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Cover Page Footnote

Marcy Karin is a Clinical Professor of Law and Director of the Work-Life Law and Policy Clinic at the Arizona State University Sandra Day O'Connor College of Law. Robin Runge is a Professorial Lecturer in Law at The George Washington University Law School. The authors thank Nicole Porter, Marcia McCormick, Elizabeth Pendo, Leila Barraza, Paul Secunda, Bradley Areheart, Deborah Widiss, Michael Green, Jennifer Londono, Laura Van Buren, and participants of the 2013 SEALS Labor & Employment Workshop, 2012 Labor & Employment Colloquium, and 2012 ASU Scholars Workshop. From 2009–2013, Professor Runge was as assistant professor at the University of North Dakota School of Law and appreciates the invaluable support from the University of North Dakota School of Law that made this paper possible.

BREASTFEEDING AND A NEW TYPE OF EMPLOYMENT LAW

Marcy Karin⁺

Robin Runge⁺⁺

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In 2010, Congress passed a comprehensive health care reform law: the Patient Protection and Affordable Care Act (PPACA).¹ Buried deep within the PPACA is section 4207, a little-noticed provision that amended the Fair Labor Standards

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

Act (FLSA) to provide protections for some women to express milk at work.² Section 4207 borrows concepts from existing labor standards and employment discrimination laws to offer job-protected break time and space-related accommodations for breastfeeding purposes. These protections are designed to achieve public health goals and are therefore different than prior federal employment laws.

Rather than establish labor standards or antidiscrimination protection for all workers with caregiving or other personal needs, Congress created protections for a relatively small subgroup of individuals: non-exempt working women who choose to express milk for children under the age of one.³ In so doing, the PPACA promotes specific behavior (breastfeeding) by offering workplace protections to a subset of workers (low-income mothers⁴) for health-based reasons. Essentially, the law is intended to encourage low-income women to breastfeed, rather than to address historical discrimination or barriers to employment for this group of workers or working mothers generally. Nonetheless, the PPACA has antidiscrimination implications.

The use of employment law to promote public health is not novel, but the decision to place breastfeeding protections in this framework must be considered within the larger context of employment law. In its examination of this new law, this Article places section 4207 in the broader civil rights context and builds upon scholarship that argues that the physical space and structure of the workplace have perpetuated discrimination against women and people with disabilities.⁵ The Article also contributes to the discussion of the interdisciplinary nature of employment law by asserting that section 4207

2. *Id.* § 4207 (codified at 29 U.S.C. § 207(r) (Supp. V 2012)).

3. 29 U.S.C. § 207(r)(1). A “non-exempt” employee is entitled to certain protections under the Fair Labor Standards Act (FLSA), such as a guaranteed minimum wage and overtime pay. *See infra* notes 113–115 and accompanying text.

4. *See* BRANDON ROBERTS, ET AL., THE WORKING POOR FAMILIES PROJECT, LOW INCOME WORKING FAMILIES: THE GROWING ECONOMIC GAP 2 (Winter 2012-2013), available at http://www.workingpoorfamilies.org/wp-content/uploads/2013/01/Winter-2012_2013-WPPF-Data-Brief.pdf (defining “low-income” as earning less than 200% of the poverty threshold); *see also* *Federal Poverty Guidelines*, Families USA (Feb. 2014), <http://familiesusa.org/product/federal-poverty-guidelines> (comparing the 2014 and 2013 federal poverty guidelines); Workplace Flexibility 2010 & Urban Institute, Lower-Wage Workers and Flexible Work Arrangements 1–3, <http://workplaceflexibility2010.org/images/uploads/Lower-Wage%20Workers%20and%20FWAs.pdf> (describing different definitions that capture the “low-income” workers population). *See infra* notes 112–118 and accompanying text (explaining how the law is limited by class even though it does not explicitly state that it is limited to “low-income mothers”).

