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## Is the Breast Best for Business?: The Implications of the Breastfeeding Promotion Act

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## **NOTES**

### **IS THE BREAST BEST FOR BUSINESS?: THE IMPLICATIONS OF THE BREASTFEEDING PROMOTION ACT**

#### **ABSTRACT**

*In June of 2009, the 111th Congress was asked again to consider the Breastfeeding Promotion Act. During that year, for the first time in history, the Senate also took up consideration of the issue, and the President of the United States signed into legislation a portion of the Act as included in a healthcare bill. The Breastfeeding Promotion Act is meant to protect a woman's right to breastfeed in the workplace. The Act accomplishes this goal by: amending the Civil Rights Act to ensure that breastfeeding will be considered a protected act in the workplace, amending the Fair Labor Standards Act to require large employers to provide space and time for breastfeeding when it is reasonable to do so, and providing a tax credit to businesses that adopt workplace friendly breastfeeding support measures. This Note examines the benefits of breastfeeding, why breastfeeding is an issue in the workplace, and which portions of the Breastfeeding Promotion Act sufficiently respond to the issues women face without unnecessary governmental interference. This Note will also discuss the ways in which the Act goes too far and would impose a burden on society that likely does not match the benefits to be gained from its provisions. Namely, this Note will conclude that the tax credit provisions suggested in the Breastfeeding Promotion Act would impose too great a financial burden on the American taxpayers in light of the inconclusive nature of many breastfeeding studies. This Note concludes 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.*

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## INTRODUCTION

In June of 2009, the Breastfeeding Promotion Act<sup>1</sup> (BPA) was introduced yet again in both the House and the Senate. The purpose of the BPA is to “amend 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” within the workplace.<sup>2</sup> Although certain provisions of the BPA are centered on breastfeeding protection in the workplace, it is not readily apparent why workplace protection is necessary, or why national legislative encouragement is an appropriate measure to accomplish this goal.

This Note will explain why breastfeeding implicates the workplace, discuss what science has to say about the potential health benefits of breastfeeding, describe breastfeeding’s potential benefits to those other than the mother and infant, and illuminate the potential costs a business must undergo to meet the recommended breastfeeding support initiatives. Additionally, this Note will discuss why recent law has placed national legislation in a sufficient position to protect breastfeeding mothers who choose to work, and why legislation on a national level is necessary. Finally, this Note will discuss certain provisions of the Breastfeeding Promotion Act of 2009 and analyze why the portions of the BPA that provide business tax credits, which have not been adopted on a national level, are an inappropriate and unnecessary step.

## I. BREASTFEEDING AND THE WORKPLACE: THE DILEMMA EXPLAINED

Breastfeeding occurs when a mother feeds her infant with milk produced from the human female body.<sup>3</sup> A mother can feed her infant breast milk using a variety of options.<sup>4</sup> Some research indicates that

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<sup>1</sup> Breastfeeding Promotion Act of 2009, S. 1244, 111th Cong. (2009); H.R. 2819, 111th Cong. (2009).

<sup>2</sup> See H.R. 2819 at pmb1.

<sup>3</sup> Lara M. Gardner, *A Step Toward True Equality in the Workplace Requiring Employer Accommodation for Breastfeeding Women*, 17 WIS. WOMEN’S L.J. 259, 261 (2002).

<sup>4</sup> A few of the options available for mothers desiring to nourish with breast milk include: nourishment directly from the breast, nourishment from a bottle filled with self-expressed breast milk, nourishment via milk from a breast bank. See NATIONAL MILK BANK, <http://www.nationalmilkbank.org> (last visited Feb. 3, 2011) (“The National Milk Bank (NMB) is a nationwide organization that collects donated human milk, ensures milk safety and quality and makes it available for infants in need.”).

breastfeeding leads to positive health benefits for both the mother and child.<sup>5</sup> Typically, these studies recommend that mothers breastfeed exclusively for the first six months in order to attain optimal benefits.<sup>6</sup> Following this six-month period, studies recommend that mothers supplement breast milk with additional nourishment for at least the first year of the infant's life.<sup>7</sup> Although an abundance of literature exists promoting the positive benefits associated with breastfeeding, the national average for mothers that breastfeed for the recommended period currently falls far below national recommended levels.<sup>8</sup>

For most women, returning to work is frequently cited as one of the primary reasons they discontinue breastfeeding.<sup>9</sup> Because most women must return to work before the end of the recommended breastfeeding time period, if a woman desires to continue breastfeeding for this recommended period, a decision to return to work necessarily involves the difficulty of breastfeeding in the workplace.

The regularity with which a breastfeeding mother must pump in order to continue producing milk and forgo undesired discomfort and infection

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<sup>5</sup> See discussion *infra* Part II.A.

<sup>6</sup> See Lawrence M. Gartner, *New Breastfeeding Policy Statement from the American Academy of Pediatrics*, 17 BREASTFEEDING ABSTRACTS 19, 19-20 (1998), available at <http://www.llli.org/ba/Feb98.html> (American Academy of Pediatrics); Cindy Harmon-Jones, *Duration, Intensity, and Exclusivity of Breastfeeding: Recent Research Confirms the Importance of these Variables*, 25 BREASTFEEDING ABSTRACTS 17, 17-20 (2006), available at <http://www.llli.org/ba/May06.html>.

<sup>7</sup> See U.S. DEP'T OF HEALTH AND HUMAN SERVS., AN EASY GUIDE TO BREASTFEEDING [hereinafter BENEFITS OF BREASTFEEDING], available at <http://www.womenshealth.gov/breastfeeding/benefits/> (last visited Oct. 25, 2009).

<sup>8</sup> Jon Weimer, *The Economic Benefit of Breastfeeding: A Review and Analysis*, FOOD AND RURAL ECONOMICS DIVISION, ECONOMIC RESEARCH SERVICE, U.S. DEPARTMENT OF AGRICULTURE 1 (2001). In 2007, the national average for women who breastfed their infants for the first six months was approximately 43 percent. CTRS. FOR DISEASE CONTROL, BREASTFEEDING AMONG U.S. CHILDREN BORN 1999-2006, CDC NATIONAL IMMUNIZATION SURVEY (2009), [http://www.cdc.gov/BREASTFEEDING/DATA/NIS\\_data](http://www.cdc.gov/BREASTFEEDING/DATA/NIS_data) [hereinafter IMMUNIZATION SURVEY]. This figure still falls short of the U.S. Surgeon General's national recommendation of 50 percent. *Id.* Additionally, some states still fall far below the recommended level, and the disparity among the states is great. CTRS. FOR DISEASE CONTROL AND PREVENTION, BREASTFEEDING REPORT CARD, UNITED STATES: PROCESS INDICATORS(2009), available at [http://www.cdc.gov/BREASTFEEDING/DATA/report\\_card3.htm](http://www.cdc.gov/BREASTFEEDING/DATA/report_card3.htm) [hereinafter BREASTFEEDING REPORT CARD] (citing Mississippi at only 20 percent).

<sup>9</sup> See Weimer, *supra* note 8, at iii (citing the increased participation of women in the labor force as one of the primary reasons for low breastfeeding rates); N. BUS. GRP. ON HEALTH, INVESTING IN WORKPLACE BREASTFEEDING 1.3 (2009) [hereinafter INVESTING IN WORKPLACE BREASTFEEDING] (women returning to work are less likely to breastfeed).

imposes a substantial burden on a working woman. A nursing woman must express milk every two to three hours during the first six months<sup>10</sup> in order to prevent swelling, engorgement, or infections.<sup>11</sup> Thus, during an eight-hour workday, a mother would need to express at least three times.<sup>12</sup> Because each expression session requires fifteen to twenty-five minutes, a mother would need to allocate approximately forty-five to seventy-five minutes per workday to milk expression.<sup>13</sup>

Aside from the practical deterrents to breastfeeding in the workplace, many women are additionally deterred by a lack of workplace support.<sup>14</sup> More specifically, insufficient break time, the absence of private sanitary space to pump, and the absence of storage space for breast milk rank among the most salient concerns.<sup>15</sup>

Current statutory protection, namely the Family Medical Leave Act (FMLA),<sup>16</sup> is insufficient to alleviate the breastfeeding in the workplace dilemma. The FMLA provides for three months of unpaid maternity leave, only half of the recommended exclusive breastfeeding time period.<sup>17</sup> For mothers requiring additional income, and thus not afforded the luxury of sitting out from work for the full three-month period, the FMLA provides even less of a solution. Assuming that breastfeeding is beneficial to mothers, infants, and society at large, action must be taken to ameliorate the obstacles women face when they choose to breastfeed in the workplace.

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<sup>10</sup> INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 1.2.

