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BREASTFEEDING IN THE AMERICAN WORKPLACE

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INTRODUCTION

> It is strange indeed that countries which so pride themselves on their fastidiousness should make social rules which often force their most vulnerable members to eat in places designed for the excretory needs of the other members of the society.[1]

Although it is strange, current American social norms dictate that women breastfeed their infants in bathrooms because it is deemed "inappropriate" for them to breastfeed in public where the breast might accidentally be exposed. These Puritanical views of motherhood and breastfeeding not only alter the view of what is proper within a public space, but also change the way we encourage and facilitate breastfeeding. With more women entering the workforce and an increasing number of women expressing an interest in breastfeeding, there are a variety of legislative measures that would facilitate the dual role of mother and employee. However, before developing such new policies, it is first necessary to understand the nature of the problem in the United States and how prior legislation has inadequately addressed the issue. This background information will make it easier to determine the best method for addressing the issue.

This Article is divided into three main parts. The first Part outlines the benefits of breastfeeding and highlights employment as a major barrier for women initiating or continuing to breastfeed. The second Part outlines the legislative and judicial responses that in application fail to aid breastfeeding employees within the United States. These legislative responses include the Pregnancy Discrimination Act of 1978,[2] which amends and complements Title VII of the Civil Rights Act of 1964,[3] the Americans with Disabilities Act of 1990,[4] and the Family and Medical Leave Act of 1993.[5] This section also discusses *Dike v. School Board of Orange County Florida*[6] in which the Fifth Circuit equated breastfeeding with a constitutional privacy right. The third Part recommends that the best policy to assist working mothers who

1. INA MAY GASKIN, BABIES, BREASTFEEDING, AND BONDING 200 (1987).
2. 42 U.S.C. § 2000e (1994).
3. 42 U.S.C. §§ 2000e—2000e-17 (1998).
4. 42 U.S.C. §§ 1201(a)—1222(13) (1990).
5. 29 U.S.C. § 2601 (1994).
6. 650 F.2d 783 (5th Cir. 1981).

want to breastfeed is to encourage and implement breast-pumping programs.

I. BENEFITS OF BREASTFEEDING AND EMPLOYMENT — BARRIER TO BREASTFEEDING

A. Rates of Breastfeeding within the United States

With the introduction of infant formula, many mothers began opting for the more convenient and liberating method of providing infant nutrition that was promoted as better than, or at least equivalent to, breast milk.[7] For this and other structural reasons, breastfeeding rates in the United States reached a low in the 1970s with 23% of all mothers initiating breastfeeding and 10% of all mothers continuing to breastfeed their child for six months.[8] However, due to a variety of public health campaigns that informed the public that "breast is best," along with an increase in the availability of training courses for expectant mothers informing them of the benefits and the proper method of breastfeeding, the breastfeeding rate rose until the early 1980s. At that time, breastfeeding reached its highest rate of nearly 60% of infants being breastfed at birth and close to 25% of all infants being breastfed for six months.[9] Since the 1980s, the breastfeeding rate has declined slightly. From 1990 to 1993, only 55.2% of all infants were breastfed at birth and 28.4% of all infants were breastfed for five or more months.[10] During that same period, the mean duration of breastfeeding was 28.7 weeks.[11]

These breastfeeding rates are problematic considering that leading health officials suggest that the optimal breastfeeding practice for the

7. The campaign to provide formula to children began as part of a social movement to liberate women from household responsibilities and to give them the opportunity to maintain their place within the workforce, even after the birth of a child. Since its inception, however, the movement away from breastfeeding has also allowed a redefinition of the use of the breast from an object for feeding a baby to an object of sexual stimulation. Some authors argue that this sexual objectification of the breast has inhibited women from breastfeeding. Whatever the case, current attitudes toward the breast and its exposure in the public arena have definitely colored the issues surrounding breastfeeding' especially within an employment context. As a result, the social norms regarding breastfeeding have been severely altered since the introduction of formula. *See* Corey Silberstein Shdaimah, *Why Breastfeeding is (Also) a Legal Issue*, 10 HASTINGS WOMEN'S L.J. 409, 412-13 (1999).

8. *See* Heidi Littman et al., *The Decision to Breastfeed: The Importance of Fathers' Approval*, 33 CLINICAL PEDIATRICS 214, 214 (Apr. 1994).

9. *See id.*

10. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998 (118th ed. 1998).

11. *See id.*

health of the infant requires at least six months of exclusive breastfeeding.[12] Though almost all women and their infants would benefit from breastfeeding,[13] public health officials recognize that primarily due to social constraints, not all women will choose to breastfeed. However, the Healthy People 2000 report emphasizes the need to encourage breastfeeding and sets a goal of 75% of all infants being breastfed for any length of time and 50% of all infants being breastfed for six months.[14] Unfortunately, as the above statistics demonstrate, we are far from reaching this goal. This suggests that there are widespread problems inhibiting women from initiating and continuing to breastfeed.[15]

B. Benefits of Breastfeeding

The "breast is best" campaign not only centered on the benefits of breastfeeding for the child, but also, as various studies have shown, the benefits to the emotional and physical health of the mother and society as a whole.[16] By emphasizing the benefits to all of the interested parties, public health officials hope to emphasize the need to change our current attitudes about breastfeeding as well as the need to alter societal structures to make breastfeeding a more feasible option.

1. Benefits to the Infant

As the primary source of nutrition for infants, breast milk provides a variety of health benefits, the most highly touted of which is that breastfed infants have fewer and less severe illnesses.[17] The reduction

12. *See* S.L. Huffman & M.H. Labbok, *Breastfeeding in Family Planning Programs: A Help or a Hindrance?*, 47 Suppl. INT'L J. GYNECOLOGY & OBSTETRICS S23, S27 (1994).

13. Universal breastfeeding is not recommended in the United States, because women who have active, untreated tuberculosis, use illegal drugs, test positive for HIV, or take certain prescription medications should not breastfeed. *See* Committee on Drugs, *The Transfer of Drugs and Other Chemicals Into Human Milk*, 93 PEDIATRICS 137, 137 (1994); *see also* U.S. DEP'T OF HEALTH & HUMAN SERV., OFFICE OF PUB. HEALTH & SCI., HEALTHY PEOPLE 2010 OBJECTIVES: DRAFT FOR PUBLIC COMMENT 12-29 (1998).

14. *See* U.S. DEP'T OF HEALTH & HUMAN SERV., HEALTHY PEOPLE 2000 REVIEW: 1998-99 (1999). The Healthy People 2000 report is part of a national health promotion and disease prevention program. The report outlines various measures and health goals for each decade with the purpose of improving the health of all Americans, eliminating disparities in health, and improving years and quality of healthy life. *Id.*

15. For more information on these widespread social and structural problems, see *supra* note 7 and *infra* notes 53-81 and accompanying text.

16. *See infra* notes 17-52 and accompanying text.

17. *See* Rona Cohen et al., *Comparison of Maternal Absenteeism and Infant Illness Rates Among Breast-feeding and Formula-feeding Women in Two Corporations,* 10 AM. J. HEALTH PROMOTION 148, 149 (1995); *see also* Micheline Beaudry et al., *Relation Between Infant Feeding and Infections During the First Six Months of Life,* 126 J. PEDIATRICS 191, 197 (1995); Margit Hamosh et al., *Breastfeeding*

in the incidence and duration of illness primarily results from a decrease in the occurrence of many common infectious diseases. These infectious diseases include: bacteraemia, bacterial meningitis, botulism, necrotising enterocolitis, ulcerative colitis,[18] sepsis,[19] gastrointestinal illness (particularly diarrhea),[20] respiratory illnesses,[21] rotavirus infection,[22] and otitis media (ear infections).[23] Further, the incidence of chronic diseases such as infantile allergy,[24] diabetes mellitus,[25] and Crohn's disease[26] is lower in infants who have been breastfed. Yet another benefit for the infant is a reduced risk of diseases which often result in death, including sudden infant death syndrome (SIDS)[27] and childhood lymphomas.[28] It has also been found that breast milk increases an infant's immune response.[29] Many long-term health effects include higher cognitive functioning and educational achievement,[30] stimulation of growth,[31] and vision

and the Working Mother: Effect of Time and Temperature of Short-term Storage in Proteolysis, Lipolysis, and Bacterial Growth in Milk, 97 PEDIATRICS 492, 496 (1996).

18. *See* Judy Holtzer Knopf, *Breastfeeding and Maternal Employment*, 352 THE LANCET 1704, 1704 (1998).

19. This finding has been limited to infants with low birth weight. *See* Mary Ann Hylander et al., *Human Milk Feedings and Infection Among Very Low Birth Weight Infants*, 102 PEDIATRICS e38 (Sept. 1998), *available at* http://www.pediatrics.org/cgi/content/full/102/3/e38.

20. *See* Cohen et al., *supra* note 17, at 148; *see also* Beaudry et al., *supra* note 17, at 191; John D. Clemens et al., *Breastfeeding and the Risk of Life-threatening Enterotoxigenic Escherichia coli Diarrhea in Bangladeshi Infants and Children*, 100 PEDIATRICS e2 (Dec.1997), *available at* http://www.pediatrics.org/cgi/content/full/6/e2; Kathryn G. Dewey et al., *Differences in Morbidity Between Breast-Fed and Formula-Fed Infants*, 126 J. PEDIATRICS 696, 700 (1995) [hereinafter Dewey et al., *Difference in Morbidity*]; Erica Frank, *Breastfeeding and Maternal Employment: Two Rights Don't Make a Wrong*, 352 THE LANCET 1083, 1083 (1998).