5. *See, e.g.*, Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 U. COLO. L. REV. 1297, 1298 (2008) (discussing the theory that physical space promotes discrimination against people with disabilities and members of other protected groups); Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1044 & n.11 (2004) (arguing that the physical structure of a building may discriminate against people with disabilities).

represents a new approach to employment law: promoting social and economic equity in the workplace while simultaneously encouraging breastfeeding among low-income, working mothers by making it possible for them to do so at work.⁶

The PPACA provides an ideal opportunity to examine how legislation aimed to achieve goals outside the civil rights context may still nonetheless effectively address historical discrimination and societal oppression. The employment provisions of this new law represent a shift away from traditional labor standards designed to improve employment conditions for all workers and traditional employment discrimination provisions used to address historic discrimination toward regulating the workplace for a public health purpose directed only at a small group of people. Admittedly, this law may not be the dawning of a new frontier. However, its unique combination of protections and its focus on one particular class of workers facilitates the consideration of whether the government should enact workplace legislation to promote healthcare-based conduct. This Article considers, and ultimately rejects, the incorporation of limited employment rights that place symbolic requirements—without more—on employers for a public health purpose.

Part I discusses the legislative history of the PPACA, focusing on the government's continued support for breastfeeding and the barriers facing women who want to breastfeed and retain employment, specifically low-income women. Part II describes the relevant provisions in the PPACA and analyzes the provisions' break time allowance and designation requirements for a location to express milk, the law's enforcement options, the Department of Labor's clarification of the law, and the case law interpreting the provisions thus far. Part III theorizes that these provisions represent a new combination of traditional labor standards and accommodations to address employment barriers to low-income, working women who choose to breastfeed in their newborns' first year of life. Finally, Part IV rejects this type of piecemeal approach to employment law.

6. *See generally*, Jessica L. Roberts, *Health Law as Disability Rights Law*, 97 MINN. L. REV. 1963 (2013) (noting the use of other types of legislation to achieve the traditional goals of employment law).

I. BREASTFEEDING AT WORK BEFORE THE PPACA

A. *Breastfeeding Benefits and Medical Recommendations*

The benefits of breastfeeding are no longer in dispute and are well documented elsewhere.⁷ Breastfeeding has recognized nutritional,⁸ physical,⁹ physiological,¹⁰ and psychological¹¹ benefits for nursing women. Similarly,

7. See, e.g., OFFICE ON WOMEN'S HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., YOUR GUIDE TO BREAST FEEDING 4 (2011), available at <http://www.womenshealth.gov/publications/our-publications/breastfeeding-guide/BreastfeedingGuide-General-English.pdf> (describing the benefits breastfeeding offers to children). Discussion of formula is outside the scope of this paper.

8. American Academy of Pediatrics, *Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS e827, e827 (2012), available at <http://pediatrics.aappublications.org/content/115/2/496.full.pdf+html> (discussing the nutritional value of breast milk).

9. Lara M. Gardner, *A Step Toward True Equality in the Workplace: Requiring Employer Accommodation for Breastfeeding Women*, 17 WIS. WOMEN'S L.J. 259, 266–67 (2002) (observing that physical benefits to breastfeeding mothers include a lower risk of breast, uterine, and ovarian cancers; an easier ability to “expel the placenta after birth;” and a decreased chance of diabetes or a “delay in the onset of subsequent diabetes for the gestational diabetic”); Heather M. Kolinsky, *Respecting Working Mothers With Infant Children: The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States*, 17 DUKE J. GENDER L. & POL'Y 333, 338 (2010) (noting that physical benefits to breastfeeding mothers include lower blood sugar over time); Matthew L. Williams, Note, *Let 'Em Work, Let 'Em Nurse: Accommodation for Breastfeeding Employees in West Virginia*, 111 W. VA. L. REV. 1017, 1020 (2009) (noting that physical benefits to breastfeeding mothers include faster loss of pregnancy weight, reduction in postpartum bleeding and anemia, and reduction in bone loss and chance of post-menopausal hip fractures and osteoporosis).

10. Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471, 477 (2001) (stating that the physiological benefits of breastfeeding “include greater bonding between the mother and child, greater confidence in parenting skills, and an increase in self-esteem related to the attainment of those parenting skills”); see also Williams, *supra* note 9, at 1020.

11. Gardner, *supra* note 9, at 267–68 (explaining that the psychological benefits of breastfeeding include “increased self-confidence and accelerated bonding between the mother and her infant”).

breastfed children also experience a range of health benefits.¹² Together, these benefits improve public health and result in significant health care savings.¹³

Further, breastfeeding is a free source of food and nutrition, which results in significant savings for individual mothers and families.¹⁴ Increased breastfeeding in certain populations may also result in financial savings for the government. For example, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC) provides free formula to low-income women.¹⁵ In fiscal year 2009, WIC spent \$850 million to provide this formula.¹⁶ Thus, the government also has a financial interest in promoting breastfeeding because encouraging new mothers to breastfeed might reduce this cost.

12. Henry Wyatt Christup, *Litigating a Breastfeeding and Employment Case in the New Millennium*, 12 YALE J.L. & FEMINISM 263, 263 (2000) (noting that breastfed children experience lower rates of “bacterial infections, botulism, diarrhea, respiratory illnesses, viral infection, allergies, and sudden infant death syndrome”); Gardner, *supra* note 9, at 268–69 (reporting that breastfed children may contract fewer ear and urinary tract infections); Kolinsky, *supra* note 9, at 337–38 (same); Williams, *supra* note 9, at 1020 (same). As breastfed children age, they are less likely to get diabetes, be overweight, or contract certain cancers. Kolinsky, *supra* note 9, at 338; Williams, *supra* note 9, at 1020. Breastfed children also experience shorter duration and decreased severity of illnesses, should they occur. Gardner, *supra* note 9, at 270–71; Kolinsky, *supra* note 9, at 337–38. For example, breastfed babies under the age of one are less likely to die of Sudden Infant Death Syndrome. Gardner, *supra* note 9, at 269–70; Kolinsky, *supra* note 9, at 337–38; Williams, *supra* note 9, at 1020. Finally, breastfeeding has been connected to higher cognitive development, better sight, and quicker speech development. Christup, *supra*, at 265; Maureen E. Eldredge, *The Quest for a Lactating Male: Biology, Gender, and Discrimination*, 80 CHI.-KENT L. REV. 875, 888 (2005).

13. See U.S. BREASTFEEDING COMM., WORKPLACE ACCOMMODATIONS TO SUPPORT AND PROTECT BREASTFEEDING 3 (2010), available at <http://www.usbreastfeeding.org/Portals/0/Publications/Workplace-Background-2010-USBC.pdf> (exploring how breastfeeding is a matter of public health); see also Stephanie Sikora, Note, *A Permission Slip to Breastfeed: Legislating a Mother’s Choice in Pennsylvania*, 16 WM. & MARY J. WOMEN & L. 781, 782–83 (2010) (quoting Jacqueline H. Wolf, *What Families Can Do for Breastfeeding and What Breastfeeding Can Do for Feminists*, 31 SIGNS: J. WOMEN IN CULTURE & SOC’Y 397, 410 (2006)) (“[C]lassify[ing] the United States’ low breastfeeding rates as a ‘public health challenge’”). If all mothers breastfed their children, at least one billion dollars in health care costs would be saved annually. Christup, *supra* note 10, at 477; Christup, *supra* note 12, at 266. Another estimate calculates \$13 billion in health care savings annually if ninety percent of new mothers breastfed. U.S. BREASTFEEDING COMM., *supra*.

14. Cf. *Why Breastfeeding is Important*, WOMENSHEALTH.GOV, <http://www.womenshealth.gov/breastfeeding/why-breastfeeding-is-important/> (last updated Aug. 4, 2011) (estimating that “formula and feeding supplies can cost well over \$1,500 each year”).