<sup>11</sup> Elizabeth N. Baldwin & Kenneth A. Friedman, *Working it Out: Breastfeeding at Work*, 93 *Mothering* 65 (1999), available at <http://www.lli.org/Law/LawEmployment.html>.

<sup>12</sup> INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 1.2.

<sup>13</sup> Nina Cavalier, *Working and Nursing*, 17 *NEW BEGINNINGS* 46 (2000), available at <http://www.lli.org/NB/NBMarApr00p46.html>.

<sup>14</sup> U.S. BREASTFEEDING COMM., BREASTFEEDING CAN REDUCE INFANT INFECTIONS AND HEALTH CARE COSTS IN THE U.S. (2006), available at <http://www.usbreastfeeding.org/NewsInformation/NewsRoom/200606BFCanReduceInfantInfectionsHCCosts/tabid/136/Default.aspx> [hereinafter REDUCE INFECTIONS AND COSTS].

<sup>15</sup> *Id.*

<sup>16</sup> 29 U.S.C. § 2612 (2006).

<sup>17</sup> *Id.*

## II. BREASTFEEDING: AN EXAMINATION OF POTENTIAL BENEFITS

A. *The Broad Reach of Breastfeeding Benefits*

In order to consider breastfeeding in the workplace a worthwhile legislative issue, there must be actual and substantial benefits that result when mothers choose to breastfeed. Numerous studies report positive health results for both the mother and infant resulting from breastfeeding.<sup>18</sup> Aside from the emotional benefits and relational development that breastfeeding fosters between the mother and the infant,<sup>19</sup> other noted *infant* health benefits include:

- Cognitive benefits (higher IQ)<sup>20</sup>
- Reduced likelihood of developing schizophrenia<sup>21</sup>
- Less risk of sudden infant death syndrome (SIDS)<sup>22</sup>
- Respiratory benefits (less likely to develop asthma)<sup>23</sup>
- Dermatological benefits (lower chance of developing skin diseases such as eczema)<sup>24</sup>
- Fewer infections (otitis media, diarrhea and other bowel diseases, Crohn's, ulcerative colitis, or stomach viruses)<sup>25</sup>
- Reduced risk of developing some types of cancer<sup>26</sup>
- Less likely to get juvenile onset diabetes<sup>27</sup>

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<sup>18</sup> UNITED STATES BREASTFEEDING COMMITTEE, BENEFITS OF BREASTFEEDING 1 (2002) [hereinafter U.S. BREASTFEEDING COMM.] (noting benefits to the child that are the exclusive result of breastfeeding); *see also* Gartner, *supra* note 6, at 19-20 (noting the unique superiority of breast milk and the vast difference of provided substitutes).

<sup>19</sup> U.S. BREASTFEEDING COMM., *supra* note 18, at 2.

<sup>20</sup> Weimer, *supra* note 8, at 1 (American Academy of Pediatrics reports enhanced cognitive development); U.S. BREASTFEEDING COMM., ECONOMIC BENEFITS OF BREASTFEEDING (2002) (noting a three to eleven point enhanced IQ for breastfed infants as compared to formula-fed infants).

<sup>21</sup> Harmon-Jones, *supra* note 6, at 17-20 (citing double risk of schizophrenia for infants never breastfed).

<sup>22</sup> U.S. BREASTFEEDING COMM., *supra* note 18, at 1.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; Press Release, United States Breastfeeding Committee, Breastfeeding Reduces Risk of Breast Cancer (Oct. 28, 2008), *available at* <http://www.usbreastfeeding.org/NewsInformation/NewsRoom/200810BFReducesRiskofBreastCancer/tabid/130/Default.aspx>.

<sup>27</sup> U.S. BREASTFEEDING COMM., *supra* note 18, at 1.

- Lower risk of obesity (both childhood and adult)<sup>28</sup>
- Greater oral health<sup>29</sup>

Studies also associate breastfeeding with health benefits for the *mother*. Notable benefits include:

- Expedited recovery post-childbirth<sup>30</sup>
- Lower risk of postpartum bleeding<sup>31</sup>
- Accelerated return to pre-pregnancy weight<sup>32</sup>
- Less likely to be diagnosed with postpartum depression<sup>33</sup>
- Lower risk of developing anemia<sup>34</sup>
- Lower risk of developing osteoporosis<sup>35</sup>
- Prevention of some forms of cancer (notably, ovarian and premenopausal breast cancer)<sup>36</sup>
- Assistance in preventing type 2 diabetes<sup>37</sup>
- Cardiovascular benefits (lower blood pressure and cholesterol)<sup>38</sup>

A number of the benefits associated with breastfeeding are positively correlated with both the duration and the exclusivity of breastfeeding as a portion of infant nutrition.<sup>39</sup> Thus, breastfeeding exclusively for the entire recommended six-month period is necessary for optimal results.

Not only is breastfeeding reported to have positive health implications for the mother and infant, but research also indicates that micro- and

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See BENEFITS OF BREASTFEEDING, *supra* note 7; see also Press Release, United States Breastfeeding Committee, Breastfeeding Recommended to Protect Infants During Swine Flu Outbreak (May 1, 2009) [hereinafter Swine Flu Outbreak], available at <http://www.usbreastfeeding.org/NewsInformation/NewsRoom/200905BreastfeedingandSwineFlu/tabid/144/Default.aspx>.

<sup>34</sup> U.S. BREASTFEEDING COMM., *supra* note 18, at 2 (as a result of a delay in resuming the menstrual cycle post pregnancy).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> BENEFITS OF BREASTFEEDING, *supra* note 7; Swine Flu Outbreak, *supra* note 33.

<sup>38</sup> BENEFITS OF BREASTFEEDING, *supra* note 7.

<sup>39</sup> Harmon-Jones, *supra* note 6, at 17-20 (claiming greater benefits associated with both duration and intensity).

macro-level economic benefits, environmental benefits, and workplace return on investment are important secondary benefits of breastfeeding. As it relates to micro-level economic benefits, reduced expenditures in formula alone could equate to savings between \$1,000 and \$4,000 per year for each family.<sup>40</sup> Additional indirect cost savings include fewer medical bills related to infant illness<sup>41</sup> and fewer absences from paid work time due to doctor visits with sick infants.<sup>42</sup>

On the macro-level, breastfeeding could be an easy contribution to reduce nationwide healthcare costs.<sup>43</sup> “Breastfeeding reduces the need for costly health services that must be paid for by insurers, government agencies, or families.”<sup>44</sup> Fewer employee absences not only provide a micro-level benefit to families,<sup>45</sup> but at the macro-level it means that society will be more productive as a whole.<sup>46</sup> In their entirety, these savings equate to roughly \$3.6 billion.<sup>47</sup> Encouraging breastfeeding could also reduce government expenditures on formula.<sup>48</sup> The United States Department of Agriculture, through the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) purchases 40 percent of all United States-sold formula, making the U.S. the largest infant formula purchaser.<sup>49</sup> Even after formula companies provide over a billion dollars in rebates for the WIC program, formula costs ring in with a \$567 million price tag.<sup>50</sup> As reducing healthcare spending moves to the political forefront, preventative methods to reduce costs will become increasingly important.<sup>51</sup>

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<sup>40</sup> See BENEFITS OF BREASTFEEDING, *supra* note 7, at 2 (providing estimates for yearly savings ranging from \$1,160 to \$3,195).

<sup>41</sup> Weimer, *supra* note 8, at 1 (noting reduced “physician, clinic, hospital, laboratory, and procedural fees”).

<sup>42</sup> *Id.*

<sup>43</sup> U.S. BREASTFEEDING COMM., *supra* note 18, at 2.

<sup>44</sup> *Id.*

<sup>45</sup> See Gartner, *supra* note 6; Harmon-Jones, *supra* note 6.

<sup>46</sup> U.S. BREASTFEEDING COMM., *supra* note 18, at 3.

<sup>47</sup> See Weimer, *supra* note 8, at 10 (noting the amount insurers pay to treat diseases that breastfeeding helps to prevent).

<sup>48</sup> Weimer, *supra* note 8, at 3.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (using figures that date back to 1997 and have not been adjusted for inflation).

<sup>51</sup> CENTERS FOR MEDICARE & MEDICAID SERVICES, OFFICE OF THE ACTUARY: DATA FROM THE NATIONAL HEALTH STATISTICS GROUP (noting total healthcare spending in 2008 as \$2,336.70 billion at 16.2 percent of gross domestic product, up from \$1,125.10 billion and 13.5 percent of gross domestic product in 1997).

