

DOING THE RIGHT THING:



A New Mexico Employer's Guide To Accommodating Working Breastfeeding/Pumping Employees

Knowing what to do when a nursing employee approaches you about an accommodation to breastfeed/pump at work can cause the most seasoned supervisor or manager to panic.

Add to that panic—for both the employer and employee—the supervisor or manager is oftentimes male. Notwithstanding that breastfeeding (and pumping when Mom and baby are apart) is a natural process and is good for both mother and baby, it is a rather intimate topic and can cause embarrassment for some people. This guide is created to help employers and employees reach a level of comfort talking about this, and also to encourage compliance with the law.



Are we required to provide an accommodation to a nursing employee in the workplace?

Breastfeeding is beneficial to both mother and baby and should be encouraged.

Babies benefit from a lower risk of numerous serious health conditions, including Sudden Infant Death Syndrome or SIDS. Mothers benefit from a lower risk of ovarian cancer and certain types of breast cancer. These health benefits to mother and baby can also benefit employers by reducing the number of days off taken by employees due to their own illnesses and/or their children's illnesses.

There are two laws that explicitly govern an employee's right to express breast milk while at work—Section 7(r) of the Fair Labor Standards Act (FLSA) and the New Mexico Human Rights Act (NMHRA) "Right to Breastfeed" and "Use of a Breast Pump in the Workplace".



What is the "right thing" to do for nursing employees?

Your initial panic has subsided. You have determined that you are covered by either or both of the FLSA or NMHRA.

Now to figure out what to do to accommodate your nursing employee's request. You start by researching what type of

accommodation(s) you are required to provide under law. The cold sweats start all over again because the laws and policies addressing the subject offer very little guidance about the actual accommodation—it being something between a bathroom stall and a suite of tastefully appointed, individual lactation rooms added onto the existing building by the employer. A vast chasm indeed when trying to figure out how to do the right thing.

What is the “right thing”? It is not so complicated as you may think. While it is true that breastfeeding is becoming more and more prevalent in public places, expressing breast milk using a breast pump in the midst of one’s co-workers is not.

Put yourself in the shoes of the nursing employee. What would you want in a space designated for nursing employees to express breast milk? Privacy? Absolutely. Time? Certainly – breast feeding is all about supply and demand. If a nursing mother does not express milk on the same schedule as she would feed her baby, her milk supply will be reduced. Typically, a nursing mother needs to express milk every two to three hours, throughout the day. Keeping up this schedule of expressing milk may require additional break time above and beyond what is required by law or an employer’s own policies. More about that later.

Let’s address the privacy issue.

As noted above, expressing breast milk in front of one’s co-workers may be awkward for both parties (to say the least!). Ideally, a space that is private, clean, has access to an electrical outlet and a chair, is a good start. If the room has windows, either to the outside or inside, some type of opaque window covering is necessary. Finally, a door that locks is imperative to prevent inadvertent intrusions and a sign indicating that the space is occupied is very helpful. A space close to the nursing employee’s workstation is good as well.



A bathroom stall is definitely not the right place and runs afoul of the law. Neither is offering the office of the employee who is in the field *most of the time*—because as sure as the sun will rise tomorrow morning, he or she will barge in on your nursing employee on her first day back to work from maternity leave. Such an arrangement — sharing a space — is rarely successful and if anything, it may cause problems.

Something else to keep in mind is that the space does not have to be permanently dedicated to nursing employees. When the nursing employee ceases to nurse her child and there are no other nursing employees requiring the space, it can be returned to its previous use. Should another employee become pregnant and want express milk while at work, the space can be set up again to accommodate that employee.

Retaliation

Finally, employers are prohibited from retaliating against any employee who seeks to avail themselves of the accommodations provided under both the FLSA and the NMHRA. See, *Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, 117 N.M. 441 (1994).





FLSA

The FLSA applies to FLSA covered employers (employers with sales of \$500k or more, and/or employers engaged in interstate commerce) and “non-exempt” (typically hourly) employees. Most employers are covered by the FLSA.

NMhra

If the FLSA is not applicable to you and/or some or all of your employees, it is likely that the NMhra will apply. The NMhra’s “Use of a Breast Pump in the Workplace” covers all New Mexico employers with four or more employees, including state and local governments. The NMhra does not differentiate between employees based on employment status, i.e. hourly versus salaried or full-time versus part-time. Both laws require employers to allow nursing employees to express breast milk as often as necessary and to accommodate a nursing employee with a designated space to express milk. The Pregnant Worker Accommodation Act (PWA), passed in 2020, protects workers from discrimination based on “pregnancy, childbirth or condition related to pregnancy or childbirth” and could arguably protect lactating employees in the workplace.

In the unlikely event that neither the FLSA or NMhra are applicable to an employer, there are other laws that may apply, Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act, to name two. Finally, even if there is not a law that requires you as an employer to accommodate nursing employees who need to express milk while at work, do it anyway because it is simply the *right thing to do*.

References

U.S. Department of Health and Human Services, Office of Women’s Health: Making the Decision to Breastfeed, <https://www.womenshealth.gov/breastfeeding/making-decision-breastfeed>.

Fair Labor Standards Act, 29 U.S.C. §201 et seq., specifically §207(r) and §215(a)(13).

United States Department of Labor, Wage and Hour Division: Frequently Asked Questions—Break Time for Nursing Mothers, <https://www.dol.gov/whd/nursingmothers/faqBTNM.htm>

New Mexico Human Rights Act, 1978 NMSA §28-1-1 et seq., specifically §28-1-7, §28-20-1 and §28-20-2.

Gandy v. Wal-Mart Stores, Inc., 1994-NMSC-040, 117 N.M. 441 (1994).

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