15. INSTITUTE OF MEDICINE, UPDATING THE USDA NATIONAL BREASTFEEDING CAMPAIGN 5 (2011), available at http://www.nap.edu/catalog.php?record_id=13235 (“WIC provides participants with supplemental foods, nutrition education[,] and referrals to health and social services in addition to breastfeeding promotion and support.”). According to the Institute of Medicine, “breastfeeding is a priority for everyone involved with WIC [and a]ll mothers are encouraged to breastfeed unless medically contraindicated.” *Id.* at 8.

16. Ruth Marcus, *A Lobbying Formula for Deficit Disaster*, WASH. POST, July 14, 2010, at A19.

The combined impact of these benefits is among the reasons the American Academy of Pediatrics recommends exclusive breastfeeding for six months and continued provision of breast milk for at least one year.¹⁷ Similarly, the World Health Organization recommends some level of breastfeeding until children are at least two years of age.¹⁸ The medical community does not dispute that breastfeeding is important.

Despite the known benefits and specific medical recommendations, the initiation and continuation rates of breastfeeding have varied over time and remain low. Recent data reflects that the overall rates for both initiation and continuation of breastfeeding are improving, however.¹⁹ Currently, approximately seventy-five percent of new mothers start breastfeeding.²⁰ Yet, the percentage of women who are breastfeeding at six months and twelve months is significantly lower.²¹ These numbers depend on a variety of factors, including marital status, race, education, class, and employment status. Generally, older, educated, married, wealthier women have the highest rates of initiation and continuation of breastfeeding.²² By contrast, less educated, single, non-white, lower-income mothers have the lowest rates of initiation and continuation.²³ While no population has consistently met the medical recommendations for breastfeeding, women living at or below poverty level breastfeed at a lower rate than women in any other economic cohort.²⁴ Low-income women also continue

17. American Academy of Pediatrics, *supra* note 8.

18. *Health Topics: Breastfeeding*, WORLD HEALTH ORG., <http://www.who.int/topics/breastfeeding/en/> (last visited Mar. 21, 2014); *accord Innocenti Declaration On the Protection, Promotion and Support of Breastfeeding*, UNICEF, <http://www.unicef.org/programme/breastfeeding/innocenti.htm> (last visited Mar. 21, 2014) [hereinafter *Innocenti Declaration*] (“As a global goal for optimal maternal and child health and nutrition, all women should [breastfeed infants exclusively] from birth to 4-6 months of age. Thereafter, children should continue to be breastfed . . . for up to two years of age or beyond.”).

19. CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., BREASTFEEDING REPORT CARD—UNITED STATES, 2012 (2012), *available at* <http://www.cdc.gov/breastfeeding/pdf/2012BreastfeedingReportCard.pdf>. The Centers for Disease Control and Prevention (CDC)’s National Immunization Survey has collected the initiation and longevity rates of breastfeeding since 2001. *Id.*

20. *FAQs: Break Time for Nursing Mothers*, U.S. BREASTFEEDING COMM., <http://www.dol.gov/whd/nursingmothers/faqBTNM.htm> (last visited Mar. 21, 2014).

21. *Id.*

22. Kolinsky, *supra* note 9, at 346.

23. *Id.*

24. *See Breastfeeding, Ever (Percent)*, HEALTH INDICATORS WAREHOUSE, http://www.healthindicators.gov/Indicators/Breastfeeding-ever-percent_1147/Profile/Data (last visited Mar. 21, 2014).

breastfeeding—at both the six-month²⁵ and twelve-month marks²⁶—at a lower rate than other women.

B. Barriers to Breastfeeding at Work

One significant factor in the variation of breastfeeding rates across different populations of women is employment outside of the home. Less than twenty percent of women continue breastfeeding after returning to work full time, and only ten percent of women continue to breastfeed after six months (the medically recommended minimum length of time to breastfeed).²⁷ This is problematic for a government that is concerned about public health, health care costs, families, businesses, and the economy.