21. *See* Beaudry et al., *supra* note 17, at 191.

22. *See* David S. Newburg et al., *Role of Human-Milk Lactadherin in Protection Against Symptomatic Rotavirus Infection*, 351 THE LANCET 1160, 1161 (1998).

23. *See* Burris Duncan et al., *Exclusive Breast-Feeding for at Least 4 Months Protects Against Otitis Media*, 91 PEDIATRICS 867, 867 (1993); *see also* Dewey et al., *Differences in Morbidity*, *supra* note 20, at 701.

24. *See* Rosemary Barber-Madden et al., *Breastfeeding and the Working Mother: Barriers and Intervention Strategies*, 8 J. PUB. HEALTH POL'Y 531, 531 (1987).

25. *See* Knopf, *supra* note 18, at 1704; *see also* David J. Pettitt et al., *Breastfeeding and Incidence of Non-Insulin-Dependent Diabetes Mellitus in Pima Indians*, 350 THE LANCET 166, 166 (1997).

26. *See* Donald W. Goodwin et al., *Breast-Feeding and Alcoholism: The Trotter Hypothesis*, 156 AM. J. PSYCHIATRY 650, 652 (1999).

27. *See* Knopf, *supra* note 18, at 1704.

28. *See id.; see also* Goodwin et al., *supra* note 26, at 652.

29. *See* Larry K. Pickering, *Modulation of the Immune System by Human Milk and Infant Formula Containing Nucleotides*, 101 PEDIATRICS 242, 243 (1998).

30. *See* L. John Horwood & David M. Fergusson, *Breastfeeding and Later Cognitive and Academic Outcomes*, 101 PEDIATRICS e9 (Jan. 1998), *at* http://www.pediatrics.org/cgi/content/full/101/1/e9.

31. *See* JAN RIORDAN & KATHLEEN G. AUERBACH, BREAST FEEDING AND HUMAN LACTATION 108-09 (1993).

improvement.[32] Although a few documented cases have reported problems with breastfeeding, these cases are generally the result of malnutrition due to improper breastfeeding practices.[33] With proper medical supervision, especially for primiparous mothers, these difficulties are easily averted.[34] Further, except for one recent study reported by the *New York Times*,[35] studies analyzing the impact of breast milk versus formula have either shown that breast milk has a positive effect or no effect on infants. Thus, a breastfed infant not only receives benefits from breastfeeding for short-term problems, such as the incidence and duration of infectious diseases, but also receives long term benefits.

2. Benefits to the Mother

Benefits to the breastfeeding mother primarily fall into two categories—physical and mental. Physical benefits include a potential reduction of the risk of breast cancer,[36] lower risk of ovarian cancer,[37] reduced postmenopausal bone loss,[38] decreased maternal body fat,[39] lower risk for diabetes,[40] greater ease in returning to her pre-pregnancy shape,[41] delayed return of fertility,[42] and lower risk of

32. *See* Eileen Birch et al., *Breastfeeding and Optimal Visual Development*, 30 J. PEDIATRIC OPHTHALMOLOGY STRABISMUS 33, 37 (1993).

33. *See* William O. Cooper et al., *Increased Incidence of Severe Breastfeeding Malnutrition and Hypernatremia in a Metropolitan Area*, 96 PEDIATRICS 957, 957 (1995) (documenting five cases of infants with severe complications due to malnutrition and dehydration in the Children's Hospital Medical Center in Cincinnati, Ohio).

34. *See id.* Primiparous mothers are women who have given birth for the first time.

35. *See* Jane E. Brody, *Personal Health: Linking Allergy, Asthma and Infant Diets*, N.Y. TIMES, Feb. 29, 2000, at F8.

36. The U.S. National Academy of Science concluded: "Most epidemiological evaluations suggest that breastfeeding may be protective against breast cancer, but there is conflicting evidence." K.I. Kennedy, *Effects of Breastfeeding on Woman's Health*, 47 Suppl. INT'L J. GYNECOLOGY & OBSTETRICS S11, S14 (1994).

37. *See* Robert Ivker, *WHO Urges Integrated Support for Breastfeeding*, 348 THE LANCET 468, 468 (1996).

38. *See* Donna Kritz-Silverstein et al., *Pregnancy and Lactation as Determinants of Bone Mineral Density in Postmenopausal Women*, 136 AM. J. EPIDEMIOLOGY 1052, 1057 (1992) (finding that breastfeeding causes higher bone mineral density of the wrist, radius and hip); *see also* Robert G. Cumming & Robin J. Klineberg, *Breastfeeding and Other Reproductive Factors and the Risk of Hip Fractures in Elderly Women*, 22 INT'L J. EPIDEMIOLOGY 684, 684 (1993).

39. *See* F. Kramer et al., *Breast-Feeding Reduces Maternal Lower-Body Fat*, 93 J. AM. DIETRIC ASS'N 429, 432 (1993); *see also* Kathryn G. Dewey et al., *Maternal Weight-Loss Patterns During Prolonged Lactation*, 58 AM. J. CLINICAL NUTRITION 162, 162 (1993) [hereinafter Dewey, et al, *Maternal Weight-Loss*].

40. The reduced risk of diabetes due to breastfeedings is limited, thus far, to women who have experienced prior gestational diabetes. *See* Siri L. Kjos et al., *The Effect of Lactation on Glucose and Lipid Metabolism in Women With Recent Gestational Diabetes*, 82 OBSTETRICS & GYNECOLOGY 451, 451 (1993).

41. *See* Dewey et al., *Maternal Weight-Loss*, *supra* note 39, at 164.

after-birth bleeding if the infant is breastfed within the first hour after delivery.[43] Mental benefits for the breastfeeding mother include greater bonding between the mother and child,[44] greater confidence in parenting skills,[45] and an increase in self-esteem related to the attainment of those parenting skills.[46] In addition, breastfeeding women in the workplace exhibit less maternal absenteeism and lateness because their infants are, on average, healthier.[47] They also exhibit increased productivity with higher job satisfaction if breastfeeding-friendly practices are adopted in the workplace.[48] As with the benefits for the infant, the maternal benefits of breastfeeding are both short term and long term. However, the realization of these maternal benefits is often dependent upon a supportive social structure and medical personnel to assist the woman through the breastfeeding process.

3. Benefits to Society and the Private Sector

Breastfeeding is both an economically frugal and ecologically sound activity because it utilizes a feeding process that is provided by nature and uniquely designed for the human infant.[49] A recent analysis found that in the United States health care costs increase by more than one billion dollars every year due to a rise in incidence of four medical disorders which are related to the decreased level of breastfeeding.[50] Therefore, encouraging breastfeeding may help

42. *See* Oona M.R. Campbell & Ronald H. Gray, *Characteristics and Determinants of Postpartum Ovarian Function in Women in the United States*, 169 AM. J. OBSTETRICS & GYNECOLOGY 55, 58-59 (1993).

43. *See* Ivker, *supra* note 37, at 468.

44. *See* S. Diaz, *Keynote Address: The Human Reproductive Patterns and the Changes in Women's Roles*, 47 Suppl. INT'L J. GYNECOLOGY & OBSTETRICS S3, S4 (1994); *see also* Kennedy, *supra* note 36, at S11.

45. *See* Kennedy, *supra* note 36, at S11.

46. *See id.* Although these mental benefits may be attributed to self-selection during the breastfeeding process (i.e., happier and more adjusted women tend to breastfeed compared to their counterparts), most of the aforementioned studies dealt with low-income women and followed their adjustment to parenting as they began breastfeeding. Generally, these studies also asked about the attitudes of the women toward their child and their parenting skills, which did not significantly differ from the attitudes reported by non-breastfeeding mothers.

47. *See* Cohen et al., *supra* note 17, at 152; *see also* Huffman & Labbok, *supra* note 12, at S27.

48. *See* Huffman & Labbok, *supra* note 12, at S27; *see also* Gordon 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, 76 (1995) (discussing the social and economic benefits of breastfeeding, reviewing state and federal breastfeeding law and proposing a model legislative approach to protect and promote breastfeeding).

49. *See* RIORDAN & AUERBACH, *supra* note 31, at 23.

50. *See* Janice M. Riordan, *The Cost of Not Breastfeeding: A Commentary,* 13 J. HUM. LACTATION 93-95 (1997) (estimating the additional costs of the treatment of diarrheal disease, respiratory syncytial virus, insulin-dependent diabete mellitus, and ottis media, all childhood disease,

reduce health care costs. Also, facilitating breastfeeding by women in the workforce would reduce both staff turnover and recruitment efforts to replace staff losses.[51] This is because policies are not developed to facilitate breastfeeding within the workplace and women who opt to breastfeed are forced to either end employment or breastfeeding. The renewed interest of breastfeeding would further enlarge or create various markets relating to a breastfeeding woman's special needs.[52] Therefore, encouraging breastfeeding not only benefits the mother-infant dyad but society as a whole.

