

By Elizabeth L. Graves

Complying with California's New Lactation Accommodation Law

Employers must allow break time and space for their employees to express milk

Labor Code Sections 1030 et seq., which became effective January 2002, mandate that every employer in California provide break time and space for their employees who are nursing mothers desiring to express milk for their infants.¹ Unlike other statutes governing the workplace such as the Americans with Disabilities Act (ADA)² or the Family Medical Leave Act (FMLA), Labor Code Section 1030 applies to employers of all sizes. The law does not specify the minimum number of employees that an employer must have to be subject to the law's requirements and refers in its language to "every" employer. The failure to comply with Section 1030 subjects the employer to a \$100 civil penalty for each violation.³ Practitioners with employer clients should inform them about this responsibility and the potential for liability. Among those who should be particularly cognizant of the new statute are law firms, whose ranks include a growing number of female attorneys and support staff with infant children.⁴

Labor Code Section 1031

states that an employer must make "reasonable efforts" to provide a lactating employee with the use of a room to express milk. Thus an employer's actions to accommodate an employee will be evaluated under a reasonableness standard.

Similar language is used in the ADA: under that law, an employer must make "reasonable accommodations" to enable an employee with a known disability to perform the essential functions of a position.⁵ Unless the employer can demonstrate that the accommodation imposes an "undue hardship on the operation of the business," an employer will be liable for discrimination under the ADA. In interpreting the ADA, courts have found that an employer must be "willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work."⁶ What constitutes a reasonable accommodation is one "that would enable an employee with a disability to enjoy an equal opportunity for benefits and privileges of employment as are enjoyed by employees without disabilities."⁷

Elizabeth L. Graves is an attorney living in Lomita, California.

Under the ADA, whether an employer is required to undertake the difficulty or expense to accommodate an employee depends on 1) the nature and cost of the accommodation, 2) the overall financial resources of the employer, 3) the size of the employer's work force, 4) the location of its facilities, 5) the number of persons employed there, and

6) the effect on a facility's resources and expenses.⁸ The reasonableness of the accommodation is determined by applying a cost-benefit analysis, with the employer bearing the burden of demonstrating that the requested accommodation would cause an undue hardship. For a showing of undue hardship, the accommodation costs must be excessive compared to the benefit or a threat to the employer's financial survival.⁹

In interpreting the reasonableness requirement under the ADA, the employee's preference is considered but not controlling if it unduly burdens the employer. The employer may choose a less expensive or easier accommodation than the one requested by the employee. For example, the Seventh Circuit held that among the requests of a paraplegic employee, the desire for a handicapped-accessible sink in the office to wash coffee cups was reasonably accommodated by the state employer's suggestion that the employee use the handicapped-accessible bathroom sink rather than the employer rebuilding the office kitchenette.¹⁰ Although the cost to the employer for lowering the kitchen sink and thereby making it accessible to the employee was only approximately \$150, the court found that the "employer [had done] what [was] necessary to enable the disabled worker to work in reasonable comfort," thereby satisfying the duty of reasonable accommodation.¹¹

A similar analysis will likely be applied to an employer's reasonable efforts to accommodate workplace lactation. While the

phrase "undue hardship" does not appear in Labor Code Sections 1030 et seq., whether an employer can reasonably accommodate an employee's need for space and unpaid break time can be analyzed utilizing the factors and analysis involved in the determination of whether an employer is required to make a reasonable accommodation under the ADA. A small employer with two employees in one office will have a greater difficulty than a larger employer occupying several floors in a building in accommodating the needs of a lactating employee.

Break Time and Private Space

Labor Code Section 1030 mandates that the employer "provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee's infant child."¹² The break time is to run concurrently with the employee's existing break time, if possible. If not, the break time for expressing milk will be unpaid.¹³

The law further requires an employer to "make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee's work area, for the employee to express milk in private."¹⁴ For employees with their own offices, an employer usually will be able to comply easily with the lactation accommodation requirements.

Whether an employee will require more than her customary break time depends on several factors, including the type of breast pump she uses (manual,

battery-operated, or electric) and where she must go to express milk.¹⁵ If an employee is allowed to use an area close to the employee's work area where she can safely leave her pump equipment plugged in and ready, the time it will take the employee to express milk and return to work will be significantly reduced. An employee might require more break time if the room to express milk does not contain a sink and refrigerator or these are not located nearby. Pump parts must be washed after each use and many women prefer to refrigerate their expressed milk.¹⁶ If an employee must express milk in one location, wash her pump parts in another area, and use a refrigerator in yet another place, her break could extend well beyond her authorized time.