Environmental benefits are another positive effect associated with breastfeeding. Reduced energy, both in production and shipment, and elimination of unnecessary packaging associated with formula production are some of the noted benefits.<sup>52</sup> Reduced reliance on formula is also associated with a more efficient use of landfill space, resulting from fewer formula cans and discarded packaging.<sup>53</sup>

Finally, businesses stand to realize benefits associated with breastfeeding when they provide opportunities for women to continue breastfeeding once they return to work.<sup>54</sup> Because of these benefits, some research indicates that the costs associated with breastfeeding in the workplace<sup>55</sup> should more appropriately be likened to an investment. A few of the notable employer benefits include fewer missed work days,<sup>56</sup> reduced health care costs,<sup>57</sup> fewer instances of employee turnover,<sup>58</sup> and increased employee loyalty.<sup>59</sup> Additionally, businesses with breastfeeding support programs are more likely to gain a positive reputation in the community.<sup>60</sup> Ultimately, studies show that the benefits associated with breastfeeding exist not only for the mother and child, but for many other interested parties as well.

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<sup>52</sup> U.S. BREASTFEEDING COMM., *supra* note 18, at 2.

<sup>53</sup> U.S. BREASTFEEDING COMM., *supra* note 18, at 2.

<sup>54</sup> See DEP'T OF HEALTH & HUMAN SERVS., THE BUSINESS CASE FOR BREASTFEEDING: STEPS FOR CREATING A BREASTFEEDING FRIENDLY WORKSITE [hereinafter BREASTFEEDING STEPS BROCHURE].

<sup>55</sup> See discussion *infra* Part III.B.

<sup>56</sup> See BREASTFEEDING STEPS BROCHURE, *supra* note 54 (noting absences related to sick infant care are twice as likely for mothers who formula feed as compared to those who breastfeed).

<sup>57</sup> U.S. BREASTFEEDING COMM., WORKPLACE BREASTFEEDING SUPPORT (2002)[hereinafter WORKPLACE BREASTFEEDING SUPPORT] (noting reduced healthcare costs averaged "\$400 per [breastfed] baby over one year"). These reduced costs come in the form of lower medical insurance, fewer prescriptions, and less frequent hospital and doctor visits. See BREASTFEEDING STEPS BROCHURE, *supra* note 54.

<sup>58</sup> See BREASTFEEDING STEPS BROCHURE, *supra* note 54. The national retention level for mothers post-birth is approximately 59 percent; Mutual of Omaha, however, a company with a lactation support program, realized an 83 percent retention rate of mothers post-birth. *Id.*

<sup>59</sup> See INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 1.2.

<sup>60</sup> *Id.* (noting local, state, and national recognition and media attention, as well as general goodwill in the community as a sampling of the positive results associated with employer breastfeeding support programs).

*B. Lack of Correlation Between Breastfeeding and Benefits*

Although there are numerous studies boasting the benefits of breastfeeding, other studies suggest that the correlation between breastfeeding and its alleged health benefits is only plausible at best. A report prepared by the Tufts-New England Medical Center for the United States Department of Health and Human Services calls into question many of the alleged health benefits linked to breastfeeding.<sup>61</sup> For example, as it relates to full-term infant outcomes, the study found the following: “little or no evidence for an association between breastfeeding in infancy and cognitive performance”: the need for further investigation as to the relationship between breastfeeding and reduced infant mortality; and that although there is the potential for a relationship between breastfeeding and a reduced rate of obesity, residual confounding makes these studies less helpful.<sup>62</sup> The study further characterized the relationship between reduced instances of cardiovascular disease and breastfeeding as currently indeterminable and needing further research.<sup>63</sup> The Tufts study research revealed a relationship between type 1 diabetes and breastfeeding to be “interpreted with caution,” and indicated that the relationship between breastfeeding and type 2 diabetes could be exaggerated.<sup>64</sup>

The Tufts study did realize some benefits associated with breastfeeding for full-term infants. The study noted a relationship between breastfeeding and a reduced risk of asthma when no family history was present; however, the study called for further research regarding the effect breastfeeding has on asthma in adolescents and adults.<sup>65</sup> Other recognized benefits include a “36% ... reduction in the risk of SIDS compared to those without a history of breastfeeding,” a 50 percent reduction in the risk of contracting otitis media, a reduced chance of atopic dermatitis, a reduction in the risk of gastrointestinal infections, a reduced “risk of hospitalization

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<sup>61</sup> See TUFTS-NEW ENGLAND MED. CTR. EVIDENCE-BASED PRACTICE CENTER, BREASTFEEDING AND MATERNAL AND INFANT HEALTH OUTCOMES IN DEVELOPED COUNTRIES V (2007) [hereinafter TUFTS REPORT].

<sup>62</sup> *Id.* at 4-5; see also M.L. Hediger et al., *Association Between Infant Breastfeeding and Overweight in Young Children*, 285 JAMA 2453, 2453 (2001) (“There are inconsistent associations among breastfeeding, its duration, and the risk of being overweight in young children.”).

<sup>63</sup> *Id.* at 4.

<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.* at 3-4.

due to lower respiratory tract diseases,” and an “association” between breastfeeding and a reduced risk of leukemia.<sup>66</sup>

The Tufts study also considered the correlation between breastfeeding and maternal health benefits. As it relates to a mother’s ability to return to pre-pregnancy weight, other studies “consistently showed that many factors other than breastfeeding had larger effects on weight retention or postpartum weight loss.”<sup>67</sup> The study found essentially no correlation existing between breastfeeding mothers and osteoporosis, and that more investigation was needed to determine the true association between breastfeeding and a reduced risk of postpartum depression.<sup>68</sup> The study did note at least a potential relationship between lower risks of type 2 diabetes and breastfeeding mothers, “consistent evidence” of “an association between breastfeeding and a reduced risk of breast cancer,” as well as a potential relationship with a reduced risk of ovarian cancer; however, the Tufts study suggests that because of limitations in the ovarian cancer studies, the results should be interpreted with caution.<sup>69</sup> Overall, the Tufts study indicates that there might be some benefits associated with breastfeeding; however, they are likely more limited than other sources indicate.

In April 2009, Hanna Rosin wrote *The Case Against Breast-Feeding* [sic], a controversial article drawing attention to the suggestion that “the medical literature [on breastfeeding] looks nothing like the popular literature.”<sup>70</sup> “[Medical literature] shows that breast-feeding is probably, maybe, a *little* better; but it is far from the stampede of evidence” that some [popular] research describes.<sup>71</sup> Rosin cites one of the “first and broadest” meta studies related to breastfeeding, which found that breastfeeding “studies do not demonstrate a universal phenomenon, in which one method is superior to another in all instances ... and do not support making a mother feel that she is doing psychological harm to her child if she is unable or unwilling to breastfeed.”<sup>72</sup>

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<sup>66</sup> *Id.* at 3-5.

<sup>67</sup> *Id.* at 6.

<sup>68</sup> *Id.* at 6-7.

<sup>69</sup> *Id.*

<sup>70</sup> Hanna Rosin, *The Case Against Breast-Feeding*, THE ATLANTIC 64, 66 (2009), available at <http://www.theatlantic.com/magazine/archive/2009/04/the-case-against-breast-feeding/7311/>.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (citing Mary Grace Kovar et al., *Review of the Epidemiologic Evidence for an Association Between Infant Feeding and Infant Health*, 74 PEDIATRICS 615 (1984)).

Yet another study published in the Health Services Research journal found the long-term effects linked to breastfeeding may have been overstated.<sup>73</sup> The problem with most breastfeeding studies is that they are observational rather than test-group oriented, which means that mothers will choose their preferred method, and researchers simply observe the results.<sup>74</sup> Because “breast-fed infants are typically brought up in very different families from those raised on a bottle ...,” even when researchers try to account for “‘confounding variables’ that might affect the babies’ health and development ... they still can’t know if they’ve missed some critical factor.”<sup>75</sup> Overall, Rosin’s article concludes that although the “breast is probably best,” on balance, the health benefits of breastfeeding are modest and might not outweigh other factors such as “modesty, independence, career, [and] sanity” that come at the expense of breastfeeding.<sup>76</sup> These other factors are a serious consideration; Rosin argues that

[t]he debate about breast-feeding [sic] takes place without any reference to its actual context in women’s lives. Breast-feeding exclusively is not like taking a prenatal vitamin. It is a serious time commitment that pretty much guarantees that you will not work in any meaningful way. Let’s say a baby feeds seven times a day and then a couple more times at night. That’s nine times for about a half hour each, which adds up to more than half of a working day, every day, for at least six months.<sup>77</sup>

As a result, promoting breastfeeding in the workplace via national legislative incentives might only place undue societal pressure on mothers to choose breastfeeding over formula feeding and take a very private lifestyle choice away from the hands of mothers and employers.<sup>78</sup>

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<sup>73</sup> Eirik Evenhouse & Siobhan Reilly, *Improved Estimates of the Benefits of Breastfeeding Using Sibling Comparisons to Reduce Selection Bias*, 40 HEALTH SERV. RES. 1781, 1796 (2005) (“The implication for breastfeeding researchers is that selection bias remains a serious problem even with controls for household income, family size, parental education, race, ethnicity, and other socio-demographic characteristics of the family.”).