C. Why Are the Breastfeeding Rates So Low?

Given all of the benefits of breastfeeding to the infant, mother and society, it would seem natural that breastfeeding rates should increase rather than plateau (with a slight decline) in the last two decades, especially considering that three out of four Americans support breastfeeding.[53] However, there are numerous barriers to the initiation and continuance of breastfeeding.[54] As a result, public health strategies now recognize that different groups of women decide not to breastfeed for different reasons, and a movement is under way to develop specialized interventions targeting specific groups of women. For example, recent legislation has been passed to encourage breastfeeding among low-income women receiving assistance from the Special Supplemental Food Program for Women, Infants, and Children (WIC).[55] Specifically, this legislation requires that WIC encourage breastfeeding whenever possible by providing an enhanced food package for breastfeeding mothers, by providing

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because of not breastfeeding); *see also* Knopf, *supra* note 18, at 1704. This analysis only examined the cost of four medical disorders, though many more disorders are associated with the benefits of breastfeeding.

51. *See* Cohen et al., *supra* note 17, at 149.

52. Various market expansions include the duplication of the human breast by the infant bottle industry and the development of more nursing-friendly clothing and bras. *See* Waggett & Waggett, *supra* note 48, at 76; *see also* John Pierson, *Feeding Baby as Nature Intended,* WALL ST. J., Oct. 14, 1994, at B1; Pamela G. Schawel, Nursing Bra with Nursing Indicator, U.S. Patent No. 4, 423, 734 (issued Jan. 3, 1984) (describing a nursing bra with a device that indicates which breast to use first when feeding an infant).

53. *See* Jayne F. Moore & Nancy Jansa, *A Survey of Policies and Practices in Support of Breastfeeding Mothers in the Workplace*, 14 BIRTH 191, 192 (1987) (explaining that respondents of a 1987 Nurses' Association of the American College of Obstetricians and Gynecologists (NAACOG) survey believe that breast milk is the best source of nutrition for an infant). Within the same NAACOG survey, 60% of the respondents stated that employment and breastfeeding are compatible, and 53% stated that employers should provide facilities to support breastfeeding. *Id.*

54. *See infra* notes 57-81 and accompanying text.

55. *See generally* Nazli Baydar et al., FINAL REPORT: WIC INFANT FEEDING PRACTICES STUDY 43-45 (1997) (providing an overview of the WIC Program breastfeeding promotion).

breastfeeding education and advice on breastfeeding to the mother, and by refraining from encouraging the use of formula. Within these WIC guidelines, breastfeeding education addressing the needs of working mothers is also encouraged.[56] Given the large number of working women, one of the greatest barriers with respect to initiating and continuing breastfeeding is employment.[57] In fact, the draft comments for the Healthy People 2010 Objectives specifically mention the need for more social support for breastfeeding, especially social support from employers.[58] Further, because working women compose such a large proportion of mothers with young children,[59] failure to address the working woman's conflict between employment and breastfeeding would result in a failure to reach the Healthy People 2000 goal or any other reasonable breastfeeding goal.[60]

D. Women and Employment

Not only do women make up a major part of the labor force, but most of these women will become pregnant while they are working. In the 1980s, working mothers and wives were the rule, not the exception, with 67% of all women of childbearing age in the labor force.[61] Of those women in the labor force, 85% will likely become pregnant while they are employed.[62] In 1994, mothers with infants and toddlers were the fastest growing segment of the labor force.[63] Further, women tend to return to work soon after childbearing, even before the child has reached one year of age. In 1985, more than 40% of mothers with children less than one year of age were working either full-time or part-time.[64] By 1995, that percentage increased to

56. *See id.*

57. *See infra* notes 61-74 and accompanying text.

58. For more information about the Healthy People reports, see *supra* note 14. For information regarding the Healthy People 2010 objectives, see U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 14, at 12-29.

59. *See* Cohen et al., *supra* note 17, at 148 (stating that by 1990 seventy-one percent of working women have children).

60. *See supra* note 14 and accompanying text.

61. *See* U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, WE, THE AMERICAN WOMEN 10 (1984).

62. *See* Marjorie Jacobson, *Pregnancy and Employment: Three Approaches to Equal Opportunity*, 68 B.U. L. REV. 1019, 1019 (1988) (noting that less than ten percent of American families fall within the traditional model with the father as the sole provider).

63. *See* Rona Cohen & Marsha B. Mrtek, *The Impact of Two Corporate Lactation Programs on the Incidence and Duration of Breast-Feeding by Employed Mothers*, 8 AM. J. HEALTH PROMOTION 436, 436 (1994) (explaining that the participation of mothers in the work force is expected to increase).

64. *See* U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-20 PUB. NO. 421, FERTILITY OF AMERICAN WOMEN: JUNE 1986 4 (1987).

59.5%.[65] By 1990, at least 50% of all women who opted to work while pregnant returned to work by the time their child was three months old.[66] Women return to work soon after giving birth in large part because of the need to continue to contribute to the family income; yet, this early return to the work environment impedes breastfeeding.

E. Working Women and Breastfeeding

As a larger percentage of women enter the workforce soon after childbirth, the effects on breastfeeding can be rather dramatic. Reports have suggested that the interaction between breastfeeding and employment results in a shorter duration of breastfeeding, not a decline in the breastfeeding rate.[67] For example, during the hospital stay immediately following the birth, 55% of both employed and unemployed mothers breastfed their infants.[68] However, only 10% of women employed full-time breastfed their child at six months of age, compared to 24% of the women who were not employed.[69] Other studies corroborate these findings by showing that a longer duration of breastfeeding is associated with longer maternity leave (five to seven months),[70] professional occupation, and working part-time postpartum rather than full-time.[71] This difference may primarily be due to the ability of these mothers to negotiate within the workplace and to push for policies that provide more protection and opportunities to allow the working mother to breastfeed, specifically, policies permitting longer leave and shorter working hours which would allow a woman to remain home to breastfeed while still maintaining an employed status. For equality purposes, *all* women should enjoy these benefits and have the opportunity to breastfeed

65. *See* U.S. BUREAU OF THE CENSUS, *supra* note 10, at 409.

66. *See* Cohen et al., *supra* note 17, at 149 (indicating that only about ten percent of working mothers breastfeed for a full six months).

67. *See* Alan S. Ryan & Gilbert A. Martinez, *Breast-Feeding and the Working Mother: A Profile*, 83 PEDIATRICS 524, 527 (1989) (noting that the breastfeeding rate in the hospital was lowest among mothers who did not work outside the home and who were young, low-income and black; whereas the high rate of in-hospital breastfeeding for full-time working mothers did not continue after the infant reached six months of age).

68. *See id.*

69. *See id.*

70. *See* Kathleen G. Auerbach & Elizabeth Guss, *Maternal Employment and Breastfeeding: A Study of 567 Women's Experiences*, 138 AM. J. OF DISEASES OF CHILDREN 958, 959 (1984) (reporting that women were more likely to continue breastfeeding if they returned to work after taking at least sixteen weeks of leave).

71. *See* Littman et al., *supra* note 8, at 217; *see also* Auerbach & Guss, *supra* note 70, at 958; Sharon G. Hills-Bonczyk et al., *Women's Experiences with Combining Breast-Feeding and Employment*, 38 J. NURSE-MIDWIFERY 257, 261 (1993); Cynthia M. Visness & Kathy I. Kennedy, *Maternal Employment and Breast-Feeding: Findings from the 1988 National Maternal and Infant Health Survey*, 87 AM. J. PUB. HEALTH 945, 945 (1997).

their child, not just those who are able to wield some power within the workforce. Therefore, a comprehensive national strategy is required to help all working mothers balance family and employment obligations.

The additional complications surrounding a breastfeeding employee have been highlighted in several studies. In a recent study examining women's attitudes toward employment and breastfeeding, 43% of the mothers who responded reported that there is difficulty in combining breastfeeding and employment.[72] Further, breastfeeding employees not only encounter typical difficulties related to breastfeeding (i.e. fatigue, breast engorgement, and leaking milk), but also encounter difficulties arising from the work environment, including finding time and a convenient area to express milk and concern about maintaining milk supply.[73] Even the more common issues, which are not directly related to employment, may be exacerbated in the workplace. For example, having milk leak in the middle of an important meeting may cause extreme stress and undue hardship — stress that would not normally be encountered, or at least not be as severe, if the mother was not within the work environment. The multiple demands on the working mother who strives to balance the demands of work and family and the difficulty in coping with these competing demands has been referred to as "role overload."[74] As a result, working mothers often need more support for breastfeeding than unemployed mothers, and the lack of existing support explains why these mothers tend to breastfeed for a shorter duration.

However, in the few studies that examined strategies to aid breastfeeding employees, the results show that the benefits of a supportive program are substantial, such that more employed mothers breastfeed for longer periods than unemployed mothers. Using a serial survey, researchers found that initiating a breast-pumping policy within the workplace resulted in an increase of 5.7 months, a statistically significant longer duration of breastfeeding.[75]

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72. *See* Hills-Bonczyk et al., *supra* note 71, at 264-65 (reporting that the majority of survey respondents nonetheless felt that the benefits provided to their infants made breastfeeding worth the trouble).

73. *See* Ryan & Martinez, *supra* note 67, at 530 (noting however that many of these difficulties can be prevented through improved educational programs for the breastfeeding mother).

74. *See id.* (citing Kathleen Auerbach, *Employed breast-feeding Mothers: Problems they Encournter* 11 BIRTH 17-20 (1984)).

