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The ACA and Nursing Mothers
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Despite overwhelming evidence that breastfeeding and the exclusive provision of breast milk to infants improves health, saves money and increases productivity, the percentage of American women who breastfeed remains far below that recommended by medical experts and governmental organizations.[1] The necessity of returning to work combined with lack of supportive work environments including appropriate time and space to express milk is a significant contributing factor to low levels of exclusive breastfeeding in the United States.[2]

The Patient Protection and Affordable Care Act ("ACA" or "the Act") aims to improve access to health care and health outcomes through a number of mechanisms.[3] While the bulk of the ACA's impact is likely to come from provisions that improve access to health insurance and

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[1] *See, e.g.,* Alan S. Ryan et al., *Breastfeeding Continues to Increase Into the New Millennium*, 110 PEDIATRICS 1103, 1104 (2002) (stating that only 46% of women breastfeed exclusively shortly after birth, and only 17% do so at 6 months). Many organizations recommend exclusive breastfeeding through six months of age. *See infra* note 8.

[2] *See, e.g.,* Andrea C. Gielen et al., *Maternal Employment During the Early Postpartum Period: Effects on Initiation and Continuation of Breast-feeding*, 87 PEDIATRICS 298, 303 (1991) (finding that, after controlling for demographic variables, mothers who were not employed by 12 months postpartum were more than three times more likely to still be breastfeeding than mothers who were so employed); Summer S. Hawkins et al., *Maternal Employment and Breast-feeding Initiation: Findings From the Millennium Cohort Study*, 21 PEDIATRIC & PERINATAL EPIDEMIOLOGY 242, 244-245 (2007) (finding 1) women employed full-time were less likely to initiate breast feeding than mothers who were not employed after adjustment for confounding factors; 2) among employed mothers, those who returned to work within 4 months postpartum were less likely to start breast feeding than women who returned at 5 or 6 months; and 3) women who returned to work within the first 6 weeks were much less likely to start breast feeding); Marina L. Johnston & Noreen Esposito, *Barriers and Facilitators for Breastfeeding Among Working Women in the United States*, 36 J. OF OBSTETRIC, GYNECOLOGIC, & NEONATAL NURSING 9, 15 (2007) (reviewing the literature and reporting that "an accepting work environment with supportive supervisors" is important to continued breastfeeding of employed mothers); Brian Roe et al., *Is There Competition Between Breast-feeding and Maternal Employment?*, 36 DEMOGRAPHY 157, 164-167 (1999) (reviewing data from Food and Drug Administration's Infant Feeding Practices Study and reporting that the answer is "yes").

[3] Patient Protection and Affordable Care Act, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) [hereinafter ACA].

evidence-based care, many others are likely to have a positive impact on individual and public health as well.[4] Among these is Section 4207.

Section 4207 is intended to make it easier for the more than 56% of women with children under the age of one who participate in the labor force to initiate and continue breastfeeding and providing breast milk to their children.[5] The section, which amends the Fair Labor Standards Act ("FLSA"), requires certain employers to provide both time and space for some employee nursing mothers to express breast milk.[6] This change is expected to increase the likelihood that employees to which it applies will be able to feed their children breast milk, with attendant positive effects on health for both mothers and their children and on productivity for the employer.

Background

The benefits of breastfeeding and the exclusive feeding of breast milk to infants are wide ranging and well documented.[7] Exclusive breastfeeding is associated with a reduced rate of gastrointestinal and respiratory tract infections in infants, as well as a reduced risk of children later developing diseases including obesity, diabetes, and certain types of leukemia.[8] It has been

