

Breastfeeding: How do state and federal laws protect employed mothers?

Mothers who work in the formal economy often return to their employer weeks or months after birth, while some are likely still breastfeeding their child. Almost a quarter of new mothers who take unpaid leave from employment after the birth of a child through the Family and Medical Leave Act (FMLA) return to work [within two weeks](#) of giving birth, and another 22% return within six weeks. While not all mothers breastfeed for a variety of reasons, the [Surgeon General, National Institutes of Health and others](#) have documented the health related benefits for mothers and babies and called for supportive work environments for those that choose to do so.

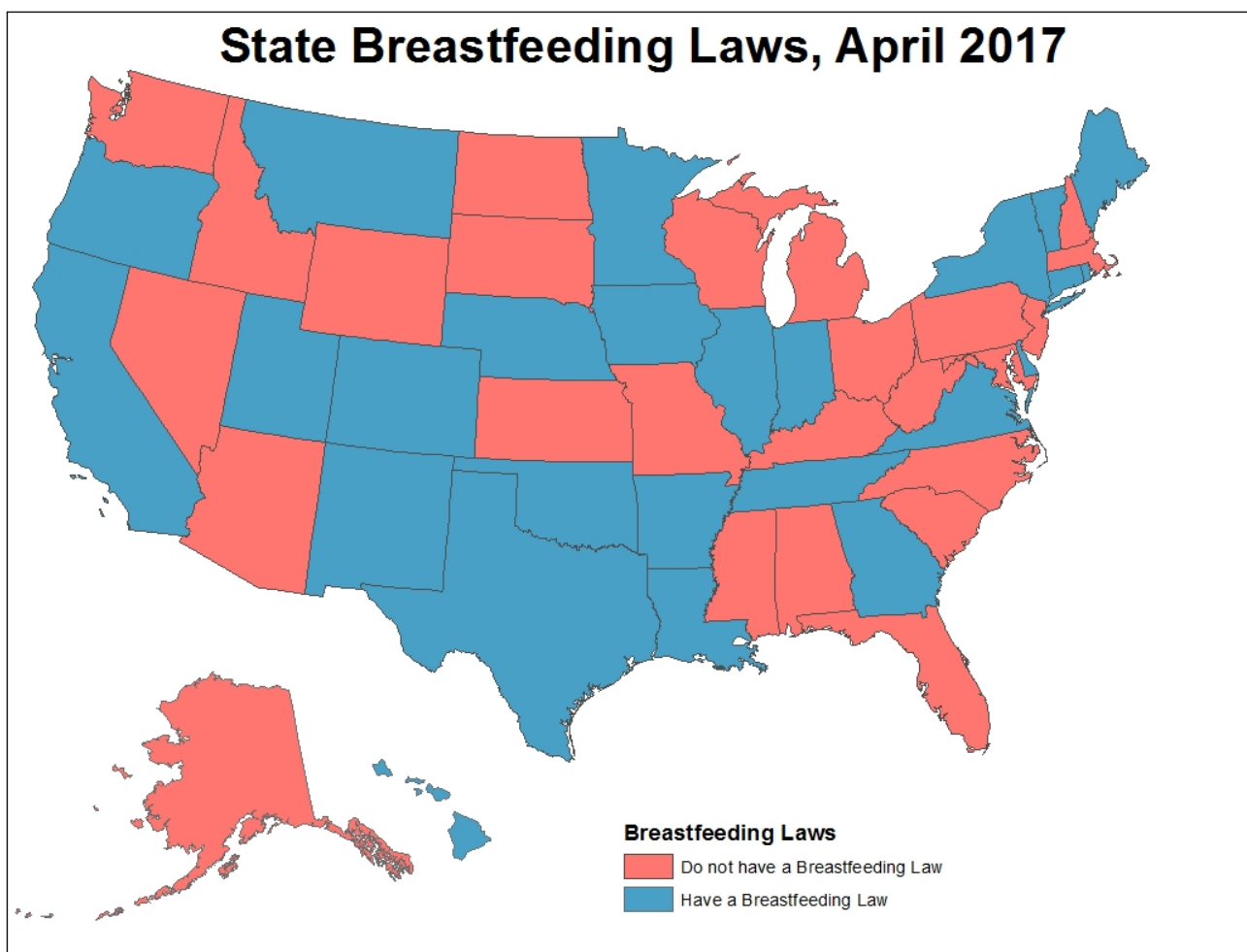
Prior to the Patient Protection and Affordable Care Act (also known as ObamaCare or ACA), in states without protections for nursing mothers, many women were forced to nurse or express breastmilk in bathroom stalls—if they were even given adequate break time. Women without break time and/or access to a private space often stopped breastfeeding upon return to work. Even with the ACA in place, some women [lose their jobs](#) for trying to work and pump (numerous [stories demonstrate](#) these and other challenges). Now, as Congress and the White House again debate healthcare, mothers working in the formal economy have reason to worry.