75. *See* Avrum L. Katcher & Mary Grace Lanese, *Breast-Feeding by Employed Mothers: A Reasonable Accommodation in the Work Place*, 75 PEDIATRICS 644, 645 (1985) (explaining that mothers who breastfeed for a longer period of time were more likely to use electric or

Further, many of the mothers commented that they continued to breastfeed their infants after returning to work because of the existence of a supportive breast-pumping program.[76] An example of such a program is the one recently established by Aid Association for Lutherans (AAL) in Appleton, Wisconsin with Sanvita.[77]

Sanvita is a comprehensive breast-pumping program in which the company not only supplies the breast-pumps but also provides a trained nurse.[78] This trained nurse meets with women when they are pregnant to discuss their breastfeeding options, assists breastfeeding mothers in returning to work, aids them in learning how to express their milk while at work, and provides advice and support throughout the process.[79] In Appleton, Wisconsin, Sanvita increased the number of women who continued to breastfeed after returning to work from a baseline of 10% to the current 50% of nursing mothers.[80] Thus, there has been approximately a 40% point increase in the number of women who breast-pump and work since the initiation of the program.

A study also determined that a corporate lactation program could increase the breastfeeding rates for working mothers at six months to 75%, well above the percentage reported for unemployed mothers and the Healthy People 2000 goal.[81] Therefore, although breastfeeding employees may require aid within the workplace, resolving the workplace issues may affect both the initiation and the duration of breastfeeding. Further, successful interventions tend to increase the breastfeeding rates for working mothers to rates above those for non-working mothers, which suggests that interventions in the workplace may help alter breastfeeding rates significantly.

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mechanical breast-pumps rather than the manual expression method used by mothers who nursed for an average of six months).

76. *See id.* (noting that some of the mothers would not have returned to work if the pump program was not available).

77. *See* Tannette Johnson-Elie, *Menash Corp. Helps Employees Continue Breastfeeding*, MILWAUKEE J. SENTINEL, Nov. 16, 1995, at 3 (describing the national breastfeeding equipment and counseling program run by Sanvita Inc.).

78. *Id.*

79. *See id.* (noting that Sanvita consultants are also on call twenty-hours a day).

80. *See id.* (suggesting that the lactation program also reduced absenteeism and illness in the workplace).

81. *See* Cohen & Mrtek, *supra* note 63, at 440 (reporting that the average duration for breastfeeding was 8.1 months for mothers participating in the two observed corporate lactation programs).

II. AMERICAN LEGISLATIVE AND LEGAL RESPONSE TO THE NEEDS OF MOTHERS IN THE WORKPLACE

There is no American legislation that directly deals with breastfeeding among working women. Rather, four laws — the Pregnancy Discrimination Act (PDA) of 1978,[82] Title VII of the Civil Rights Act of 1964,[83] the Americans with Disabilities Act (ADA) of 1990[84] and the Family and Medical Leave Act (FMLA) of 1993[85]— have been poorly adapted to deal with this issue. Also, where one circuit court has considered including breastfeeding as a constitutional privacy right, others are slow to follow.[86] Though these legislative and judicial responses rely on different views of obtaining equality of women within the workforce, each provides a means by which women can balance both family and work within today's society. Yet, the legislative responses are still ill-equipped in protecting breastfeeding workers and each will be examined to illustrate its unavailing impact.

A. Pregnancy Discrimination Act and Title VII

Title VII of the Civil Rights Act of 1964 restricts employment practices that discriminate on the basis of an "individual's race, color, religion, sex, or national origin."[87] Of particular importance to breastfeeding among employed women is the application of Title VII to discrimination on the basis of sex and its link to pregnancy, childbirth, and other related issues. The Pregnancy Discrimination Act amends Title VII to explicitly include discrimination on the basis of pregnancy-related disabilities as sexual discrimination.[88] In effect,

82. 42 U.S.C. § 2000e (1994).

83. 42 U.S.C. § 2000e-§ 2000e-17 (1998)

84. 42 U.S.C. § 1201a-§ 1222(13) (1990).

85. 29 U.S.C. § 2601 (1994).

86. *See* Dike v. Sch. Bd. of Orange County Fla., 650 F.2d 783, 787 (5th Cir. 1981) (holding "that the Constitution protects from excessive state interference in a woman's decision regarding breastfeeding her child.").

87. 42 U.S.C. § 2000e-2(a) (1994).

88. The PDA states the following:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in . . . this title shall be interpreted to permit otherwise.

42 U.S.C. § 2000e(k) (1994).

the PDA allows all women affected by pregnancy to be treated the same as other temporarily disabled persons with respect to their ability or inability to work.[89] The PDA provides a way for pregnant women to receive disability coverage from companies which already have formal means to deal with individuals who are temporarily disabled.[90] However, this is of limited benefit because corporate disability programs covered only 40% of the American workforce in 1982.[91]

1. Breastfeeding Under Title VII and the PDA

In discussing the PDA and Title VII, three questions are particularly important: (1) Is breastfeeding covered by the PDA? (2) Even if breastfeeding is not covered by the PDA, can lactating women still be considered as discriminated against on the basis of sex under Title VII? (3) Can states expand the federal legislation of the PDA to provide more benefits for breastfeeding employees?

In dealing with the first question, courts have been unwilling to extend the PDA to breastfeeding women. In *Wallace v. Pyro Mining Co.*,[92] the Sixth Circuit affirmed a district court ruling that "related medical conditions," within the meaning of Title VII, "should be limited to incapacitating conditions for which medical care or treatment is [not] usual and normal. Neither breastfeeding or weaning, or difficulties arising therefrom, constitute such conditions."[93] The court stated that the plaintiff, did not provide "evidence supporting her contention that breastfeeding her child was a medical necessity,"[94] even though she had proven that "her baby would only breastfeed, refusing bottles."[95] In *Fejes v. Gilpin Ventures Inc.*,[96] the Colorado District Court went further than the Sixth Circuit, and concluded that "the PDA only provides protection based on the condition of the mother—not the condition of the child" and therefore, "breastfeeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within

89. *See id.*

90. *See id.*

91. *See* Barber-Madden et al., *supra* note 24, at 531.

92. No. 90-6259, 1991 U.S. App. LEXIS 30157 (6th Cir. Dec. 19, 1991).

93. 789 F. Supp. 867, 868 (W.D. Ky. 1990), *aff'd*, No. 90-6259, 1991 U.S. App. LEXIS 30157 (6th Cir. Dec. 19, 1991).

94. 1991 U.S. App. LEXIS 30157 at *3.

95. *Id.* at *2.

96. 960 F. Supp. 1487 (D. Colo. 1997).

the meaning of the PDA."[97]

Although a court may rule that breastfeeding is not covered under the "related medical conditions" of the PDA, women may still have a claim of sexual discrimination under Title VII because lack of accommodation for breastfeeding provides a disadvantage for women. Unfortunately, courts that have ruled on this matter have stated that lactating women are not covered under Title VII. For example, in *Record v. Mill Neck Manor Latham School for the Deaf*,[98] a district court distinguished child rearing from pregnancy leave because it is "a disservice . . . to both men and women to assume that child-rearing is a function peculiar to one sex."[99] Later rulings then formalistically analogized breastfeeding and its related activities to child-rearing activities, and concluded that breastfeeding was not covered under Title VII.[100]

These later rulings may appear facially neutral, however, they actually discriminate against women in the same way that the pregnancy decisions discriminated against women before the enactment of the PDA.[101] The courts' failure to recognize this discrimination is apparently grounded in their belief that any genuine difference between men and women can be a valid and legal basis for discrimination.[102] Thus, as long as courts continue to hold

97. *Id.* at 1492.

98. 611 F. Supp. 905 (E.D.N.Y. 1985).

99. *Id.* at 907.

100. *See supra* notes 92-97 and accompanying text.

101. Congress enacted the PDA primarily in response to several unfavorable Supreme Court rulings that did not place pregnancy and pregnancy-related issues under sexual discrimination protection within either Title VII or the Equal Protection Clause. In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Supreme Court stated that a state law, which excluded a temporary disability arising from a normal pregnancy from disability benefits, did not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 485. The Court compared women on the aggregate to men on the aggregate and said that there was no evidence that the plan "worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." *Id.* at 496. The Court further stated that "there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-97. In *General Electric Company v. Gilbert*, 429 U.S. 125 (1976), the Court stated that an employer's disability plan that covered all disabilities except those associated with or arising out of pregnancy was not in violation of Title VII. *Id.* at 125. Using the same aggregate comparison, the Court ruled: "As there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all-inclusive." *Id.* at 138-39. Following these two cases that effectively eliminated the right of a woman to obtain employment disability coverage for pregnancy, Congress acted swiftly to alter the language of Title VII to explicitly include pregnancy as a covered disability. *See supra* note 88 and accompanying text.

102. *See, e.g.*, Barrash v. Bowen, 846 F.2d 927, 931 (4th Cir. 1988) (holding that a denial of discretionary leave for breastfeeding does not provide a basis for a disparate impact claim under

that breastfeeding is not a sex-specific activity and/or medical condition related to the sex-specific activity of giving birth, women and men cannot be considered equally.

Despite the federal government's failure to recognize breastfeeding under the PDA, state and local policymakers can still develop more comprehensive programs as a remedy for the PDA's deficiency. In dealing with the third question related to federalism, the Supreme Court ruled that the PDA sets a "floor beneath which pregnancy disability benefits may not drop — not a ceiling above which they cannot rise."[103] In fact, California[104] and New York[105] have already enacted more comprehensive legislation related to pregnancy and its work-related issues. In allowing states to be more comprehensive in their protection of pregnant women under Title VII, the Court provides states with the opportunity to expand policies related to breastfeeding within the workplace, before similar action occurs at the federal level.