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[4] For a chart of the ACA's main public health provisions, *see* Corey Davis & Sarah Somers, *Public Health Provisions of the Patient Protection and Affordable Care Act* (October 2010), http://www.publichealthlawnetwork.org/wp-content/uploads/ACA-chart-formatted-FINAL2.pdf.
[5] *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2009 2, tbl 6 (2010) (noting that 56.6% of American mothers with infants under one year old participate in the labor force).
[6] *See* ACA § 4207 (amending 29 U.S.C. § 207).
[7] *See* Lawrence M. Gartner et al., *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 496 (2005) (reporting that the American Academy of Pediatrics has concluded that "extensive research . . . documents diverse and compelling advantages for infants, mothers, families, and society from breastfeeding and use of human milk for infant feeding"); *See also* Am. Acad. of Pediatrics, *AAP Official Policy Statement, Breastfeeding and Use of Human Milk* (2005), http://www.aap.org/breastfeeding/policyOnBreastfeedingAndUseOfHumanMilk.html (last visited Dec. 1, 2010) (reporting that the evidence that breastfeeding protects infants against a variety of diseases and conditions is "unequivocal.").
[8] *See* Liesbeth Duijts et al., *Breastfeeding Protects Against Infectious Diseases During Infancy in Industrialized Countries. A Systematic Review*, 5 MATERNAL AND CHILD NUTRITION 199, 207 (2009) (reporting that the results of 21 studies strongly suggest that breastfeeding results in reduced incidence of overall infection as well as gastrointestinal and respiratory tract infections); *see also* Liesbeth Duijts et al., *Prolonged and Excusive Breastfeeding Reduces the Risk of Infectious Diseases in Infancy*, 126 PEDIATRICS e18, e20 (2010) (reporting that infants who were breastfed exclusively for four months and partially thereafter had lower risks of respiratory tract and gastrointestinal morbidity in infants, but that partial breastfeeding did not significantly lower the risk of those infections); STANLEY IP ET AL., U.S. AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, BREASTFEEDING AND MATERNAL AND INFANT HEALTH OUTCOMES IN DEVELOPED

estimated that increasing the rate of exclusive breastfeeding among American mothers to 90% would save 900 lives per year, most of them infants.[9] Maternal benefits include a reduced risk that mothers will later develop maternal type 2 diabetes, breast cancer, and ovarian cancer.[10]

Based on this evidence, expert panels and professional organizations including the American Academy of Pediatrics Section on Breastfeeding, the American College of Obstetricians and Gynecologists, the American Academy of Family Physicians and the World Health Organization recommend that infants be exclusively breastfed for the first six months of life.[11] The Surgeon General of the United States has repeatedly noted the benefits of breastfeeding to women, infants and employers.[12]

The economic case for breastfeeding is strong. The United States Department of Agriculture has concluded that a minimum of $3.6 billion would be saved if the prevalence of exclusive breastfeeding increased from current rates to those recommended by the Surgeon

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COUNTRIES 21-23 (2007) (analyzing published literature on relationship between breastfeeding and twenty-three outcome measures).

[9] Melissa Bartlick and Arnold Reinhold, *The Burden of Suboptimal Breastfeeding in the United States: A Pediatric Cost Analysis*, 125 PEDIATRICS e1048, e1052-e1053 (2010) (concluding that current U.S. breastfeeding rates are suboptimal and result in significant excess costs and preventable infant deaths).

[10] *See* Stanley Ip et al., *supra* note *8.*

[11] *See* Lawrence M. Gartner et al., *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 498 (2005) (recommending that "Pediatricians and other health care professionals should recommend human milk for all infants in whom breastfeeding is not specifically contraindicated…"); Am. Coll. of Obstetricians and Gynecologists, *Breastfeeding: Maternal and Infant Aspects,* 109 OBSTETRICS & GYNECOLOGY 479, 479 (2007) ("The American College of Obstetricians and Gynecologists strongly supports breastfeeding and calls upon its Fellows, other health care professionals caring for women and their infants, hospitals and employers to support women in choosing to breastfeed their infants"); Am. Acad. of Family Physicians, *AAFP Policy Statement on Breastfeeding,* http://www.aafp.org/online/en/home/policy/policies/b/breastfeedingpolicy.html (last visited December 28, 2010) ("The AAFP recommends that all babies, with rare exceptions, be breastfed and/or receive expressed human milk exclusively for the first six months of life"); MICHAEL S. KRAMER & RISUKA KAKUMA, WORLD HEALTH ORGANIZATION, REPORT OF THE EXPERT CONSULTATION OF THE OPTIMAL DURATION OF EXCLUSIVE BREASTFEEDING 2 (2001) (The Expert Consultation recommends exclusive breastfeeding for 6 months, with introduction of complementary foods and continued breastfeeding thereafter.").

[12] *See, e.g.,* S.K. Galson, *Mothers and Children Benefit from Breastfeeding*, 108 J. OF THE AM. DIETETIC ASS'N 1106, 1106 (2008) (noting that "breastfeeding is a safe, time-proven feeding method that helps infants to have a healthful start in life" and that ". . . many employers have discovered that accommodating employees who breastfeed is good business.").