Section 1031 specifically states that a toilet stall is not an acceptable "room" for expressing milk. The sanitation and odor concerns are obvious as well as the lack of privacy. Some bathrooms, however, have rooms or areas adjacent to the toilet. Whether such areas would suffice under the Labor Code will likely depend on the degree of privacy afforded to the employee expressing her milk and whether the employee would still be exposed to the sounds and smells of other bathroom patrons. If the area in the bathroom can be closed off, with either a door or

partition, this situation might be acceptable. If an employer is proposing that an employee sit in a corner of the bathroom where she can be seen by other patrons or subjected to the smells of the bathroom, that will not likely be acceptable.

It is significant that Labor Code Section 1031 specifically mentions privacy. Employers who fail to accommodate the privacy interest of employees risk being found in violation of the statute. This is not only because of the modesty concerns of employees but also because women must be able to relax in order to pump efficiently. If an employee is concerned that she will expose herself to her coworkers or that someone could intrude while she is pumping, she will have difficulty expressing milk. The ideal breast-feeding room contains a door that can be locked from the inside by the employee to afford her complete privacy.

For the same reasons, a cubicle—even one with a door—offers insufficient privacy. Pumps can be heard outside a cubicle's walls. Moreover, the noise from outside the cubicle's walls could hinder a woman's ability to relax and express milk. However, for an employer with severe and justifiable space limitations, an enclosed cubicle (or alternatively, arrangements that provide additional break time to permit an employee to return home or to

another location) may be acceptable as a last resort.

Employers with more than one employee seeking to express milk may have to make special arrangements if there is only one area available for expressing milk. Ideally, an employer should provide more than one room if there is more than one nursing employee. However, if space is a factor and there is only one room for lactating employees, employers may have to adjust employee break times so that each employee can express milk privately. While some women might be comfortable expressing milk in the presence of other women, many are not. No employer should assume that women would feel comfortable expressing milk together.

The statute exempts employers from providing break time "if to do so would seriously disrupt the operations of the employer."¹⁷ What constitutes a serious disruption is not defined in the statute. Presumably, courts would have to balance an employee's right to breast-feed against an employer's operational requirements. Any employer that permits employees to take regularly scheduled breaks should be able to accommodate employee breast-pumping breaks without a serious disruption in the employer's operations. However, some employees in particular occupations, such as those in the police or medical

Advantages for All

California has a long history of legislation accommodating the right to breast-feed. California law prior to the enactment of Labor Code Sections 1030 et seq. clearly delineates this right by:

- Permitting mothers to breast-feed their babies in any location where they are authorized to be with their babies, except the private home or residence of another person.
- Allowing a breast-feeding mother to postpone jury service for up to a year.
- Promoting breast feeding in a State Department of Health Services public service campaign and making breast-feeding consultation or information available for mothers in hospitals.¹

Despite these laws in California and comparable legislation nationwide in other states,² the rates at which infants are breast-fed have remained low. In 1997, about 62 percent of all infants were breast-fed while in the hospital, yet when the infants were six months old only 18 percent of working mothers were still breast-feeding, as compared to 29 percent of nonworking mothers.³ One reason the breast-feeding rates are so low is the large number of working mothers. Studies show that without a lactation support program, employment significantly reduces the length of time a woman continues breast-feeding her child.⁴ A significant lactation program, on the other hand, can increase breast-feeding duration to 72.5 percent of working mothers at six months and 36 percent at 12 months.⁵ Employers can encourage the rates and duration of breast feeding by initiating breast-pumping policies within the workplace.⁶

Employers that accommodate lactating employees are part of a growing trend.⁷ The Los Angeles Department of Water and Power, with a 76 percent male work force, began offering a Family Care Lactation

Program in 1988 that includes prenatal classes, counselors, a lactation room, and free breast pumps.⁸ The DWP also offers a Fathering Program that provides breast-feeding education classes and lactation counseling as a way of recognizing that the "role of the father...[is] one of the strongest influences on the success of breastfeeding among mothers in the United States."⁹