The ACA provides important protections for nursing mothers; it amended [Section 7\(r\) of the Fair Labor Standards Act](#) so that, effective March 23, 2010, “an employer shall provide—

1. a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to

- express the milk; and
2. a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”

If these federal protections are repealed, many nursing mothers in the 26 states without breastfeeding protection laws may lose break time and space to breastfeed at work. Many other states and territories have laws with less generous protections than those included in the ACA. This patchwork of state laws will provide women lucky enough to live in some states with additional options and rights, but the vast majority of nursing mothers need the ACA’s improved protections.



The ACA breastfeeding provision and state laws have some

important distinctions affecting the type of protections nursing mothers receive. It is important to understand the ways that the ACA provides additional benefits currently, but also how stronger state laws might inform improvements of protections in the future.

Mandatory vs. voluntary laws

ACA provisions are mandatory (with exemptions) for employers with 50 or more employees. Some states, such as Georgia, Rhode Island, Tennessee, and Vermont, have voluntary laws, which specify that employers *may* provide certain accommodations, though they are not required to do so.

Time period

The ACA explicitly states that the nursing break-time provision only applies to mothers for one year after the child's birth. Many states with similar laws do not specify a time period, while other states extend the period past a year. These more-generous state laws supersede the ACA.

Separate space

The ACA requires employers to provide a separate space, other than a bathroom, that is shielded from view, for nursing mothers to express breast milk. Most state laws include a similar provision but some do not make the provision mandatory. For example, California's law, passed in 2001, does not include any language regarding a separate space. Some states, such as Minnesota, are *more* generous than the ACA, and require the private space to have access to an electrical outlet. Other states allow employers to designate themselves as "infant-friendly" if they meet requirements such as access to a sink and refrigerator.

Exempt employers

Similar to other provisions within the Fair Labor Standards Act (FLSA), the ACA's nursing mother's provision does not apply to employers with fewer than 50 employees. State laws generally do not specify an employer size or they apply the law to all employers with one or more employees. A small number of states have more expansive exemptions, such as Indiana, whose law only applies to state and local governments as employers, or Oregon, whose law only applies to employers with 25 or more employees.

Exempt employees

Most state and federal laws reference definitions of "employee" in other statutes, which may leave out sectors of the economy (commonly agricultural and domestic workers) or certain types of employees under a covered employer. Most notably, the [definition of 'employee' under the FLSA \(which is used under the ACA\) does not include most salaried workers](#). State laws may have broader definitions of 'employee,' extending benefits to more working mothers.

Enforcement mechanisms

Enforcement mechanisms vary but are generally inadequate at the federal and state levels. It is difficult for workers to access their rights if an employer is not complying with the law. In the federal process, employees [can file a complaint](#) with the U.S. Department of Labor's Wage and Hour Division if their employer is violating the FLSA. But, this enforcement mechanism has limited utility, as the [penalty is generally to compensate an employee for lost wages](#), of which there may be none, because nursing break times are not compensated.^[1] In addition, the time frame under which enforcement is triggered is critical. Immediate action is needed in the case of a

worker-employer disagreement related to nursing, as an interruption of nursing for even a couple of days can severely compromise or end the possibility of nursing and potentially cause [health issues for the mother](#). In Minnesota, for example, the Minnesota Department of Labor & Industry must respond to a complaint within 72 hours to minimize disruptions that could compromise a mother's ability to continue nursing.

There are some areas in which federal and state laws are significantly similar.

Neither the ACA provisions nor any additional state laws related to providing break time for nursing mothers require employers to compensate employees for nursing break time.

This provision is likely intended to lessen the financial burden for employers, but it overlooks a large barrier for low-income nursing mothers: many cannot afford to take unpaid breaks. The ACA and most state laws also include a potentially large loophole in the form of an undue hardship clause. Its vague wording allows employers to assert that they cannot provide nursing accommodations because it would cause them significant difficulty or expense.

As Congress and the White House debate repeal-and-replace proposals, nursing provisions are rarely a topic of discussion.

However, without them, nursing mothers will once again be at the mercy of a patchwork of state laws (which, for the most part, fall short of one or both of the ACA requirements for time and private space). Given the significant and proven health benefits of breastfeeding for both babies and mothers—[benefits recognized by the federal government](#)—a lack of robust, national protections is a failure for those mothers who choose to breastfeed.

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- Photo by the [US Department of Labor](#)