General.[13] A more recent study using updated data found that if 90% of American mothers breastfed exclusively for six months, the United States would save over $13 billion per year.[14] It is reasonable to believe that many of the economic benefits of breastfeeding accrue to employers in the form of reduced absenteeism and lower health care costs, and at least one study has found that mothers who breastfed reported fewer absences than those who did not.[15]

Significant disparities exist in rates of breastfeeding based on maternal education, age, race, ethnicity, and socioeconomic status.[16] While approximately 70% of white women in the United States begin breastfeeding, the rate for blacks is only about 40%.[17] Lack of support in the workplace perpetuates and exacerbates these inequities, particularly for the more than 60% of American women who work in hourly paid positions that are less likely to offer the flexibility or workplace support that is needed to maintain and facilitate continued breastfeeding for new mothers.[18] Hispanic and black women in particular are more likely to work in service occupations than white and Asian women, with the latter women being more likely to work in management, professional, and related occupations.[19] Not surprisingly, mothers in administrative and manual occupations are more likely to stop breastfeeding sooner than women

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[13] *See* J. WEIMER, U.S. DEP'T OF AGRIC. FOOD AND RURAL ECON. DIVISION, ECON. RESEARCH SERV., THE ECONOMIC BENEFITS OF BREAST FEEDING: A REVIEW AND ANALYSIS 10 (2001) (noting that "this figure probably underestimates the total savings").

[14] *See* Bartlick and Reinhold, *supra* note 9 at e1053.

[15] 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 (1995).

[16] *See, e.g.* Ann C. Celi et al., *Immigration, Race/Ethnicity, and Social and Economic Factors as Predictors of Breastfeeding Initiation*, 159 ARCH. PEDIATRIC. & ADOLESCENT MED. 255, 257 (2005) (finding that immigrant women initiated breastfeeding at higher rates than native-born American women, and that higher maternal education and household income predicted higher initiation rates).

[17] *See* Ruowei Li et al., *Prevalence of Breastfeeding in the United States: The 2001 National Immunization Survey*, 111 PEDIATRICS 1198, 1199 (2003) (reporting data from the National Immunization Survey); *see also* Constance M. Wiemann et al., *Racial/Ethnic Differences in the Decision to Breastfeed Among Adolescent Mothers*, 101 PEDIATRICS 1, 3-4 (1998) (finding breastfeeding initiation rates among sampled blacks to be approximately three times higher than those of whites).

[18] *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, CHARACTERISTICS OF MINIMUM WAGE WORKERS tbl. 4 (2007) (reporting that nearly three in four workers earning the minimum wage or less in 2007 were employed in service occupations, mostly in food preparation and service jobs).

[19] *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK tbl 12 (2010) (reporting that 28.5% of black women and 32.4% of Hispanic women work in the service industry as compared to 20.1% of white and 20.7% of Asian women and 41.4% of white women and 47.4% of Asian women work in management, professional, and related occupations compared to 33.7% of black women and 24.6% of Hispanic women).

in professional occupations and those who do not need to enter the workforce before their children are weaned.[20]

ACA Requirements and Enforcement

Section 4207 requires employers to provide working mothers covered by the Fair Labor Standards Act with "reasonable break time… to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk."[21] The employer must provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public" in which the mother can express the milk.[22] Although a location for expressing milk must be available to the mother when needed, an employer may make a temporary or converted space available so long as the space is shielded from view and free from any intrusion from co-workers and the public.[23]

The break need not be paid if the employee is completely released from work duties. However, if the employer provides paid breaks to other employees and the nursing mother uses that time to express milk, she must be compensated in the same way other employees are compensated for break time.[24] Where a state law provides greater rights to employees (for example, by providing compensated break time, break time for exempt employees, or break time beyond one year after the child's birth), state law will control.[25]

Section 4207 became effective immediately upon enactment of the ACA in March 2010. Because it applies only to workers who are covered by Section 7 of the FLSA, salaried and some other employees are not covered by the change.[26] Additionally, employers with fewer than 50 employees are exempt from the provision if complying would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size,

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[20] *See* R.T. Kimbro, *On-the-Job Moms: Work and Breastfeeding Initiation and Duration for a Sample of Low-Income Women*, 10 MATERNAL AND CHILD HEALTH JOURNAL 19, 24 (2006) (concluding that "low-income women are having difficulty combining work and breastfeeding, which has important health implications for their infants" and that "women working in administrative and manual occupations may face special constraints.").
[21] ACA § 4207 (amending 29 U.S.C. § 207).
[22] *Id.*
[23] U.S. Dep't of Labor, Wage and Hour Division, *Fact Sheet #73: Break Time for Nursing Mothers under the FLSA* (2010), http://www.dol.gov/whd/regs/compliance/whdfs73.htm (last visited Dec. 19, 2010).
[24] ACA § 4207 (amending 29 U.S.C. § 207).
[25] *Id.* ("Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.'').
[26] Most, but not all, non-agricultural, non-salaried workers are covered by the FLSA generally and § 7 specifically. *See* 29 U.S.C. § 213 (2006); *See generally* U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT (2010) (providing information on the FLSA, including covered employers and employees).

