystify it. Instead of being viewed

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188. CDC GUIDE, *supra* note 84, at 10.

189. Mohler, *supra* note 2, at 178.

190. *Working Mothers, Breastfeeding, and the Law*, *supra* note 111, at 218.

191. CDC PEDIATRIC OVERWEIGHT, *supra* note 138, at 1.

192. Mohler, *supra* note 2, at 184.

as an awkward activity that a mother does in her home, it could (and should) be viewed as a natural part of life, of motherhood, and of a workday if a mother chooses to return to work while she is still capable of breastfeeding and if she chooses to breastfeed her new infant.

Upon the passage of such federal comprehensive legislation, working mothers will no longer have to choose between their profession and the onuses of motherhood while small to mid-size businesses will be able to retain a greater percentage of their workforce and revenue by way of tax cuts for expenditures.

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