<sup>74</sup> Rosin, *supra* note 70, at 67-68.

<sup>75</sup> *Id.* at 68 (noting that breastfeeding is more likely to occur among “white, older, and educated women; a woman who attended college, for instance, is roughly twice as likely to nurse for six months”).

<sup>76</sup> *Id.* at 69.

<sup>77</sup> *Id.* at 70.

<sup>78</sup> *Id.* at 69-70 (identifying the societal pressures to breastfeed even in the absence of

Ultimately, although some studies tout breastfeeding's benefits, other studies report that these benefits are all but certain. Even assuming the benefits exist, they must be considered in conjunction with the costs of breastfeeding: the mother's time and freedom.

### III. RATIONAL EMPLOYERS WILL ADOPT PROGRAMS OFFERING POSITIVE RETURNS ON INVESTMENTS

When mothers choose to breastfeed, they do so after considering both the associated benefits and costs.<sup>79</sup> The cost-benefit analysis, appropriate for a mother choosing to breastfeed, is also relevant when an employer considers whether to implement workplace breastfeeding support initiatives. Some studies suggest that employers stand to gain numerous benefits, including a positive return on investment, when they choose to support breastfeeding in the workplace.<sup>80</sup> If the benefits of breastfeeding support in the workplace actually exist, rational employers, interested in earning positive returns on investment, would be motivated to support breastfeeding in the workplace even in the absence of legislative mandates.<sup>81</sup> While numerous studies exist describing benefits to employers who provide breastfeeding support,<sup>82</sup> these benefits must be considered in context with employer costs. A rational employer would readily adopt a program if the benefits and savings outweigh the costs associated with the initiative.<sup>83</sup>

#### *A. Employer Breastfeeding Support Options*

There are a wide variety of support options that employers may provide to lactating mothers; however, the fundamental needs are

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scientific research reporting significant benefits to breastfeeding).

<sup>79</sup> See generally discussion *supra* Part II (discussing studies on health benefits from breastfeeding to the mother and child).

<sup>80</sup> See generally discussion *infra* Part III.B (discussing employer benefits from implementing a lactation support program).

<sup>81</sup> See generally discussion *infra* Part V (arguing federal legislation promoting breastfeeding accommodations is unnecessary if health benefits from breastfeeding exist and are substantial).

<sup>82</sup> See INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 1.2; see also discussion *infra* Part III.B.

<sup>83</sup> See INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 1.2 (listing several benefits to the employer from providing breastfeeding accommodations); see also discussion *infra* Part III.B (discussing costs associated with providing accommodations).

minimal. Basic needs include: a place to express milk, time to express, breastfeeding education, and support within the workplace.<sup>84</sup> While the rudimentary needs are nominal, there are a variety of more involved options available to employers seeking to create a breastfeeding-friendly workplace environment.

An expression room is an area breastfeeding women use to express milk; this space could range from an abandoned coat closet to a space specifically designed as a lactation area.<sup>85</sup> Employers also face a variety of options in considering the amenities to include within the room. Basic needs are met with a space at least four feet by five feet, within close proximity to running water for cleaning pumps and washing hands, and with an electrical outlet and a lock on the door.<sup>86</sup> When a woman has a private location to pump or breastfeed, it helps her to “physiologically relax for more efficient milk removal.”<sup>87</sup> Most importantly, a restroom will not suffice as it is “NOT a sanitary place to breastfeed or express milk.”<sup>88</sup> Employers will generally have a variety of options already available for the necessary private space, including a “locked office, conference room, or other space,” or the employer could even “[c]onstruct walls to enclose a small space in a larger room or other area.”<sup>89</sup> The

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<sup>84</sup> See INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 8.15-16. “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, concerns about support for employers and colleagues, and real or perceived low milk supply.” DEP’T. OF HEALTH & HUMAN SERVS., SUPPORT FOR BREASTFEEDING IN THE WORKPLACE 7 [hereinafter SUPPORT FOR BREASTFEEDING].

<sup>85</sup> See INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 3.1.

<sup>86</sup> *Id.* at 8.15-16 (suggesting also the inclusion of a chair or shelf on which to place employer-rented or purchased pumps for use by more than one mother, or subsidizing portable pumps for each mother); SUPPORT FOR BREASTFEEDING, *supra* note 84, at 8 (listing the essential components of a Nursing Mother Room as central location, “adequate lighting, ventilation, privacy, seating, a sink, an electrical outlet, and possibly a refrigerator”).

<sup>87</sup> DEP’T. OF HEALTH & HUMAN SERVS., THE BUSINESS CASE FOR BREASTFEEDING 8 (2008) [hereinafter BUSINESS CASE FOR BREASTFEEDING].

<sup>88</sup> INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 8.15 (emphasis in original); see BREASTFEEDING STEPS BROCHURE, *supra* note 54 (noting it is unsanitary to prepare food in a restroom, the difficulties of expressing in a stall, the unavailability of convenient electrical outlets, and overall that women “should never be asked to express milk or breastfeed in a restroom”); BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 8 (the same).

<sup>89</sup> INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 8.15; BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 8 (suggesting a “little used existing office space or other room,” “clean, infrequently used closet,” “[s]ectioning off a room with either

amount of space needed is dependent upon numerous variables relating to company size and the number of women employed who could potentially bear children.<sup>90</sup> When there are numerous employees in need of a lactation room, creating an expression schedule could be an alternative to transforming a larger space into an expression area.<sup>91</sup>

Employees also need sufficient break time allotted to pumping breast milk. During the standard eight-hour workday, an employee will generally require approximately three twenty-minute breaks, with additional time to walk or travel to the pumping site.<sup>92</sup> To accommodate expressing employees, an employer could require the employee to take pumping breaks during regular break periods (including the lunch break), or the employer might permit the employee to make up additional needed time before or after the regular workday.<sup>93</sup> Necessary expression time can generally be easily accommodated during standard employee break times.<sup>94</sup>

In addition to having time to express breast milk, employees need a place to store the milk. This need is unlikely to impose a heavy burden on the employer as available solutions could include something as simple as an employee's personal cooler, or the employer could provide a workplace refrigerator.<sup>95</sup>

Most employees will also require some sort of education and support in the workplace. "Because breastfeeding is a learned behavior, basic

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permanent walls or portable partitions," and a "walled off corner of a lounge adjacent to the women's restroom").

<sup>90</sup> See BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 9.

<sup>91</sup> *Id.* at 10.

<sup>92</sup> See INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 8.16; BREASTFEEDING STEPS BROCHURE, *supra* note 54 (employees "typically need no more than an hour per [workday] to express milk"); BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 8 (two to three times a day, fifteen minutes per session).

<sup>93</sup> See INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 8.16; BREASTFEEDING STEPS BROCHURE, *supra* note 54 (stating breaks "can easily be divided between usual paid breaks and the meal period").

<sup>94</sup> BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 17 (noting organizations that use flexible structures report little employee abuse as a result of employee appreciation for accommodations).

<sup>95</sup> See INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 8.16 (listing options ranging from a small refrigerator exclusively for breast milk storage to a publicly shared refrigerator to be used by all employees); BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 10 (as a result of "unique antibacterial properties in human milk, breast milk can be safely stored in a refrigerator or personal cooler"). Women might not be comfortable, however, storing their milk in a shared refrigerator. *Id.*

breastfeeding information beginning in pregnancy helps both male and female employees make an informed choice about infant feeding ....<sup>96</sup> Women with more education generally breastfeed for a longer time period than uneducated women; in addition, the longer a woman spends breastfeeding, the greater the company's potential return on investment.<sup>97</sup> To fulfill basic employee needs, an employer should provide "prenatal information on breastfeeding," as well as "postpartum assistance in the hospital, at home, and back at work."<sup>98</sup> On a basic level, the employer could meet these needs by providing informational materials or referrals to classes and experts. More extensive options include educational support initiatives, such as the provision of classes and individualized consultation within the workplace.<sup>99</sup>

Studies show that breastfeeding employees need support from both management and their peers.<sup>100</sup> These studies also indicate that company support is one of the most valued components of breastfeeding programs.<sup>101</sup> Employers can ensure a sufficient system is available by providing supervisor training, creating support groups, and facilitating electronic communication groups, such as listservs.<sup>102</sup> Other ways to support breastfeeding include permitting a gradual return to the workplace

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<sup>96</sup> BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 13-14 (providing options such as prenatal classes during lunch breaks to educate both mothers and fathers, or the opportunity to leave the work site to participate in classes available within the community).