Since the initiation of the DWP programs, many of the participating mothers breast-fed their children until each child was at least 6 months old—approximately the same percentage as stay-at-home mothers.¹⁰ With regard to the fathers participating in the Fathering Program, 69 percent of their infants were still breast-feeding at 6 months, with an average of 8 months.¹¹ The approximate cost to the employer was \$500 per employee from the prenatal period to the first six months of the baby's life (not including the cost of the physical facility for the program).¹² An employer, however, saves approximately \$331 to \$475 for each infant breast-fed at least three months—a savings due to reduced illness and healthcare expenses.¹³ A 1990 survey of DWP's Family Care Lactation Program participants revealed that 83 percent felt more positive about the DWP as an employer, 67 percent stated that they intended to make DWP their long-term employer, and 71 percent reported taking less time off since participating in the program.¹⁴

As the DWP statistics indicate, there are benefits for employees and employers from corporate lactation programs. Numerous studies have identified the benefits of nursing for children, including cognitive development, reduced risk of childhood diseases such as respiratory infections and ear infections, and fewer illnesses during the first year of life.¹⁵ In one study, babies who were never breast-fed visited their doctors 1.8 times more frequently than breast-fed infants.¹⁶ The benefits for nursing mothers include reduced risk of breast cancer, ovar-

(Continued on page 22)

fields, must respond to emergencies, and regular break times can be delayed. Employers of these and similar types of emergency workers may have a legitimate argument that breast pumping is disruptive to the delivery of necessary services and therefore cannot be accommodated.

Conceivably an employer could be neither required to provide break time nor a place to express milk if the employer could demonstrate a disruption of operations and an inability to reasonably accommodate the employee. These exemptions are not likely to be applicable to most law offices, particularly if courts look to the case law developed under the ADA for guidance.

Enforcing the Law

Despite the broad impact of Labor Code Section 1030, its enactment has received little publicity, and employers may be unaware of their legal obligation to support breast-feeding employees. Attorneys representing aggrieved employees may find that employer education is a more productive first step than an immediate rush to litigation. When applicable, mothers may be well advised to seek assistance from their union, human resources department, or employee liaison. Local groups such as the Breastfeeding Task Force of Greater Los Angeles¹⁸ may be helpful in the

implementation of policies that support breast feeding. If an employee takes these initiatives and her employer is unwilling to provide break time or space to express milk, the employee's attorney may advise her to seek redress by filing a claim with the state labor commissioner.

The employee's attorney should also evaluate whether an employer's refusal to provide a suitable space for expressing milk as well as any retaliatory actions taken by the employer against the employee requesting lactation accommodation constitute possible grounds for a claim of discrimination. Although breast feeding is not covered by the federal Pregnancy Discrimination Act of 1978,¹⁹ and courts have held that breast feeding is not a "related medical condition" as defined by the PDA,²⁰ women "may still have a claim of sexual discrimination under Title VII because lack of accommodation for breastfeeding provides a disadvantage for women."²¹ In addition, California's Pregnancy Disability Act may provide a cause of action.²²

Law firms and other employers should explore their space options before an employee requests accommodation. Employers should also designate a human resources person to answer any questions and serve as a liaison between the employer and employee. Lactation accommodation poli-

cies should be distributed to employees and included in the employee manual.

The minimum requirements of Labor Code Section 1030 are a room offering privacy with an electrical outlet and unpaid break time. An employer seeking to truly support a breast-feeding employee will ensure that the room has an inside lock, refrigerator, sink, comfortable chair and footstool, wardrobe hooks, and mirror—and might consider that the break period be a paid one. In addition, an employer who wants to encourage breast feeding and contribute to an increase in the rate of breast feeding among its female employees with infants can inform employees of its policies and arrangements for breast-feeding support before employees go on maternity leave. Employers can go beyond compliance with Section 1030 and provide breast pumps and make the services of a lactation consultant available to employees. The benefits for employers who fully accommodate breast-feeding employees are numerous. (See "Advantages for All," page 21.)

Employers could either purchase or subsidize pumps for each nursing employee²³ or purchase hospital grade electric pumps for multiple uses and individual sterilized kits. Employers that opt to purchase or subsidize the cost of breast pumps should at least consider the electric pump models, even though

(Continued from page 21)

ian cancer, and hip fractures as well as greater bonding between mother and child and increased self-esteem.¹⁷

The health benefits for both mother and child translate into employer and societal benefits in the form of reduced healthcare, insurance, medical, and welfare costs. One company implementing a lactation accommodation program found a \$240,000 reduction in medical costs, with 62 percent fewer prescriptions.¹⁸ Moreover, healthier children and mothers result in reduced maternal absenteeism and lateness in the workplace.¹⁹ Some programs found a 77 percent reduction in maternal absenteeism due to infant illness.²⁰

Finally, when practices that encourage breast feeding are adopted in the workplace, breast-feeding mothers "exhibit increased productivity with higher job satisfaction."²¹ Employer policies may encourage women to initiate breast feeding if they believe they will be able to continue breast-feeding upon their return to work. Moreover, since the ability to express milk at work enables women to both work and breast-feed, it advances gender equality in employment.²² The employer's support could even make a difference in whether a mother returns to the work force after the birth of her child.—**E.L.G.**

¹ See CIV. CODE §43.3, CODE CIV. PROC. §210.5, HEALTH & SAFETY CODE §§319.50 et seq.