There is a direct relationship between breastfeeding and employment. The way many workplaces and work schedules are prohibits breastfeeding.²⁸ Workplace structures often include scheduling inflexibility,²⁹ lack of break time and control over when break time may be used,³⁰ insufficient privacy,³¹ lack of support from supervisors and coworkers,³² and problems with storage of pump and milk supplies.³³ These workplace obstacles are problematic for all breastfeeding workers, but they are even more difficult to overcome for hourly workers. Unlike workers in professional occupations, who may have their own offices with doors that can be closed for privacy, hourly workers face not only

25. *Breastfeeding, at 6 Months (Percent)*, HEALTH INDICATORS WAREHOUSE, http://www.healthindicators.gov/Indicators/Breastfeeding-at-6-months-percent_1148/Profile/Data (last visited Mar. 21, 2014).

26. *Breastfeeding, at 1 Year (percent)*, HEALTH INDICATORS WAREHOUSE, http://www.healthindicators.gov/Indicators/Breastfeeding-at-1-year-percent_1149/Profile/Data (last visited Mar. 21, 2014).

27. Christrup, *supra* note 10, at 480.

28. *See id.* at 480–81 (describing several studies of breastfeeding and the workplace).

29. Gabriela Steier, *Womenomics for Nursing Growth: Making the Case for Work Time Flexibility and Mother-Friendlier Workplaces*, 21 BUFF. J. GENDER, L. & SOC. POL'Y 119, 135 (2013) (“Nonetheless, breastfeeding duration remains low, in part due to inflexible work schedules . . .”).

30. Brit Mohler, Note, *Is the Breast Best for Business?: The Implications of the Breastfeeding Promotion Act*, 2 WM. & MARY BUS. L. REV. 155, 159 (2011) (observing that “insufficient break time” creates a deterrent to breastfeeding in the workplace); *see also* Elsie M. Taveras et al., *Clinician Support and Psychosocial Risk Factors Associated with Breastfeeding Discontinuation*, 112 PEDIATRICS 108, 113 (2003).

31. *See, e.g.*, *Salz v. Casey’s Marketing Co.*, No. 11-CV-3055-DEO, 2012 WL 2952998, at *1 (N.D. Iowa July 19, 2012) (alleging that a camera was installed in the room in which the employee pumped breast milk, without her knowledge).

32. *FAQs: Break Time for Nursing Mothers*, *supra* note 20 (“Returning to an unsupportive work environment [is] a major reason for the avoidance or early abandonment of breastfeeding.”).

33. KATHERINE R. SHEALY ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., THE CDC GUIDE TO BREASTFEEDING INTERVENTIONS 7 (2005), *available at* http://www.cdc.gov/breastfeeding/pdf/breastfeeding_interventions.pdf.

inflexible schedules, but also a greater unavailability of privacy and facilities in which to pump and store breast milk in the workplace.³⁴ Further, if a nursing worker cannot find a way to express at work, it influences her ability to express at other times. Because a woman's milk supply diminishes if she cannot breastfeed at continuous, comfortable, and regular intervals, a woman cannot go a full day at work without breastfeeding without decreasing, and ultimately ending, her ability to do so outside of work.³⁵

Irregular expression also has a direct impact on a woman's body. For example, the inability to breastfeed regularly is painful.³⁶ Milk collects in a woman's lactiferous ducts, and her body anticipates that it will be expressed regularly.³⁷ If it is not, the nursing mother may experience pain from the built-up milk supply.³⁸ Further, the lack of expression of milk results in engorgement, which in turn leads to blocked milk ducts and may possibly cause "infection or mastitis" and embarrassment.³⁹

Consequently, studies show that the more hours a woman works, the less likely she is to breastfeed.⁴⁰ Moreover, an inflexible workplace may cause a nursing worker to wean a child off of breast milk earlier or to choose not to

34. Lisa Hansen, Note, *A Comprehensive Framework for Accommodating Nursing Mothers in the Workplace*, 59 RUTGERS L. REV. 885, 893–96 (2007) (observing that low-wage workers "not only lack privacy and adequate breaks, they are also more likely to be subject to harassment for expressing milk at work"). See generally LIZ WATSON & JENNIFER SWANBERG, FLEXIBLE WORKPLACE SOLUTIONS FOR LOW-WAGE HOURLY WORKERS (2011) (describing disparities in the experiences of low-wage and other workers with respect to flexible scheduling, and other workplace structures).