financial resources, nature, or structure of the employer's business."[27] The Department of Labor (DOL) has filed a request for information from the public regarding the new requirements, but does not plan to issue implementing regulations.[28]

Employers who willfully violate the provision may be punished with a fine up to $10,000 and, for employers who repeatedly violate the law, a prison sentence up to six months.[29] DOL can also request that a federal judge order an employer to comply with the law.[30] Federal law makes it illegal for an employer to discriminate against an employee for filing a complaint regarding an employer's failure to comply with the provision, and an employee who is negatively affected by such discrimination can sue for reinstatement, back wages and liquidated damages.[31] Finally, if an employer treats employees who take breaks to express breast milk differently than employees who take breaks for other personal reasons, the nursing employee may have a claim under Title VII of the Civil Rights Act of 1964.[32]

How the Provision Differs from Existing Law

Prior to this provision there was no federal law explicitly requiring employers to provide time and space for the expression of breast milk. However, 24 states as well as the District of Columbia and Puerto Rico had legislation in place related to breastfeeding in the workplace.[33]

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[27] All employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply. U.S. Dep't of Labor, Wage and Hour Division, *Fact Sheet #73, supra* note 23.
[28] *See* Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073 (Dec. 21, 2010) (providing DOL's initial interpretations of § 4207 and stating that comments will be accepted through February 22, 2011).
[29] 29 U.S.C. § 216(a) (2006) (stating that "any person who willfully violates" Section 215 of the FLSA shall be subject to a fine and possible imprisonment upon conviction). Section 215 makes it unlawful to violate FLSA Section 207. *See id.* § 215(a)(2).
[30] *See* 29 U.S.C. § 217 (2006). Because employers are not required to compensate employees for break time used to express breast milk, in most instances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks. For this reason, employees likely will not have a private right of action to enforce the provision. *See* 29 U.S.C. § 216(b) (limiting a private right of action to these circumstances).
[31] *See* 29 U.S.C. § 215(a)(3) (2006) (creating a cause of action for retaliation); *Id.* § 216(b) (creating cause of action to recover "such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3)").
[32] *See* 42 U.S.C. § 1981a (2006) (creating a cause of action for violation of the Civil Rights Act of 1964).
[33] These are Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Maine, Minnesota, Mississippi, Montana, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, and Wyoming. *See* National Conference of State Legislatures, *Breastfeeding Laws* (Sept. 2010), http://www.ncsl.org/IssuesResearch/Health/BreastfeedingLaws/tabid/14389/Default.aspx.

These laws vary widely in the protections they offer; for example, some do not require the employer to do anything or have no clear enforcement provision.[34]

The federal law is more stringent than some state laws and less stringent than others. Oregon, on which the ACA provision was based, requires only one 30-minute break per every four hours worked and requires the employee to express breast milk during regularly scheduled break and meal times, if feasible, while the federal law does not define "reasonable break time" and does not require that employees spend their meal times expressing milk.[35] However, Oregon's law applies to employers with more than 25 employees and women with children up to 18 months old, in contrast with the federal law's 50 employee and 12 month limits.[36]

Conclusion

Lack of a supportive employment environment contributes to many women, particularly low-income and minority women, abandoning breastfeeding early or avoiding it altogether. Substantial evidence shows that increased levels of breastfeeding would improve health, save money, and improve productivity. Section 4207 should make breastfeeding in the workplace a viable option for more women with resulting positive outcomes for individual women and their children as well as their employers and society as a whole.

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[34] *See, e.g.,* Okla. Stat. tit. 40, § 435 (2006) (stating "[a]n employer *may* provide reasonable unpaid break time. . . ") (emphasis added).

[35] Or. Rev. Stat. §§ 653.075, 653.077, 653.256 (2007). Since exclusively breastfed babies should eat between 8 and 12 times per day, one break every four hours is likely to be insufficient. *See* Lawrence M. Gartner et al., *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 499 (2005) (stating that "mothers should be encouraged to have 8 to 12 feedings at the breast every 24 hours").

[36] Or. Rev. Stat. §§ 653.075, 653.077, 653.256 (2007).