B. Americans with Disabilities Act of 1990

The primary goal of the ADA is to prohibit employment and other discrimination on the basis of disability.[106] Under the ADA, a disability is a "physical or mental impairment that substantially limits one or more of the major life activities of the individual; a record of such impairment; or being regarded as having such an impairment."[107] Title I of the ADA directly addresses the issue of employment discrimination, and it specifically requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."[108]

Title VII).

103. Cal. Fed. Savs. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (citing Cal. Fed. Savs. & Loan Ass'n v. Guerra, 758 F.2d 390, 395 (9th Cir. 1985)).

104. CAL. GOV'T CODE § 12945 (West 1992 & Supp. 2001). Employees may "take leave on account of pregnancy for a reasonable period not to exceed four months." *Id. California Federal Savings & Loan Associationn v. Guerra*, 479 U.S. 272, 290 (1987), held that § 12945 is consistent with the PDA.

105. N.Y. WORKER'S COMPENSATION LAW § 201(9)(B) (McKinney 1994) (mandating that "disability . . . includes disability caused by or in connection with a pregnancy"). *Kalir v. Friendly Ice Cream*, 463 N.Y.S.2d 56, 57-58 (N.Y. App. Div. 1983), ruled a breastfeeding woman eligible for workers' compensation because her child was allergic to formula and had to be breastfed.

106. *See* 42 U.S.C. § 12101, 12101(b) (1994).

107. 42 U.S.C. §§ 12101, 12102(2) (1994).

108. 42 U.S.C. §§ 12101, 12112(5)(A) (1994).

This "reasonable accommodation" may include "job restructuring, part-time or modified work schedules" among other means of accommodation.[109] Within the employment setting, the ADA influences the way employers treat disabled individuals by imposing "reasonable accommodation" rules as long as there is not undue hardship for the employer.[110]

1. Breastfeeding Under the ADA

Some plaintiffs have argued that breastfeeding is a disability, and therefore should be covered under the ADA. These plaintiffs sue for "reasonable accommodation" standards for their disability, which may include longer breaks for either breastfeeding or breast-pumping. Courts have been unsympathetic to the argument by ruling that "pregnancy and related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA."[111] Under these circumstances, breastfeeding is considered a "pregnancy-related medical condition," due to rulings by the Equal Employment Opportunity Commission (EEOC). The EEOC, an agency that is entitled to substantial deference in interpreting the ADA, has explicitly excluded "conditions, such as pregnancy, that are not the result of a physiological disorder."[112] Because it is "simply preposterous to contend a woman's body is functioning abnormally because she is lactating,"[113] courts have consistently ruled (with guidance from the EEOC) that breastfeeding is not a disability covered by the ADA.[114]

2. Problems with the ADA

Even if breastfeeding was covered under the ADA, a variety of problems are associated with the application of the ADA to breastfeeding. First, equating breastfeeding to a disability runs counter to policies within public health that emphasize the naturalness of breastfeeding and its superiority to infant formula. Furthermore, lactating women are already being marginalized by businesses and the courts. By associating them with disabled

109. 42 U.S.C. § 12111(9)(B) (1994).

110. 42 U.S.C. § 12111 (10)(A)-(B) (1994). Undue hardship is an "action requiring significant difficulty or expense, when considered in light of" such factors as nature and cost of accommodation, and overall financial resources of covered employer. *Id.*

111. Lacoparra v. Pergament Health Ctrs., Inc., 982 F. Supp. 213, 228 (S.D.N.Y. 1997).

112. 29 C.F.R. pt. 1630, App. §1630.2(h), at 347 (1998).

113. Bond v. Sterling Inc. , 997 F. Supp. 306, 311 (N.D.N.Y. 1998).

114. *See id.*; *see also* Martinez v. N.B.C. Inc., 49 F. Supp. 2d 305, 308-09 (S.D.N.Y. 1999); *Bond*, 997 F. Supp. at 310.

individuals who are marginalized to the extent that public law has to intervene,[115] pregnant and lactating women may face marginalization.

Second, reasonable accommodation for lactating employees under the ADA is a double-edged sword. Though reasonable accommodation would require an analysis on a case-by-case basis, it does not provide over-arching premises by which all women can rely on protection for breastfeeding. Given the issues with both breastfeeding and women gaining equal employment opportunities, this breastfeeding flexibility does not allow women to maintain a position within the workforce and, as such, provide them the opportunity to push for other workplace equality issues.[116]

Third, equating lactation with disability further expands the definition of disability to potentially incorporate both other short-term disabilities as well as normal body processes that may inhibit employment. This broad expansion of disability may impose too great of a burden upon businesses as they struggle to accommodate a multitude of issues and problems. In this struggle, employers are likely to neglect the accommodation for the traditional definition of the disabled individual, and thus inhibit the effectiveness of the ADA as it was originally conceived. Therefore, including breastfeeding under the ADA is not a decent policy option for lactating mothers or for the traditional definition of the disabled that the ADA was originally conceived to protect.

C. Family and Medical Leave Act of 1993

The FMLA provides up to twelve weeks of unpaid leave within one year for both men and women after the birth of a baby; after the adoption of a child or placement of a foster child; when a serious health condition renders the employee unable to perform job functions; or when the employee needs to care for a spouse, parent or child with a serious health condition.[117] To qualify for leave, an employee must have been working with that employer for twelve months and for at least 1,250 hours in that year.[118] Employees who work for an employer with fewer than fifty persons at that worksite or less than fifty total employees within seventy-five miles of the worksite

115. The author does not support the preposition that disabled individuals should be marginalized. Rather, she only points to the current realities of the situation.

116. An underlying assumption is that most employers are going to accommodate breastfeeding by asking the employee to leave work because this accommodation requires little if any workplace modification. For information about these greater equality issues, *see infra* note 145 and accompanying text.

117. 29 U.S.C. § 2612(a)(1)(A)-(D) (1994).

118. 29 U.S.C. § 2611(2)(A)(ii) (1994).

are not entitled to leave under the Act.[119] Therefore, although the FMLA provides a variety of provisions for both men and women, there are limitations to the coverage.

1. Applying the FMLA to Breastfeeding

When the FMLA is applied to breastfeeding, there are three main benefits. First, women may stay at home for twelve weeks to breastfeed and to perform other motherly duties. Second, although employers are not required to change workforce conditions to accommodate new mothers, the employers do need to make some accommodations in dealing with the employee's absence for the twelve weeks of leave. These accommodations may involve hiring temporary employees or shifting responsibilities to other employees. Third, men may also receive the benefits of being able to stay at home. By allowing men as well as women to stay home, the FMLA attempts to maintain equality between the sexes. In maintaining this equality, the FMLA tries not to create incentives for employers to choose male employees over female employees. Further, if only women were allowed to take the leave, the courts would probably strike down the provision because the courts have viewed child rearing practices as being completely separate from pregnancy and not a sex-specific activity.[120]

2. Problems with the FMLA

While the FMLA does provide several benefits regarding breastfeeding, it does not solve all of the problems women face in the workplace. First, because the leave is unpaid, the FMLA only provides a "hollow right" because many contemporary dual income families cannot afford for women, or men, to take unpaid parental leave to care for an infant. In 1989, paid parental leave was only available to two percent of all workers, and the paid leave was generally limited to less than three days.[121] Therefore, the benefits of the leave under the FMLA are only realized by the wealthier, more educated groups of people who can negotiate the leave without the FMLA, while the groups who really require government protection under the FMLA are not covered.[122]

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119. 29 U.S.C. § 2611(2) (1994).

120. *See supra* notes 98-102 and accompanying text.

121. *See* Arielle Horman Grill, *The Myth of Unpaid Family Leave: Can the United States Implement a Paid Leave Policy Based on the Swedish Model?*, 17 COM. LAB. L.J. 373, 375 (1996).

122. *See id.* at 374 (noting that few American workers were entitled to take parental leave prior to the 1993 enactment of the FMLA).

Second, the FMLA excludes many employers from its provision, due to the restriction of benefits to employees who are employed at companies who have fifty or less employees and employees who worked a total of 1,250 hours within the last twelve months before obtaining leave.[123] Because of these two exclusionary provisions, 95% of the firms and more than fifty percent of the workforce are not covered by the FMLA.[124] Further, women are more likely to be those "contingent" and part-time workers who are unlikely to have completed the necessary 1,250 hours of employment.[125] In this manner, women are less likely than men to receive the benefits of the FMLA.

Third, twelve weeks of coverage may not be sufficient for breastfeeding. Women are more likely to continue breastfeeding if they have at least sixteen weeks of leave, assuming that the workplace to which they return is accommodating.[126] In addition, infants who switch from breastfeeding to bottle-feeding may find the transition difficult because different muscle and oral activity is required for the two methods.[127] Sometimes, infants find it difficult to switch from one form of feeding to another, resulting in nipple confusion.[128] This nipple confusion is most prominent when an infant is three months old[129]—the exact time that the FMLA would require women to return to work and typically necessitate the introduction of bottle-feeding. Therefore, the twelve-week time period may be particularly problematic not only for the continuation of breastfeeding, but also for the overall health of the infant.

Though the FMLA was designed to help families adjust to the transition resulting from childbirth by providing a twelve-week period of unpaid parental leave, the benefits of the FMLA are not widely available. The FMLA is inadequate because it does not provide paid leave, excludes a large portion of the work force, disproportionately excludes women from the benefits and does not provide a long

123. *See* 29 U.S.C. § 2611(2)(A)(ii) & § 2611(2)(B)(ii) (1994).

124. *See* Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2190 (1994).

125. *See* Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 131-32 (1998) (discussing occupations and their compatibility with taking parental leave or raising small children).