² At least 30 states have enacted legislation to promote breast feeding. See G. Waggett & Rega Richardson Waggett, *Breast Is Best: Legislation Supporting Breast-Feeding Is an Absolute Bare Necessity—A Model Approach*, 6 MD. J. CONTEMP. LEGAL ISSUES 71 (1995).

³ Eleena De Lisser, *For Working Moms, Nursing Is Something to Keep in the Closet—It Turns Squeamish Colleagues into Unfunny Humorists; A Pumping-Room Sorority*, WALL STREET JOURNAL, Aug. 31, 1999, at A1.

⁴ Shana M. Christup, *Breastfeeding in the American Workplace*, 9 AM. U.J. GENDER

Soc. POL'Y & L. 471, 480 (2001).

⁵ See CIGNA Working Well (2002), the UCLA Center for Healthier Children, Families and Communities study of CIGNA's corporate lactation program, available at <http://healthproject.stanford.edu/koop/CIGNA/documentation.html>.

⁶ Christup, *supra* note 4, at 481.

⁷ See Melissa Healy, *Pentagon Yields to Families with Room for Nursing Moms*, LOS ANGELES TIMES, Aug. 11, 1999, at A1.

⁸ Jocelyn Y. Stewart, *Breast-Feeding Becoming a Workplace Issue*, LOS ANGELES TIMES, Jun. 13, 1993, at A1. See also Rona Cohen & Marsha B. Mrtek, *The Impact of Two Corporate Lactation Programs on the Incidence and Duration of Breastfeeding by Employed Mothers*, AMERICAN JOURNAL OF HEALTH PROMOTION, July/Aug. 1994, at 2, 4.

⁹ Rona Cohen et al., *A Description of a Male-Focused Breastfeeding Promotion Corporate Lactation Program*, 18 J. HUMAN LACTATION 1, 61 (2002).

¹⁰ Cohen & Mrtek, *supra* note 8, at 5.

¹¹ Cohen, *supra* note 9, at 63.

¹² Cohen & Mrtek, *supra* note 8, at 5.

¹³ T.M. Ball and A.L. Wright, *Health Care Costs of Formula-Feeding in the First Year of Life*, PEDIATRICS, Apr. 1999, at 870.

¹⁴ Sanvita Programs Corporate Lactation brochure, at 2. Copy on file with author.

¹⁵ Elizabeth N. Baldwin, *A Look at Enacting Breastfeeding Legislation*, La Leche League International, Apr. 4, 1999, at <http://www.lalecheleague.org/Law/LawEnact.html>.

¹⁶ CIGNA Working Well, *supra* note 5, at Documentation.

¹⁷ Peter Layde, et al., *The independent association of parity, age at first full-term pregnancy and duration of breastfeeding with the risk of breast cancer*, 42 J. OF CLINICAL EPIDEMIOLOGY 963, 966 (1989); K.E. Brock, et al., *Sexual, reproductive and contraceptive risk factors for carcinoma-in-situ of the uterine cervix*, 160 MEDICAL J. OF AUSTRALIA 125, 127 (1989).

¹⁸ CIGNA Working Well, *supra* note 5, at Evaluation Summary.

¹⁹ Rona Cohen et al., *Comparison of Maternal Absenteeism and Infant Illness Rates among Breast-Feeding and Formula-Feeding Women in Two Corporations*, AMERICAN JOURNAL OF HEALTH PROMOTION, Nov./Dec. 1995, at 153.

²⁰ CIGNA Working Well, *supra* note 5.

²¹ Christup, *supra* note 4, at 477.

²² *Id.* at 501-02.

they are more expensive, because these models enable mothers to express milk more rapidly and thereby reduce the amount of break time that is required.

Labor Code Sections 1030 et seq. offer employees the opportunity to continue working at their jobs while breast-feeding. Most employers can easily accommodate nursing mothers by simply providing a space and time to express milk. Wise employers can use this legislation as an opportunity to reduce their costs while educating staff and supporting their employees who are breast-feeding mothers. ■

¹ The author wishes to thank Mark Meyerhoff of Liebert Cassidy Whitmore and Alexis Martin Neely of Munger Tolles & Olson LLP for their comments on this article.