<sup>97</sup> *See generally id.* at 18 (providing information on methods employers may use to determine a program's return on investment).

<sup>98</sup> *See* INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 8.16; SUPPORT FOR BREASTFEEDING, *supra* note 84, at 7 (noting support includes "teaching employees about breastfeeding").

<sup>99</sup> *See* INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, 8.16; BREASTFEEDING STEPS BROCHURE, *supra* note 54 (noting options include "[p]hamplets, resources, lunchtime prenatal classes, and access to a lactation consultant").

<sup>100</sup> *See* INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 8.17 (including basic support needs from "company managers, supervisors, and co-workers" as well as "mother-to-mother support"); SUPPORT FOR BREASTFEEDING, *supra* note 84, at 6 (suggesting "offering professional lactation management services"); BREASTFEEDING STEPS BROCHURE, *supra* note 54 (noting support "send[s] a message to all employees that breastfeeding is valued").

<sup>101</sup> BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 16-17 (noting the importance of policies and procedures (even if unwritten), co-worker support from those not breastfeeding to assist with understanding breastfeeding employees, and mother-to-mother support so that breastfeeding women feel a part of a community in the workplace).

<sup>102</sup> *See* INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 2.2, 3.8.

post-birth,<sup>103</sup> “writing corporate policies to support breastfeeding women,”<sup>104</sup> “providing on-site or near-site child care,”<sup>105</sup> and providing pumps for employee use.<sup>106</sup>

Employers have a variety of options available for providing support relating to designated milk expression areas, time to express, education on breastfeeding, and support within the workplace. Various studies discuss these options and provide examples of the most “basic,” to “better” or “state-of-the-art” workplace breastfeeding support models.<sup>107</sup> In practice, these options provide employers a variety of opportunities to support breastfeeding mothers with either the most basic essentials or more comforting and lavish conveniences.

Considering the actual expression room, minimal requirements include electrical outlets, a lock, a chair, a table to hold the pump, and a space that is within close proximity to running water.<sup>108</sup> Enhancements to reach an “even better” model would include: a room solely designated for breastfeeding women, complimented with aesthetically pleasing décor; an employer-provided multi-user pump; and employer-provided refrigerator space or personal coolers.<sup>109</sup> To be deemed a “comprehensive” or “state of the art” model, more comfortable seating should be provided, as well as soft lighting, in-room refrigeration, access to telephone and email while pumping, and employer-provided collection kits.<sup>110</sup>

When employers consider how to best accommodate the time a breastfeeding employee needs, a basic model would permit expression

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<sup>103</sup> *Id.* at 8.15 (providing options such as “[p]art time for a period of time,” “[j]ob sharing,” “[t]elecommuting,” and “[f]lexible scheduling”); SUPPORT FOR BREASTFEEDING, *supra* note 84, at 7 (also suggesting extended maternity leave).

<sup>104</sup> SUPPORT FOR BREASTFEEDING, *supra* note 84, at 7.

<sup>105</sup> *Id.* at 7.

<sup>106</sup> *Id.* at 10 (“Access to breast pumps and support groups were significantly associated with the high breastfeeding duration rates.”). In some circumstances insurance companies may subsidize the cost of breast pumps; however, other alternatives include contracting with pump companies or purchasing or renting pumps for employee use. *See* BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 9.

<sup>107</sup> BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 11.

<sup>108</sup> *See id.* at 11 (describing a “Basic Model” of a “Lactation Room”); WORKPLACE BREASTFEEDING SUPPORT, *supra* note 57, at 2 (describing “Adequate Facilities”).

<sup>109</sup> *See* BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 11 (describing an “Even Better Model” of a “Lactation Room”); WORKPLACE BREASTFEEDING SUPPORT, *supra* note 57, at 2 (describing “Expanded Facilities”).

<sup>110</sup> *See* BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 11 (describing a “State of the Art Model” of a “Lactation Room”); WORKPLACE BREASTFEEDING SUPPORT, *supra* note 57, at 2 (describing “Comprehensive Facilities”).

time during regular breaks, with additional time being considered unpaid leave. The “even better” option would be to permit additional needed time to be made up on a flexible basis.<sup>111</sup> Finally, a “state of the art” scenario simply considers additional expression time, outside of already provided breaks, as part of regular paid time.<sup>112</sup> Employers can provide additional support using creative options such as permitting the use of vacation time to express milk at work, permitting the employee to bring the child to work, providing job and work sharing options, and permitting or facilitating commuter plans.<sup>113</sup>

Basic examples of employer provided breastfeeding education include pamphlets and lists of community resources.<sup>114</sup> A middle-grade option would provide lactation consultations as well as classes during the lunch hour.<sup>115</sup> Finally, the more advanced alternatives also include breastfeeding education for partners who are not breastfeeding.<sup>116</sup> Ultimately, there are a variety of options available to employers, each associated with a different price tag.

### *B. Costs to the Employer: A Case Study Analysis*

The potential provisions an employer may offer are each associated with certain costs. Ultimately, costs to the company depend on the resources a company may already have available for breastfeeding support. For example, if a company currently has unoccupied space available to be converted in to a lactation room, that employer would be able to support breastfeeding employees at a lower cost than a company without unutilized space. Additionally, an employer could more inexpensively support breastfeeding employees by providing fewer or

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<sup>111</sup> See BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 13 (Milk Expression/ Infant Feeding Options, all models).

<sup>112</sup> *Id.*

<sup>113</sup> See *id.* at 13, 17 (Mother-to-Mother Support Options); WORKPLACE BREASTFEEDING SUPPORT, *supra* note 57, at 2 (Written Company Policy).

<sup>114</sup> See BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 14 (describing “Basic Services” for “Education Options”); WORKPLACE BREASTFEEDING SUPPORT, *supra* note 57, at 2 (describing “Adequate Workplace Education” models).

<sup>115</sup> See BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 14 (describing “Even Better” models for “Education Options”); WORKPLACE BREASTFEEDING SUPPORT, *supra* note 57, at 2 (describing “Expanded Workplace Education” models).

<sup>116</sup> See BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 14 (describing “State of the Art” models for “Education Options”); WORKPLACE BREASTFEEDING SUPPORT, *supra* note 57, at 2 (describing “Comprehensive Workplace Education” models).

limited support options; for example, an employer who chooses not to provide individual breast pumps to employees could still support breastfeeding in other ways (such as shared pumps for use at work), but at a lower cost than an employer providing individual employee pumps.<sup>117</sup>

Company case studies provide a realistic picture of actual employer costs and savings. CIGNA, a healthcare services company, implemented a program to ease the transition for nursing mothers returning to work.<sup>118</sup> Employing approximately 19,500 women, CIGNA officials have said that the “potential cost reductions in health care expenses and employee turnover more than offset the nominal expense of implementing and maintaining a program that supports an employee’s decision to breastfeed.”<sup>119</sup> With approximately 300 to 400 participants annually, CIGNA provides: private rooms that either contain, or are within close proximity to, a sink; a breast pump for all employees; permission to express milk during standard break times; education kits; consultations before and after birth; classes; a lactation consultant; and mother-to-mother support via postings in the nursing mother rooms.<sup>120</sup>

As a result of these provisions, CIGNA reports “[a]nnual savings of \$240,000 in health care expenses,” a “77 percent reduction in lost work time due to infant illness, with annual savings of \$60,000,” 62 percent fewer prescriptions equating to lower pharmacy costs, and “[i]ncreased breastfeeding rates [of] 72.5 percent at 6 months compared to the national average of 21.2 percent for employed mothers.”<sup>121</sup>

Another company, Mutual of Omaha, provides a nine by eleven foot room that accommodates three four by five foot expression rooms; hospital grade pumps; supportive managerial staff; six weeks paid leave (and an additional six weeks unpaid leave if needed); registered nurses available on site; and company-wide baby showers.<sup>122</sup> As a result, Mutual of Omaha has recognized higher employee satisfaction and a “[r]eduction

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<sup>117</sup> See BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 9 (explaining that pump costs can range from \$1,975 for the first year plus \$850 per year thereafter for a multi-user hospital-grade pump, up to \$5,000 per year for a single user portable electric breast pump).

<sup>118</sup> See INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 4.1; BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 15.

<sup>119</sup> INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, at 4.1.

<sup>120</sup> See *id.* at 4.1-4.2; see also BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 15.

<sup>121</sup> See INVESTING IN WORKPLACE BREASTFEEDING, *supra* note 9, 4.2; see also BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 16.