126. *See* Auerbach & Guss, *supra* note 70, at 958.

127. *See* Irene B. Frederick & Kathleen G. Auerbach, *Maternal-Infant Separation and Breast-Feeding: The Return to Work or School*, 30 J. REPROD. MED. 523, 524 (1985).

128. *See id.*

129. *See* Frederick & Auerbach, *supra* note 127, at 524 (discussing an infant's refusal to accept a bottle).

enough period of leave for women who want to breastfeed.

3. Various State Rulings that Expand the FMLA

Like the PDA, the FMLA does not exclude the possibility of states providing more extensive regulation in this area. Therefore, several states allow for longer leave, paid leave and extension of parental leave benefits to other groups. States that provide longer leave include California, the District of Columbia, Louisiana, Rhode Island, Tennessee and Connecticut.[130] In particular, Connecticut allows for up to 16 weeks of paid leave within a two-year period.[131] California, Hawaii, New Jersey, New York and Rhode Island provide some paid maternity leave under the temporary disability insurance laws, and the payment is dependent upon current regulations related to those temporary disability laws.[132] Oregon increases the number of individuals covered by parental leave by requiring employers with twenty or more employees to provide at least ten weeks of unpaid leave.[133] Thus, some states provide women who breastfeed with more protection than other states. However, these modest improvements have not been sufficient to address all of the problems faced by women who breastfeed.

D. Breastfeeding as a Constitutional Privacy Right

Although the courts have refused to find that breastfeeding is protected under the PDA, Title VII, and the ADA, at least one court has proved sympathetic to an argument that breastfeeding is protected as a constitutional privacy right. Breastfeeding is equated with other rights tied to parenting and choices of parenting which are considered sufficiently private to generate constitutional rights. In *Dike v. School Board of Orange County, Florida*,[134] the Fifth Circuit held

130. *See* Grill, *supra* note 121, at 375; *see also* Maureeen Porette & Brian Gunn, *The Family and Medical Leave Act of 1993: The Time Has Finally Come for Governmental Recognition of True "Family Values,"* 8 ST. JOHN'S J. LEGAL COMMENT. 587, 603 (1993).

131. *See* Porette & Gunn, *supra* note 130, at 603 (noting this requirement for private sector employees while state employees are entitled to twenty-four weeks of unpaid family leave).

132. *See* Grill, *supra* note 121, at 378-79.

133. *See* Porette & Gunn, *supra* note 130, at 604 (noting this state leave policy applies only to the birth or adoption of a child).

134. 650 F.2d 783, 784 (5th Cir. 1981). Janice Dike, an elementary school teacher in the Orange County, Florida, School System, sued the school board alleging that the board's refusal to allow her to breastfeed during her duty-free lunch period violated her constitutional right to nurture her child as she saw fit. *Id.* at 785. During her duty-free lunch period, either her husband or her nanny would bring the baby to her at the school and stay with her while she breastfed. *Id.* Dike alleged that she could breastfeed the child, in privacy, without disrupting school activities and without interfering with her work. *Id.* at 784-85. Dike argued that breastfeeding was necessary to her child's health, as her child developed psychological changes

that:

> Breastfeeding is the most elemental form of parental care. It is a communion between mother and child that, like marriage, is intimate to the degree of being sacred. Nourishment is necessary to maintain the child's life, and the parent may choose to believe that breastfeeding will enhance the child's psychological as well as physical health. In light of the spectrum of interests that the Supreme Court has held specially protected we conclude that the Constitution protects from excessive state interference a woman's decision respecting breastfeeding her child.[135]

However, the woman's right to breastfeed in a state-run workplace is not absolute. Instead, the *Dike* court required state employers that interfered with breastfeeding to satisfy a two-part test: (1) the interference must further "sufficiently important state interests," and (2) any restrictions on breastfeeding must be "closely tailored to effectuate only those [state] interests."[136] Upon remand, the district court once again ruled in favor of the School Board, stating that there was a sufficient state interest in avoiding disruption of the educational process and that the school board directive prohibiting teachers from bringing their children to work with them for any reason was sufficiently tailored.[137] Though the state's articulated interest in not allowing any non-school age children on campus during work hours is legitimate, a greater question arises as to whether the directive was narrowly tailored to accomplish its purpose. Presumably, the state could have allowed young children on campus for breastfeeding purposes during specified breaks without disrupting the educational process.

1. Problems with Breastfeeding as a Constitutional Privacy Right

Unfortunately, though the Fifth Circuit originally provided a strong argument for protecting breastfeeding within the workplace by equating breastfeeding with a constitutional privacy right, the balancing test imposed by the court appears to be extremely deferential to the state because the test provides state actors with the ability to easily defend any attacks upon its policies. Furthermore,

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and later refused to nurse from a bottle when Dike attempted to comply the board's request. *Id.* The Fifth Circuit reversed the district court's dismissal and remanded the case to the lower court for further review to determine whether the state's interest in "ensuring that teacher's perform their duties without distraction" justify the board's regulation of Dike's protected liberty interest in breastfeeding. *Id.* at 787.

135. *Dike*, 650 F.2d at 787.

136. *Id.* at 787.

137. *See* Dumeriss Cruver-Smith, *Protecting Public Breast-Feeding in Theory But Not in Practice*, 19 WOMEN'S RTS. L. REP. 167, 174 (1998).

other circuits have narrowly (and perhaps disingenuously) interpreted *Dike* as holding merely that "further proceedings were necessary" before dismissal, inferring that application of the balancing test was unnecessary.[138] Indeed, other circuits have indicated that a similar case in their circuit would be analyzed under a rational basis test, which would be even more deferential to the state than *Dike*'s balancing test. The rational basis test only requires that the state action bears a reasonable relationship to the attainment of some legitimate government objective rather than requiring that the action be reasonably tailored for that objective.[139]

A further complication with *Dike*'s application to breastfeeding is that like *Roe v. Wade*,[140] it applies only to state actors, not private individuals. As such, the decision only affects state employees. Because of this tie to state action, the *Dike* decision is limited in its scope, like the scope of *Roe* was limited by *Webster v. Reproductive Health Services*.[141] In *Webster*, the court ruled that a woman's constitutionally protected right to choose to have an abortion does not require the state to act to protect that right.[142] Rather, the right itself only requires the state *not* to act to infringe on that right.

Applying the principle in *Webster* to *Dike*, the state must recognize the constitutional right of a woman to breastfeed by not explicitly infringing on that right. However, the state is not required to legislate, enforce, or mandate any laws specifically protecting that right, or, if the state is an employer, to accommodate the woman's right to breastfeed if there is a significant countervailing state interest. Further, as a constitutional privacy right, attempts to alter court interpretations will be thwarted because privacy rights are within the protections of the Constitution. As such, they are only open to court interpretation and not able to be amended by legislative action.

The courts have done little to support women who breastfeed in the workplace. This lack of protection forces women, to make drastic choices in balancing work and familial obligations, such as breastfeeding. Though the disparate impact claim under laws related to sex-based employment discrimination has not been validated by

138. Shahar v. Bowers, 114 F.3d 1097, 1102 n.10 (11th Cir. 1997) ("In *Dike*, the district court had dismissed the teacher's complaint on the ground that no constitutionally protected interest was involved. The *Dike* court's actual holding was that she had stated a cause of action and that further proceedings were necessary.").

139. *See id.*

140. 410 U.S. 113 (1973).

141. 492 U.S. 490 (1989).

142. *Id.* at 501.

the courts in the area of breastfeeding, a strong argument still exists for recognition of such a claim because only women can physically provide breast milk. Even if one concedes that the advent of breast-pumping technology separates the breastfeeding role from the primary parental role for an infant, a woman can only continue breastfeeding while working if there is a supportive breast-pumping environment. Unfortunately, unless legislation changes to fully protect the women who breastfeed, breastfeeding rates within the United States will remain at discouraging rates or even continue to decline as more women enter the workforce.

III. THE NEXT STEP: BREAST-PUMPING BREAKS

Given the inability of the PDA, Title VII, the ADA, and the FMLA to address the issues related to working mothers, more expansive policies should be adopted to aid women within the workplace. These policies should target issues that affect all breastfeeding mothers, such as: finding time and a convenient area to express milk, concern about maintaining milk supply, and "role overload" issues. The policies must also address gender equality issues within the workforce that may arise where a breastfeeding mother is given extended leave or direct accommodation at work. If differential treatment becomes an excessive burden, then employers may have perverse incentives to hire male employees over female employees. Given that women initially switched to formula in an attempt to secure their place within the work environment,[143] any new policies should facilitate the ability of women to maintain their level of employment while breastfeeding. Thus, the goals of a new breastfeeding policy must be to promote breastfeeding, to provide women with the opportunity to work while breastfeeding, and to promote equal employment opportunities for women.

The best option for maintaining workplace equality and encouraging breastfeeding is the requirement that employers accommodate breast-pumping. This alternative allows women to maintain their status within the workforce while requiring minor accommodations for breastfeeding, and is politically feasible and inexpensive.[144]

A. Description of Previous Breast-Pumping Proposals

In 1998, U.S. Representative Carolyn Maloney introduced a

143. *See supra* note 7.

144. *See infra* notes 157-76.

comprehensive New Mothers' Breastfeeding Promotion and Protection Act ("NMBPPA") which included a provision to modify the FMLA to require breaks so that women could breast-pump at work.[145] A breast-pumping amendment, like the NMBPPA, can utilize the strengths of the FMLA, and also remedy its failure to address breastfeeding and employment issues.[146] By building upon the FMLA, modifications within the workforce will be seen as incremental, and as such, more politically feasible.