35. Christup, *supra* note 12, at 266 (explaining that milk production is an "intricate process of supply and demand which necessitates breastfeeding or pumping at regular intervals"); Williams, *supra* note 9, at 1020–21 (observing that the "production of breastmilk is a supply and demand system . . . a woman's supply of breastmilk will literally dry up if she is unable to nurse or pump for periods of eight hours or more for several consecutive days"). Once milk production stops, it does not commence again unless the woman goes through childbirth again. See Gardner, *supra* note 9, at 261; Kolinsky, *supra* note 9, at 337.

36. Christup, *supra* note 12, at 266.

37. See *Breastfeeding: Helpful Tips*, COMPREHENSIVE WOMEN'S HEALTH SERVS., http://comprehensivewomenshealthservice.com/?page_id=153 (last visited Mar. 21, 2014).

38. See *id.*

39. Michelle A. Angeletti, *Workplace Lactation Program: A Nursing Friendly Initiative*, 31 J. HEALTH & HUM. SERVICES ADMIN. 223, 230 (2008); see also *Jacobson v. Regent Assisted Living, Inc.*, No. CV-98-564-ST, 1999 WL 373790, at *4 (D. Or. Apr. 9, 1999) (describing the plaintiff's feelings of embarrassment after leaking at work); U.S. BREASTFEEDING COMM., *supra* note 13, at 5–6 (describing the impact of missing even one session of expressing milk). Mastitis, which may result from failing to regularly express milk, is "a painful swelling and inflammation of the breasts." *Id.* at 6.

40. See, e.g., Laura Duberstein Lindberg, *Women's Decisions About Breastfeeding and Maternal Employment*, 58 J. MARRIAGE & FAM. 239, 241 (1996) (discussing the "linear relationship between hours of employment and breastfeeding continuance").

breastfeed at all.⁴¹ The decisions to return to work and to discontinue breastfeeding are often dependent on each other.⁴²

The dominant workplace culture in America increases the potential for embarrassment. Workers are hesitant to use words such as “breast,” “lactation,” “expression,” “milk,” or other related terminology, especially with coworkers and supervisors of the opposite sex, in part “because of heightened sensitivity to the possibility (or perception) of sexual harassment.”⁴³ This concern that talking about breasts would sexualize the workplace influences the way breastfeeding is perceived at work.

This concern is not unfounded. Workers have been harassed at work regarding breastfeeding.⁴⁴ Supervisors and coworkers have made comments about growth in the size of a nursing worker’s breasts because of breastfeeding.⁴⁵ Colleagues have “mooed” at nursing workers.⁴⁶ Nursing workers have been told that they will “smell like curdled milk” or will be “dripping wet.”⁴⁷ In addition, breastfeeding workers have been deprived of the ability to change clothing if leakage occurred.⁴⁸ There are also countless stories of coworkers, bosses, customers, and others walking in on nursing workers while they were pumping, with their breasts exposed.⁴⁹ These experiences emphasize that the structure and

41. See OFFICE OF THE SURGEON GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., THE SURGEON GENERAL’S CALL TO ACTION TO SUPPORT BREASTFEEDING 14 (2011) [hereinafter SURGEON GENERAL’S CALL TO ACTION], available at <http://www.surgeon-general.gov/library/calls/breastfeeding/calltoactiontosupportbreastfeeding.pdf>.