<sup>122</sup> See BUSINESS CASE FOR BREASTFEEDING, *supra* note 87, at 7.

in newborn health care claims.”<sup>123</sup> The company reports an additional \$115,881 in costs per year over those not participating in the program.<sup>124</sup> Overall, these case studies report significant savings for companies implementing breastfeeding support programs in the workplace.

#### IV. THE CURRENT LEGISLATIVE STATE AND AN INTRODUCTION TO THE BREASTFEEDING ACT OF 2009

Although support options are bountiful and case studies suggest employer savings, many women find that in the absence of a legislatively mandated right to breastfeed in the workplace, the obstacles in attempting to continue breastfeeding upon returning to work are daunting.<sup>125</sup> Even if employers are “willing to make efforts ... it is usually up to the new mother to take the initiative” to request support, and even when effort is made to provide support, it might only be access to an unorganized maintenance closet or a public restroom.<sup>126</sup> Assuming the health benefits of breastfeeding are valid, in order to ensure that working mothers continue to breastfeed there must be a “strategy to address workplace conditions” to ensure the benefits of breastfeeding are not lost.<sup>127</sup> “Laws mandating support for breastfeeding mothers who return to work encourage mothers to continue breastfeeding after returning to work by requiring a minimum level of breastfeeding support from the employer.”<sup>128</sup>

Until recently, no federal protection existed for women choosing to breastfeed in the workplace. In 1978, Congress passed the Pregnancy Discrimination Act as an amendment to Title VII of the Civil Rights Act of 1964.<sup>129</sup> However, some courts have found that although the Pregnancy

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<sup>123</sup> *Id.* at 7.

<sup>124</sup> *Id.* at 7 (“[h]ealth care claims are \$1,269 for program participants compared to \$3,415 for those who do not participate”).

<sup>125</sup> Audrey J. Naylor, *When Working Mothers Breastfeed*, N.Y. TIMES, Sept. 7, 2006, at A28.

<sup>126</sup> Mary Ellen Slayter, *Workplaces Accommodate Breast-Feeding Mother, Sometimes Grudgingly*, WASH. POST, Oct. 28, 2002, at E04; see also Rebecca Adams, *Despite Law, Some Nursing Moms Still Find it Hard to Express Breast Milk at Work*, WASH. POST, May 13, 2008, at HE01 (noting the difficulty an employer faces in requesting additional space to pump).

<sup>127</sup> 155 CONG. REC. S6,545-01 and 6,551-52 (2009).

<sup>128</sup> BREASTFEEDING REPORT CARD, *supra* note 8.

<sup>129</sup> 42 U.S.C. § 2000e(k) (2006) (making discrimination on the basis of pregnancy unlawful).

Discrimination Act extended protection to “pregnancy, childbirth, or related medical conditions,” the Act does not protect the right to breastfeed.<sup>130</sup> On March 23, 2010, President Barack Obama signed the Patient Protection and Affordable Care Act (PPACA) into law.<sup>131</sup> This law amends the Fair Labor Standards Act of 1938<sup>132</sup> to require employers to provide reasonable break time for an employee to express milk (although the employer is not required to compensate the employee for this time), and a place to express milk (other than a bathroom).<sup>133</sup> The Act does not apply to employers of fewer than fifty employees if the provisions would place an “undue hardship,” defined as a “significant difficulty or expense,” on the employer.<sup>134</sup>

Furthermore, state law inadequately provides full protection to breastfeeding mothers. Aside from the lack of uniformity, most state laws do not provide the comprehensive breastfeeding support that an average mother needs.<sup>135</sup> Although forty-nine states have recognized some sort of breastfeeding support, only fifteen states have specifically provided workplace support for breastfeeding.<sup>136</sup> In addition, it seems that the introduction of legislation providing additional state support for breastfeeding has become stagnant.<sup>137</sup> As a remedy to an alleged lack of proper state or federal solution, the BPA was proposed to “provide a unified national policy to keep mothers, their children, and their communities healthy” and to provide a nation-wide policy for

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<sup>130</sup> *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 439 (6th Cir. 2004) (concluding on the basis of a Title VII analysis that “breastfeeding discrimination ... is not discrimination on the basis of sex under the law”); *Wallace v. Pyro Min. Co.*, 789 F. Supp 867, 869 (W.D. Ky. 1990) (breastfeeding “simply does not entitle plaintiff to the protections of the Pregnancy Discrimination Act”).

<sup>131</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>132</sup> See 29 U.S.C. § 207.

<sup>133</sup> See Patient Protection and Affordable Care Act § 4207, 29 U.S.C.A. § 207 (West 2011).

<sup>134</sup> Patient Protection and Affordable Care Act § 4207.

<sup>135</sup> U.S. BREASTFEEDING COMM., *Tell Congress to Support the Breastfeeding Promotion Act to Help Working Mothers Stay Healthy!*, [http://org2.democracyinaction.org/o/5162/t/6359/campaign.jsp?campaign\\_KEY=1697](http://org2.democracyinaction.org/o/5162/t/6359/campaign.jsp?campaign_KEY=1697) (last visited Feb. 3, 2011).

<sup>136</sup> BREASTFEEDING REPORT CARD, *supra* note 8.

<sup>137</sup> Sue Shellenhager, *Employer, State Support Stalls for Mothers Who Nurse at Work*, WALL ST. J., Nov. 22, 2005, at D4.

breastfeeding.<sup>138</sup> The Breastfeeding Promotion Act of 2009<sup>139</sup> is a proposed bill that would

amend Title VII of the Civil Rights Act to clarify that breastfeeding and expressing milk in the workplace are protected activities; amend the Fair Labor Standards Act (FLSA) to require large employers to provide time and privacy for lactation; and establish a tax credit for employers that provide a suitable environment for employees to breastfeed or express milk.<sup>140</sup>

Although the bill has been introduced in the House for five legislative sessions,<sup>141</sup> 2009 marked the first time the bill was introduced in the Senate.<sup>142</sup> Following the bill's June 2009 Senate introduction, the number of additional senators and congressmen signing on in support provides further evidence of the increasing interest in the BPA.<sup>143</sup>

#### V. THE BREASTFEEDING PROMOTION ACT: COSTLY AND UNNECESSARY

The BPA's overarching purpose is to further "clarify that breastfeeding and expressing breast milk in the workplace are protected conduct" under the Pregnancy Discrimination Act.<sup>144</sup> Logistically, the BPA would accomplish this goal by acknowledging breastfeeding as a protected right and inserting the word "lactation" after the word "childbirth" in the Pregnancy Discrimination Act.<sup>145</sup> The BPA would define lactation "as a condition that may result in the feeding of a child

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<sup>138</sup> Jennifer Lance, *Support the Breastfeeding Promotion Act (H.R. 2819, S.1244)*, ECO CHILD'S PLAY (2009), <http://ecochildsplay.com/2009/06/17/support-the-breastfeeding-promotion-act-hr-2819-s-1244/>.

<sup>139</sup> Breastfeeding Promotion Act of 2009, H.R. 2819, 111th Cong. tit. I § 102 (2009).

<sup>140</sup> *Bill Would Amend Title VII and the FLSA, and Provide Employer Tax Credit to Protect and Promote Breastfeeding*, WASHINGTON D.C. EMPLOYMENT LAW UPDATE (June 15, 2009), <http://www.dcmplemploymentlawupdate.com/2009/06/articles/discrimination-in-the-workplac/bill-would-amend-title-vii-and-the-flsa-and-provide-employer-tax-credit-to-protect-and-promote-breastfeeding/>.

<sup>141</sup> Angela Whit, *Breastfeeding Promotion Act Progress*, BLISSTREE, [http://blisstree.com/live/breastfeeding-promotion-actprogress/?utm\\_source=blisstree&utm\\_medium=web&utm\\_campaign=b5hubs\\_migration](http://blisstree.com/live/breastfeeding-promotion-actprogress/?utm_source=blisstree&utm_medium=web&utm_campaign=b5hubs_migration) (last visited Feb. 3, 2011).

<sup>142</sup> See Lance, *supra* note 138.

<sup>143</sup> H.R. 2819 (view recent history).

<sup>144</sup> *Id.* tit. I § 102.

<sup>145</sup> *Id.*

directly from the breast or expressing of milk from the breast.”<sup>146</sup> By adding these amendments to the Pregnancy Discrimination Act, the BPA provides the needed legislative support to women who choose to breastfeed in the workplace.