Specifically, provisions of the proposed NMBPPA call for up to one hour of break time within each eight-hour workday, to express milk for the first twelve months after birth of the child.[147] The time allotted can be taken as two one-half hour breaks or three twenty minute breaks.[148] However, the employer is not required to compensate the employee for the time spent on these breaks.[149] There are also provisions to allow for adjustments to the breaks if a woman works for more or less than eight hours a day, though the statutory language is rather vague about its application.[150] Further, this break time cannot be charged against the employee's entitlement for twelve weeks of unpaid leave under the FMLA.[151] Therefore, the NMBPPA has emphasized the need to provide mandatory breaks for working women to pump their breasts.

B. Breast-pumping Directly Addresses Breastfeeding Issues Related to Working Mothers

As previously discussed, the working mother not only faces traditional breastfeeding issues but also encounters unique problems within the work environment such as finding the time and place to

145. *See* H.R. 3531, 105th Cong. § 6 (1998); *see also* H.R. 285, 107th Cong. (2001) (introduced again in 2001). Representative Carolyn Maloney introduced the bill to promote breastfeeding by providing tax incentives to employers. *Id.*

146. The author acknowledges that amendments to other legislative acts could be just as feasible for accommodating lactating women in the workplace. In particular, amendments to the PDA to specifically include breastfeeding may be appropriate. However, this option would rely on future court interpretation of the PDA, and the courts have been reluctant to view breastfeeding as sexual discrimination within the context of Title VII. *See supra* note 92 and accompanying text. Unfortunately, an amendment to the ADA is probably not the best option, due to a variety of complications related to the designation and definition of disability. *See supra* notes 106-116 and accompanying text. Thus, an amendment to the PDA is probably the only other viable option for building upon other current legislation while still effectively dealing with issues women face within the employment context.

147. *See* H.R. 3531, 105th Cong. § 6 (1998).

148. *See id.*

149. *Id.*

150. *Id.*

151. *Id.*

express milk, maintaining milk supply, and addressing "role overload" issues.[152] The NMBPPA breast-pumping provision would directly address three of the four major issues. First, by requiring special breaks for breastfeeding mothers, women would have special time to express milk. This additional time would give women security in their ability to maintain their milk supply, and the support from the employer would help remedy some of the issues of "role overload." However, this proposed Act does not directly address where the employed mother would express her milk. Though the preference would be for the mother to be outside of the bathroom during this time, it is unlikely that legislation requiring employers to provide separate areas, with reasonable privacy, would be feasible. Employers would view the provision of separate areas as imposing too many restrictions upon their private autonomy.[153] Therefore, given the current constraints, the NMBPPA policy standard as it is stated is the best possible resolution. In the future, however, more expansive polices could and should be implemented to deal with a broader range of issues related to breastfeeding in the workplace.

C. Addresses Other Workplace-Related Issues for Women

As mentioned earlier, the breast-pumping policy proposal should not only be feasible and cost-effective, but it must also correctly address problems with breastfeeding in the workplace without exacerbating other employment issues. Therefore, one topic of discussion is whether it would be better for working women to stay at home and breastfeed or to maintain work and family responsibilities concurrently through the promotion of breast- pumping at work. A combination of both alternatives would be most beneficial because it would allow women to choose according to their specific needs. Unfortunately, most alternatives such as the FMLA, which promotes mothers staying at home and the NMPBBA, which promotes mothers working, do not promote this combination.

If the maternal-infant bond was the most important factor, then breastfeeding would be the best method because it promotes intimacy between the mother and the infant during regular feedings.[154] This strict separate spheres solution neglects the paternal-infant bond and the ability of the father to participate in

152. *See supra* notes 72-74 and accompanying text.

153. *See infra* notes 157-167 and accompanying text.

154. The author does concede that women who opt to breast-pump during working hours could, in fact, breastfeed before and after work and on the weekends. Thus, the maternal-infant bond could be enhanced during those times.

many child-rearing activities. Though the father is unable to produce breast milk, he can still feed previoulsy-expressed bottled breast milk. Further, the policies that promote breastfeeding over breast-pumping neglect issues, backed by economic analyses, show that women not only receive less pay due to their gender, but also are more likely to take leave for child rearing and other family activities. Taking more leave to deal with family-related issues produces a pronounced "birth effect."[155] Therefore, to promote true equality in the workplace, such that women and men receive the same pay rate for similar job functions, policies need to allow women to enter the separate sphere of continuous employment while men enter the separate sphere of child rearing. Breast-pumping policies can be a vehicle for promoting equality between the sexes both at home and in the workplace, if they promote both female and male participation in the public and private spheres.[156] The breast-pumping policy alternative is better than the FMLA, because it directly addresses the breastfeeding issue without adding further complications with respect to workplace equality. This ability of the breast-pumping proposal to maintain employment equality is feasible as long as the FMLA is still available for women who opt to stay at home to breastfeed and provide other child-rearing functions.

D. Feasibility

To determine the feasibility of an alternative, it is not only necessary to examine the attitudes of Congress, but to also look at broad public support and the views of employers. Thus, it not only will be necessary to discuss the ability of the NMPBBA and similar proposed legislation to become law, but also the attitudes of businesses.

1. Congress

Breast-pumping breaks, as they have been framed thus far, have a

155. *See* Solomon W. Polachek, *Discontinuous Labor Force Participation and Its Effects on Women's Market Earnings*, *in* SEX, DISCRIMINATION, AND THE DIVISION OF LABOR 90, 111 (1975). As a result of discontinuous labor force participation, women are over-represented in lower-paying occupations while also receiving lower pay in higher income professions. *Id.* Professor Polachek further argues that the work force wage differential is compounded by the life-cycle division of labor within the family. *Id.* Thus, he observes the fact that being married and having children correlates with increased wages for men and decreased wages for women. *Id. See also* Solomon W. Polachek, *Potential Biases in Measuring Male-Female Discrimination*, 10 J. HUM. RESOURCES 205, 215-16, 226-27 (1975). *See generally* Issacharoff & Rosenblum, *supra* note 124, at 2159-66 (describing the dynamics of working women and motherhood).

156. This analysis highlights the difficulty in an area that involves a true biological difference—the ability to breastfeed—and other social constructs that have made it difficult for men and women to reach equality in the workplace.

reasonable chance of enactment. The policy alternative articulated by Representative Maloney in 1998 rests upon an amendment to the FMLA and thus, is seen as a more incremental step.[157] Maloney structured the amendment within the 105th Congress as part of a comprehensive breastfeeding promotion package; even with a more expansive package (i.e., the NMBPPA) she was able to gain some Democratic support.[158] Under the NMBPPA, she was able to aggregate thirty-five Democratic co-sponsors and no Republican co-sponsors,[159] and it is likely that an amendment to the FMLA, addressing only breast-pumping breaks would garner broader bipartisan support if the promotion of family values was emphasized.[160]

2. Public support

As mentioned earlier, at least 75% of all Americans support breastfeeding. However, when asked within the same survey whether employers should provide facilities to support breastfeeding, only 58% responded affirmatively.[161] Thus, even though the general public supports breastfeeding, they are less likely to support the requirement that employers accommodate breastfeeding. Therefore, any policies requiring employer action must be moderate in scale and not force too many restrictions upon employers. The NMBPPA is rather moderate in its requirements for employer action compared with other potential amendments to the FMLA, such as paid leave. As such, it should not be difficult to garner public support as long as the policy is framed as a moderate step for breastfeeding that poses no major burdens upon businesses. Further, as evidenced by public support of a new Minnesota statute which provides "a reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child,"[162] a less restrictive policy may be

157. *See* H.R. 3531, 105th Cong. § 6 (1998).

158. *See id.*

159. *See* H.R. 3531105th Cong. (1998), *available at* http://thomas.loc.gov/cgi-bin/bdquery D?d105:1:/temp/~bd6PNI:@@@L&summ2=m&l/bss (Revised April 17, 1998).

160. Because there were no Republican cosponsors, proposed legislation should also be framed in a way to promote Republican values. In promoting those "family values" important to Republican legislators, care should be taken not to emphasize the fact that women are now liberated from being at home and able to work because of breast-pumping promotion. Rather, the political campaign should emphasize the ability of mothers to breastfeed more while allowing men to also feed their children and be more involved with child rearing activities. Plus, this alternative promotes breastfeeding while not posing too many restrictions upon businesses, whereas other alternatives (e.g., paid FMLA leave) would increase financial burdens for businesses.

161. *See* Moore & Jansa, *supra* note 53, at 192.

162. MINN. STAT. ANN. § 181.939 (West 1993 & Supp. 2001). The statute also provides that

successful in promoting the importance of breast-pumping and gaining public support.