² 42 U.S.C. §§12111(10)(A), 12112(b).

³ LAB. CODE §§1030 et seq.

⁴ See Rona Cohen et al., *Comparison of Maternal Absenteeism and Infant Illness Rates among Breast-Feeding and Formula-Feeding Women in Two Corporations*, AMERICAN JOURNAL OF HEALTH PROMOTION, Nov./Dec. 1995, at 148.

⁵ 42 U.S.C. §12111(8), (9); §12112(a).

⁶ Vande Zande v. State of Wis. Dep't of Admin., 44 F. 3d 538, 542 (7th Cir. 1995).

⁷ Howell v. Michelin Tire Co., 860 F. Supp. 1488, 1492 (M.D. Ala. 1994).

⁸ 42 U.S.C. §12111(10)(A), (B).

⁹ Vande Zande, 44 F. 3d at 543.

¹⁰ *Id.* at 545-46.

¹¹ *Id.* at 546.

¹² LAB. CODE §1030.

¹³ *Id.*

¹⁴ LAB. CODE §1031.

¹⁵ To maintain a full milk supply, breast-feeding mothers require a minimum 20 minutes every 3 to 4 hours to express milk. With an electric double breast pump, most women could pump within 20 minutes. Manual and battery-operated pumps could require more time. Therefore, a breast-feeding mother needs to pump at least twice during an eight-hour work day. An employee probably cannot express her milk sufficiently in 10 minutes (the minimum legally allotted break time for most employees). See www.lalecheleague.com for further information about pumping.

¹⁶ However, milk can be safely stored at room temperature, if it is under 72 degrees, for up to 10 hours. Gina Bevinetto, *Nutrition Now*, AMERICAN BABY, May 2002, at 10.

¹⁷ LAB. CODE §1032.

¹⁸ See www.breastfeedingtaskforla.org.

¹⁹ 42 U.S.C. §2000e (1994).

²⁰ Wallace v. Pyro Mining Co., 789 F. Supp. 867, 868-69 (W.D. Ky. 1990); Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1492 (D. Colo. 1997). The Ninth Circuit has been silent on this issue.

²¹ Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U.J. GENDER SOC. POL'Y & L. 471, 485 (2001). Nevertheless, courts ruling on this matter have denied Title VII coverage to lactating women. Representative Carolyn B. Maloney introduced HR 285, the Breastfeeding Promotion Act, on March 15, 2001. This legislation would clarify the Pregnancy Discrimination Act of 1978 to protect breast feeding under the 1964 Civil Rights Act.

²² GOV'T CODE 12945.

²³ Prices range from approximately \$41 for a manual pump for short-term pumping to \$188.95 for a double electric pump. See, e.g., affordable-breast-pumps.com.

Mē'di-ā'tion

n. **The Secret** to Successful Results
- - and Satisfied Clients.

www.jeffkichen.com **213.996.8465**

COMPETENT REAL ESTATE BROKERAGE

- Specializing in helping attorneys and their clients buy and sell real estate in bankruptcy, probate, family, and real estate law
- Experienced negotiator with legal background
- Licensed broker, California Department of Real Estate
- Call for LACBA member discount

COLDWELL BANKER
PREVIEWS
International



OFFICE: (818) 905-7111 EXT. 251

OFFICE: (310) 820-2229

TODD RUBINSTEIN, J.D., BROKER ASSOCIATE

FACSIMILE: (818) 905-7299 EMAIL: ToddR@realtor.com

LA'S NEWEST DOWNTOWN HOTEL

Hilton Checkers Los Angeles

Introducing Hilton Checkers Los Angeles, LA's all new award-winning European-styled hotel and Hilton Hotel's only downtown location. Our multi-million dollar renovation and staff of seasoned professionals invite you and your corporate clients to experience the intimate ambiance of our new restaurant and lounge, luxuriously comfortable new guestrooms and our breathtaking rooftop pool and spa.



- Multi-million dollar renovation
- 188 brand new rooms and suites
- Award-winning full-service restaurant and bar, Checkers Downtown, now featuring an intimate private dining room seating up to 16
- Rooftop pool & fitness center, Checkers Spa
- 3,300 sq. ft. of meeting and banquet space



Hilton
Checkers Los Angeles

535 South Grand Ave.
Los Angeles, CA 90071
888-892-4533