Specifically relevant to this Note, and the potential costs associated with the BPA, are the provisions in Title II, providing an employer tax credit, and Title V, imposing certain support requirements. Title V of the BPA amends the Fair Labor Standards Act by adding:

[a]n employer shall provide reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to do so. The employer shall make reasonable efforts to provide a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk. An employer shall not be required to compensate an employee for any work time spent for such purpose.<sup>147</sup>

The above provision applies only to an organization “who employs 50 or more employees for each working day during each of 20 or more calendar workweeks.”<sup>148</sup> The penalty for violation of this BPA allows the employee to bring an action to enjoin the employer and to acquire other forms of equitable relief.<sup>149</sup> This provision has, in effect, been passed into law under the March 2010 PPACA.<sup>150</sup>

The requirements that Title V of the BPA, and in effect the PPACA, impose on the workplace are minimal. If a woman requires approximately seventy-five minutes to sufficiently pump breast milk during the workday,<sup>151</sup> the PPACA or Title V of the BPA do little more than provide a breastfeeding woman with the additional backing of the United States government in the event that presently allotted break time is insufficient.<sup>152</sup> As the law does not require the employer to pay the employee for additional time taken, obligations under the Act are

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<sup>146</sup> *Id.* (internal quotations omitted).

<sup>147</sup> *Id.* tit. V(a)(1).

<sup>148</sup> *Id.* tit. V(a)(2).

<sup>149</sup> *Id.* tit. V(b).

<sup>150</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4207, 124 Stat. 119 (2010).

<sup>151</sup> See REDUCE INFECTIONS AND COSTS, *supra* note 14.

<sup>152</sup> H.R. 2819 tit. V (“employer shall provide reasonable break time”).

nominal.<sup>153</sup> Additionally, providing the needed space to pump, as required by the PPACA and the BPA is likely a minimal burden on the employer for two reasons. First, the requirement is limited by a reasonableness standard in the BPA,<sup>154</sup> and a reasonableness standard for employers with fewer than fifty employees in the PPACA.<sup>155</sup> Thus, the statutes would likely not require an employer to provide any space should the burden be too cumbersome.<sup>156</sup> Secondly, most offices with over fifty employees have a room with a lock that can be used to satisfy the basic needs of a breastfeeding woman.<sup>157</sup> Consequently, the PPACA and Title V's main use will be to provide breastfeeding women with the additional backing of the United States government in her quest to express milk in the workplace. She will no longer have to demand employer support alone.<sup>158</sup>

While Title V's impact appears minimal, Title II of the BPA could have huge financial implications for the United States government, and thus the taxpaying citizen. Title II provides a "credit for employer expenses for providing [an] appropriate environment on [the] business premises for employed mothers to breastfeed or express milk for their children."<sup>159</sup> This title amends the Internal Revenue Code to permit a "credit for employer expenses incurred to facilitate" breastfeeding in "an amount equal to 50 percent of the qualified breastfeeding promotion and support expenditures of the taxpayer for such taxable year ... not [to] exceed \$10,000."<sup>160</sup> Employers could take a tax credit for item purchases including breast pumps and other similar equipment, as well as consultation services and other tangible personal property.<sup>161</sup> In effect,

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<sup>153</sup> *Id.* ("employer shall not be required to compensate an employee").

<sup>154</sup> *Id.* ("employer shall make reasonable efforts to provide a place"); *but see* Adams, *supra* note 126, at HE01 ("Ninety-nine percent of all employers can do this without any hardship at all ... [but] companies that mount such a claim will find it an unappealing exercise ... [partly] because they have to reveal their finances.").

<sup>155</sup> *See* Patient Protection and Affordable Care Act § 4207.

<sup>156</sup> *See id.* § 4207.

<sup>157</sup> *See supra* Part III.A (discussing possibilities for lactation room); *but see* Adams, *supra* note 126, at HE01 ("Complying with the law has proved to be a challenge for some local employers, especially those with limited space.").

<sup>158</sup> *See* BREASTFEEDING REPORT CARD, *supra* note 8 ("Laws mandating support for breastfeeding mothers who return to work encourage mothers to continue breastfeeding after returning to work by requiring a minimum level of breastfeeding support from the employer.").

<sup>159</sup> H.R. 2819 tit. II.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

Title II of the BPA provides a tax credit for the employer to promote breastfeeding on the business premises.

To explain, the Internal Revenue Code (I.R.C.) provides a list of general business credits.<sup>162</sup> Essentially, after a business calculates the amount of taxes due on the United States Corporation Income Tax Return,<sup>163</sup> section 38 of the I.R.C. allows the business to deduct certain credits, dollar for dollar, from the total amount of taxes to be paid.<sup>164</sup> So for example, if a business owes \$50,000 in taxes, and the business accumulated \$5,000 in credits, the business would only pay \$45,000 in adjusted income taxes.

The credit provision is subject to certain limitations. Section 38(c) provides that the credit may “not exceed the excess (if any) of ... 25 percent of so much of the taxpayer’s net regular tax liability as exceeds \$25,000.”<sup>165</sup> The credit provided for in the BPA provides the additional limitation that the total maximum credits cannot exceed \$10,000.<sup>166</sup> Thus, in order to take full advantage of this tax credit, the employer would need to (1) spend \$20,000<sup>167</sup> and (2) have a net taxable income that equals or exceeds \$65,000.<sup>168</sup>

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<sup>162</sup> 26 U.S.C. § 38 (2006).

<sup>163</sup> DEP’T. OF THE TREASURY INTERNAL REVENUE SERV., U.S. CORPORATION INCOME TAX RETURN 1120 (2009).

<sup>164</sup> *Id.* (deducting credits from taxes).

<sup>165</sup> *See* 26 U.S.C. § 38(c). This section also provides that the credit may not exceed the excess of the taxpayer’s net income over the tentative minimum tax for the year, *id.*; however, including the effect of the Alternative Minimum Tax within this calculation goes beyond the scope of this Note.

<sup>166</sup> Breastfeeding Promotion Act of 2009, H.R. 2819, 111th Cong. tit. II (2009).

<sup>167</sup> *Id.* The proposed regulation provides an “amount equal to 50 percent of the qualified breastfeeding promotion and support expenditures” not to exceed \$10,000. *Id.* Thus, an employer would need to spend \$20,000 to take full advantage of the credit. *Id.* § 45R.

<sup>168</sup> 26 U.S.C. § 38(c) (2006). In order for a taxpayer to take a \$10,000 credit, 25 percent of the amount of the taxpayers net regular tax liability that exceeds \$25,000 must be equal to or greater than \$10,000. The following is a formula representing this figure: ( $\$10,000 = .25 (X - \$25,000)$ ). The variable in this equation “X” represents the net income tax a business must pay in order to qualify for a \$10,000 credit. By solving this equation, it is evident that a business must pay income tax of at least \$65,000 in order to qualify for the credit.

Alternatively, a business may qualify for the credit under section 38 of the I.R.C. via the alternative minimum tax; however, numerous variables would have to be assumed in order to adequately calculate the effect of this provision. Calculations using the Alternative Minimum Tax go beyond the scope of this Note.

Although it is difficult to estimate the exact impact this credit will have on the government's forgone tax revenues, certain conservative estimates may be made in order to calculate a likely minimal impact figure. For purposes of this estimation the following assumptions will be made: (1) a participating business will use the maximum available credit (the business will spend enough to acquire the full \$10,000 credit); (2) only large businesses (those having more than \$2.5 billion in assets) will be assumed to have the means to participate in this social spending program;<sup>169</sup> (3) of the businesses that fall into this category, at least fifty percent will participate. These assumptions are based on the premise that most businesses with the ability to afford spending corporate revenue on breastfeeding promotion will be larger companies with enough additional capital to invest in supporting employee morale and life choices.

Based on the forgoing assumptions, roughly 1.3 million businesses would spend \$20,000 on breastfeeding support programs in order to opt-in to receive the full \$10,000 tax credit.<sup>170</sup> This equates to an initial \$13 billion in forgone tax revenue.<sup>171</sup> However, these are not the only tax implications. The business would also deduct the initial \$20,000 breastfeeding support expenditure as a tax-deductible business expense.<sup>172</sup> Based on the deduction alone, the government would forgo \$8.84 billion in tax revenue.<sup>173</sup> Thus, assuming only fifty percent participation from less

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<sup>169</sup> It is likely that more businesses would participate in the program; however, the Statistics of Income for all Industries reports these businesses in the highest earning percentile. INTERNAL REVENUE SERVICE SOURCE BOOK STATISTICS OF INCOME CORPORATION INCOME TAX RETURNS 11 (2006) [hereinafter STATISTICS OF INCOME]. This percentile submitted 2.6 million returns and collectively paid \$3.3 billion in income taxes before credit reductions. *Id.* Thus, on average each of these businesses paid roughly \$129,000 in taxes, meaning that each of these businesses would qualify under the limitations in section 38 to take full advantage of the Breastfeeding Promotion Act credit. 26 U.S.C. § 38 (2006).