3. Businesses

Even though neither federal law nor state law requires it, a few progressive companies have begun to support breastfeeding in a limited way through the provision of breast-pumping facilities. Because breast-pumping takes no longer than fifteen minutes with the latest electrical pumps and because a pumping session should be scheduled every three hours, lactating mothers who opt to pump their milk generally require breaks only slightly longer than those already required by law for all employers.[163] Therefore, the only requirements for a breast-pumping facility beyond a moderate extension of breaks are a breast-pump, a dedicated area with a reasonable amount of privacy, and a refrigerator for human milk storage.[164] At least one company assists companies in providing facilities—Sanvita, Inc.[165] Companies that have implemented breast-pumping support and facilities include: B.F. Goodrich Corporation, Zenith Electronics Corporation, Nerco Coal Company, AT&T, Texas Instruments, New York Life Insurance Company, and Goldman Sachs & Company.[166] Therefore, some companies have already seen the need to increase protection for breastfeeding women, and the continuation of these programs over many years suggests that such programs are cost-effective and beneficial to employers.[167]

Mentioning a few progressive companies, however, does not indicate that all companies would be supportive of breast-pumping in

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"the employer must make reasonable efforts to provide a room or other location, in close proximity to the work area, other than a toilet stall, where the employee can express her milk in privacy." *Id.*

163. *See* Frederick & Auerbach, *supra* note 127, at 524.

164. Because human milk can only be safely stored for four hours at room temperature, a refrigerator is required for storage of milk. Breast milk may be stored safely in a refrigerator for up to 24 hours or a freezer for a longer period of time, which allows the mother to save the breast milk for later feedings. *See* Frederick & Auerbach, *supra* note 127, at 525; *see also* Hamosh et al., *supra* note 17, at 492.

165. *See* Shelley Donald Coolidge, *Sanvita Program Promotes Breast-Feeding by Mothers*, CHRISTIAN SCI. MONITOR, Mar. 1, 1994, at 9 (describing Sanvita, Inc. as a consultant company which helps employers implement adequate lactation programs and facilities); *see also supra* notes 77-80 and accompanying text.

166. *See* Pamela Mendels, *Making Moms Feel at Home: Employers Find Breast-Feeding Rooms are Good Business*, DALLAS MORNING NEWS, June 24, 1994, at 1C (noting that breast-pumping support programs include lactation rooms at New York Life Insurance Company and rooms with curtains and benches, but not pumps at Dallas-based EDS); *see also* Moore & Jansa, *supra* note 53, at 193.

167. The author concedes that some companies may continue such programs for moral reasons, rather than purely financial ones.

the workplace, especially if the accommodation is mandated by law rather than being an option for employers. The feasibility of breast-pumping accommodation would be increased if the provisions were moderate and if the businesses saw the provisions as both cost-effective and beneficial for the well being of their company.[168]

E. Cost-Benefit Analysis

The actual cost of the breast-pumping breaks, as defined within the NMBPPA, is rather negligible because the requirement is only that employers provide a one-hour break during the course of one day and because this breast-pumping break time is unpaid, there are no major direct employer costs.[169] However, there may be moderate costs in providing a time structure to allow for the breast-pumping break. Even if the employer was to pay the employee for the time she spent on those breaks, given that the average white female employee is paid $10/hour[170] and assuming that the duration of breast-pumping is limited to six months, then the cost for one breastfeeding female employee within one year would be $1,200 ($10/hour for 1 hour/day for 24 weeks for a 5 day/week work period). However, the benefit from such a program in the reduction of maternal absenteeism and tardiness, reduced infant medical costs (that are indirectly related to employers if they provide health benefits) and reduced staff turnover would generally outweigh cost issues.[171] Plus, cost would not even be a factor unless the employer chose to pay for the breast-pumping breaks. For the female employee, obtaining an electric pump (the most expensive alternative because some women may decide to manually pump using their hands) would cost less than $100, including the initial assortment of necessary supplies.[172] For the

168. *See, e.g.*, Coolidge, *supra* note 165, at 9 (explaining Sanvita's findings that "companies with a lactation program reduced health-care costs by 35.7% and absenteeism by 27.3%"); *see also* Mendels, *supra* note 166. A spokesperson for the Los Angeles Department of Water said that "for every dollar we put [into lactation programs] we get back about eight dollars in undocumented absenteeism reduction . . . ." Mendels, *supra* note 166, at 2C.

169. *See* H.R. 3531, 105th Cong. § 6 (1998) (proposing two thirty minute breaks or three twenty minute breaks).

170. *See* COUNCIL OF ECON. ADVISORS, ECON. REP. OF THE PRESIDENT 108 (1999) (reporting that wages for women workers range from approximately eight dollars an hour for Hispanic women to about ten dollars an hour for white, non-Hispanic women).

171. *See supra* notes 50-51 and accompanying text.

172. *See, e.g., White* River Concepts, *Products and On-line Shopping, at* http://whiteriver.com/products_index.htm (last visited Feb. 18, 2001). To illustrate the costs of breast-pumps and other supplies, an examination of White River Concepts Internet site is useful. Breast-pumps range in price from $15.00 for manual pumps to $65.00 for an electric model. *Id.* For the purpose of this paper's analysis, it will be assumed that the mother will choose the more expensive pump, believing it to have more benefits. The cost of breast-pumping also includes a variety of other supplies, such as disposal bags, special nipples to decrease the incidence of

government, there are no major costs involved because there are no specific financial benefits within this alternative. Therefore, for all parties, the cost for the provision of breast-pumping breaks is nominal.

Unfortunately, there have been no studies that focused solely on the use of breast-pumping breaks to determine their effect upon the duration of breastfeeding. Most of the studies have examined breast-pumping in conjunction with the employer providing a suitable breast-pump. Assuming that the cost to the mother is nominal, that the breaks would provide the same benefit as having the breast-pumps being supplied by the employer, and that all women would take advantage of the benefit, the benefit of this alternative would be to increase the percentage of women breastfeeding after returning to work by at least 40% and up to 75%.[173] This policy change would mean that employees who decided to use breast-pumps would be breastfeeding at the same rate as breastfeeding women who were not working. Of course, this assumes that all employers will provide the benefit, that all women will take advantage of this benefit, and that all women would return to work right after giving birth, thus, benefiting from this employment provision. Because not all of these assumptions can be satisfied when establishing a nationwide program, the estimated benefit for a nationwide program will be much smaller than that of the projections previously mentioned. Therefore, for this analysis, the increased rate of breastfeeding due to a nationwide program will be set at a lower bound of a 10% point increase in the number of women breastfeeding after returning to work (one-fourth of the benefit for the demonstration project with the lowest increase in breastfeeding in which most of the aforementioned assumptions were satisfied), and continuing to breastfeed until the infant is six months old. Thus, for a nominal cost, largely borne by the women themselves, working women can be breastfeeding at the rate similar to that of estimates for non-working women.

A policy like the NMBPPA has the potential for "spillover effects" in employment equality and breastfeeding rates. First, because the policy proposal improves the ability of women to both work and breastfeed, it promotes gender equality. Further, other studies have shown that introducing policies that allow women to balance work and family actually increases workplace attachment, which can help

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nipple confusion and sanitation supplies. *Id.*

173. *See* Johnson-Elie, *supra* note 77; supra notes 77-81 and accompanying text (discussing various breast-pumps and their overall effects).

eliminate the "birth effect."[174] Second, women may be more likely to initiate breastfeeding if they are aware of programs that will allow them to continue to breastfeed for longer periods.[175] Therefore, even though the NMBPPA is designed to aid those women who have already decided to breastfeed to maintain this process, it may actually affect the initial decision of whether or not to breastfeed. Third, by increasing the numbers of women who are balancing both employment and breastfeeding, the policy helps set a normative example of the possibility of combining both. More women may decide to breastfeed in the future due to personal experiences with women who continue breastfeeding because of these workplace policies. Breast-pumping promotion provides major benefits for the working mother, not only making breastfeeding more manageable, but also advancing gender equality in employment.

CONCLUSION

"There is no way to transform a bottle feeding culture into a breastfeeding culture without engaging in politics."[176]

There is no doubt that breastfeeding is best for the health of the infant and that it provides great benefits to the mother and society as a whole. However, due to previous social movements, our culture has changed from a breastfeeding culture to a bottle-feeding culture.[177] To allow all mothers the opportunity to breastfeed, we must address the issues affecting working mothers as more women return to work soon after giving birth. The current statutory scheme, which includes the Pregnancy Discrimination Act of 1978, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, and the Family and Medical Leave Act of 1993, is inadequate in dealing with workplace issues for breastfeeding mothers. If we were to continue to rely on this legislation, breastfeeding employees would not have the protection or the ability to negotiate breastfeeding within the workplace. Thus, a better strategy would be to encourage the promotion of breast-pumping at work by providing designated,

174. *See generally* KRISTEN E. SMITH & AMARA BACHU, U.S. BUREAU OF THE CENSUS, WOMEN'S LABOR FORCE ATTACHMENT PATTERNS AND MATERNITY LEAVE: A REVIEW OF THE LITERATURE (Jan. 1999) (analyzing academic studies on the FMLA and women's participation in the workforce).

175. *See supra* note 77 and accompanying text.

176. P. Van Esterik, *Breastfeeding and Feminism*, 47 Suppl. INT'L J. GYNECOLOGY & OBSTETRICS S41, S46-47 (1994) (arguing that redefining the breastfeeding culture demands consideration of public versus private, the economy, the environment and politics).

177. P. VAN ESTERIK, BEYOND THE BREAST-BOTTLE CONTROVERSY 3-27 (Rutgers Univ. Press 1989) (outlining the public debate between the benefits of breastfeeding versus bottle-feeding and the changes in infant feeding practices).

unpaid breaks for working mothers to express their milk. This option is not only responsive to the needs of breastfeeding mothers, but it is also sensitive to the needs of working women. Plus, it is both feasible and cost-effective. To promote breastfeeding for all women, we must be aware of the needs of various groups of women and be willing to engage in politics to change our bottle-feeding culture to a breastfeeding one.