<sup>170</sup> STATISTICS OF INCOME, *supra* note 169, at 11 (stating that 2.6 million corporations with more than \$2.5 billion in assets submitted returns; assuming 50 percent participation, 1.3 million businesses would claim the \$10,000 tax credit).

<sup>171</sup> Calculate using the following equation: 1.3 million businesses x \$10,000 credit = \$13 billion.

<sup>172</sup> 26 U.S.C. § 162.

<sup>173</sup> The 2006 Corporation Source Book of Statistics of Income reports that, on average, each of the companies with more than \$2.5 billion in assets has approximately \$364,200 in income subject to tax. STATISTICS OF INCOME, *supra* note 169, at 11. Assuming this figure would place the business in the 34 percent income tax bracket, and assuming each business spends the full \$20,000 on breastfeeding promotion, each business would forgo paying \$6,800 in taxes. *See* 26 U.S.C. § 11(b)(requiring corporations making between \$75,000 and \$10,000,000 to pay a 34 percent base line

than one percent of the total businesses submitting tax returns,<sup>174</sup> this program would cost the United States government \$21.4 billion.

If reduced government spending as a result of decreased health care costs offsets this reduced revenue, the breastfeeding credit could be worthwhile. Although the overall health benefits associated with breastfeeding could be a reason for society to support this legislation, the actual existence of these benefits is still scientifically unclear.<sup>175</sup> With such uncertainty, government spending on potential benefits attached to such a high price tag might be a financial risk that a government, already facing huge deficits, should leave to the private sector.

Interestingly, Title I of the Act claims to provide the reason for the BPA's necessity.<sup>176</sup> Section 101 notes:

Research studies show that children who are not breastfeed [sic] have higher rates of mortality, meningitis, some types of cancers, asthma and other respiratory illnesses, bacterial and viral infections, diarrheal diseases, ear infections, allergies, and obesity.<sup>177</sup> .... Research studies have also shown that breastmilk and breastfeeding have protective effects against the development of a number of chronic diseases, including juvenile diabetes, lymphomas, Crohn's disease, celiac disease, come chronic liver disease, and ulcerative colitis.<sup>178</sup> .... Maternal benefits of breastfeeding include a reduced risk for postpartum hemorrhage and decreased risk for developing osteoporosis, ovarian cancer, and premenopausal breast cancer.<sup>179</sup>

Many of the asserted reasons for enacting this legislation are the precise health benefits that some scientific research reports as being weakly correlated with breastfeeding, or those benefits that show no correlation at all.<sup>180</sup> Yet, when Senator Jeff Merkley (D-OR) introduced this bill in the Senate, he claimed that "the science is undisputable."<sup>181</sup> The

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income tax). If the assumed 1.3 million companies participate, in total, the deduction equates to \$8.84 billion in reduced government revenue.

<sup>174</sup> STATISTICS OF INCOME, *supra* note 169, at 11 (stating that businesses with more than \$2.5 billion in assets submitted 2.6 million of 5.8 billion total returns).

<sup>175</sup> See *supra* Part II.B.

<sup>176</sup> Breastfeeding Promotion Act of 2009, H.R. 2819, 111th Cong. tit. I §101 (2009).

<sup>177</sup> *Id.* § 101(4).

<sup>178</sup> *Id.* § 101(5).

<sup>179</sup> *Id.* § 101(6).

<sup>180</sup> See generally *supra* Part II.B (calling into question many of the alleged benefits associated benefits with breastfeeding).

<sup>181</sup> 155 Cong. Rec. S6545-01, 6551-52 (2009).

BPA also recognizes other factors as contributing to its necessity, such as the increasing number of mothers with infants in the workforce, as well as the American Academy of Pediatrics recommendation “that mothers breastfeed exclusively for 6 months.”<sup>182</sup> The proposed legislation also recognizes certain secondary benefits of breastfeeding, such as less parental absenteeism at work;<sup>183</sup> however, these concerns are only relevant if a mother is interested in breastfeeding in the first instance. Thus, it appears that the relevance of the BPA hinges largely on benefits that, although possibly present, certain studies have disputed or found to be only minimal at best.<sup>184</sup> Given the uncertainty surrounding the true benefits of breastfeeding, coupled with the societal pressure legislation might place on mothers choosing not to breastfeed, it is far from certain that national legislation, especially when it comes with at least a \$21.4 billion price tag, is the proper route to impose the breastfeeding agenda.<sup>185</sup>

Aside from the potential financial risk to the government and the taxpaying citizen, the alleged return on investment to employers, identified by numerous case studies, is only additional cause to leave breastfeeding promotion to the private sector. If the return on investment actually exists, a government tax credit to induce corporate involvement would not be necessary to provide a participation incentive to a rational, profit-seeking employer. Assuming an employer has knowledge of the potential return on investment, a rational employer, interested in making profit, invest in breastfeeding promotion even in the absence of the legislative credit. Thus, the credit provides no *additional* incentive for the employer to spend any more than would be reasonably profitable.

Consider the scenario where an employer attains his greatest possible return on breastfeeding investment when he spends \$5,000 on breastfeeding promotion. Assuming the employer is aware of the potential

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<sup>182</sup> H.R. 2819 tit. I § 101(2), (3), (7).

<sup>183</sup> *Id.*

<sup>184</sup> See generally *supra* Part II.B (discussing low correlations between breastfeeding and many alleged health benefits); but see Joan Meek, U.S. BREASTFEEDING COMM. (describing a letter from United States Breastfeeding Committee to Representative Carolyn Maloney asserting the that “the evidence for the value of breastfeeding to children’s and women’s health is scientific, solid, and continually being reaffirmed by new research.”) (emphasis in original).

<sup>185</sup> See Breast Feeding Promotion Act of 2009, H. R. 2819, <http://lawprofessors.typepad.com/adjunctprofs/2009/06/breast-feeding-promotion-act-of-2009-h-r-2819.html> (June 25, 2009) (“While it is hard to come up with a reason to oppose such legislation, I question whether it is necessary. I suppose it is necessary since employers may not otherwise have a duty to allow employees to express breast milk at work.”).

return on investment, the employer would have an incentive to invest up to \$5,000 in breastfeeding promotion even in the absence of the legislative tax credit. However, the BPA essentially results in the ability for an employer to pay only half of what he would otherwise pay and have the government pay the remaining funds. In this case, the employer would be subsidized \$2,500 from the government. Essentially, the taxpayer is paying an employer to make a decision that a rational, profit-seeking, employer would allegedly already have an incentive to make. If businesses really can achieve a return on investment through providing breastfeeding support at work, the government would be better advised to educate businesses and provide the business, rather than the United States government, the choice of whether to assume the risks associated with investing in breastfeeding support in the workplace.

It is additionally unclear why the legislature would couch such a substantial financial incentive in the depths of the tax code, rather than as a stimulus. A stimulus would draw attention to the legislation, and its alleged impact, and could provide the necessary social awareness that the breastfeeding issue might presently be lacking. As it is currently presented, the proposed amendment appears likely to go largely unnoticed. If the legislation worked as a matching stimulus,<sup>186</sup> the breastfeeding issue would receive greater publicity than it would as an amendment to the tax code. Not only is the current tax credit proposal in Title II costly and unnecessary, it also fails to provide much needed education surrounding the breastfeeding.

#### CONCLUSION

Overall, the Tax Credit provided in Title II of the BPA seems unnecessary. Although some scientific studies point to the benefits of breastfeeding, other studies call the true relationship between breastfeeding and these alleged health benefits into question. The need for federal legislation hinges to some degree on the extent that these health benefits actually do exist. Even assuming the health benefits are present, the potential costs of Title II seem likely to outweigh any benefit. Ultimately, the appropriateness of Title II of the Act rests on whether a taxpayer should pay a business to engage in alleged profit growing activities in order to encourage a social policy that may or may not be supported by scientific evidence. The tax credit provided for in Title II of

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<sup>186</sup> An example would be for the government to match business expenditures on breastfeeding up to \$10,000.

the BPA imposes an unnecessary financial drain on the United States treasury.

However, assuming the benefits of breastfeeding are valid, and considering factors other than those of a financial nature, attaining nationwide support for breastfeeding in the workplace might not be possible without national legislation. A mother who chooses to continue working and breastfeeding necessarily contemplates the difficulties of breastfeeding in the workplace. The minimal requirements required in Title V of the BPA, and recently codified into law under the PPACA, provide breastfeeding, working women with adequate support in the workplace. The appropriate role for national legislation is exactly as it stands. The need for workplace breastfeeding support has been recognized on the national forefront, and additional tax incentives are a costly, and unnecessary measure.

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