42. Lindberg, *supra* note 40, at 248 (“[T]he decisions to start work and stop breastfeeding are made simultaneously.”).

43. U.S. BREASTFEEDING COMM., *supra* note 13, at 4; see also Kolinsky, *supra* note 9, at 360 (“[W]omen’s breasts carry a stigma of sexuality, sensuality, physicality, and desire. While there is nothing sexually explicit about breastfeeding, it carries the same stigma [and] often requires a woman to expose some part of her breast.”).

44. See, e.g., Jodi Kantor, *On the Job, Nursing Mothers are Finding a 2-Class System*, N.Y. TIMES, Sept. 1, 2006, at A1 (describing the experience of a dental hygienist whose supervisor “wore a Halloween costume consisting of a large silver box . . . with a cutout labeled ‘insert breast here’” when she pumped at work).

45. See, e.g., *Donaldson v. American Banco Corp., Inc.*, 945 F. Supp. 1456, 1462 (D. Colo. 1996) (reporting that one employee told another “Jesus, Patty, your tits are huge!”).

46. See, e.g., *Falk v. City of Glendale*, No. 12-CV-00925-JLK, 2012 WL 2390556, at *1 (D. Colo. June 25, 2012).

47. *Donaldson*, 945 F. Supp. at 1462.

48. See, e.g., *Falk*, 2012 WL 2390556, at *1; *Jacobson v. Regent Assisted Living, Inc.*, CV-98-564-ST, 1999 WL 373790, at *4 (D. Or. Apr. 9, 1999) (noting that the plaintiff alleged that she was denied break time and “forced to sit on [a] plane drenched in breast milk”).

49. See, e.g., *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 307 (S.D.N.Y. 1999) (stating that individuals attempted to enter the room in which the plaintiff was pumping with a key on more than one occasion); Heidi Blake, *Comment on the Wage and Hour Division (WHD) Notice: Reasonable Break Time for Nursing Mothers*, REGULATIONS.GOV (Mar. 3, 2011), <http://www.regulations.gov/#!documentDetail;D=WHD-2010-0003-1507> (“[O]n several occasions, [coworkers] blew past my sign and walked in on me . . . They may be doctors, but they are still my

culture of a woman's workplace has a large impact on her ability to breastfeed. Thus, women who are unable to breastfeed at work are often faced with a difficult choice: keep their paychecks or breastfeed.⁵⁰

These issues are particularly significant because, for the first time, women constitute half of the American workforce.⁵¹ Approximately seventy percent of mothers are full-time workers,⁵² and the fastest growing segment of the workforce is women with children under the age of three.⁵³ Recognizing these changes in workforce demographics and worker needs, as well as a documented

colleagues, and they were pretty embarrassed at seeing my breasts exposed.”); Abbie Keibler, *Comment on the Wage and Hour Division (WHD) Notice: Reasonable Break Time for Nursing Mothers*, REGULATIONS.GOV (Mar. 4, 2011), <http://www.regulations.gov/#!documentDetail;D=WHD-2010-0003-1709> (“I have now had my door UNLOCKED and opened TWICE (both with males) who did not understand what I was doing. It was humiliating.”); Amanda Kowski, *Comment on the Wage and Hour Division (WHD) Notice: Reasonable Break Time for Nursing Mothers*, REGULATIONS.GOV (Mar. 3, 2011), <http://www.regulations.gov/#!documentDetail;D=WHD-2010-0003-1396> (“I was walked in on numerous times, much to THEIR embarrassment.”); Laura Isabel Serna, *Comment on the Wage and Hour Division (WHD) Notice: Reasonable Break Time for Nursing Mothers*, REGULATIONS.GOV (Mar. 3, 2011), <http://www.regulations.gov/#!documentDetail;D=WHD-2010-0003-1479> (describing an incident in which the commenter's supervisor “used his master key to walk [into her] office when the door was closed”).

50. See Gardner, *supra* note 9, at 268 (“Because of the positive impact breastfeeding has on a woman's health, when we fail to accommodate breastfeeding in the workplace, we effectively force her to choose between her health and her employment. Even worse, we also force her to choose between her child's health and her employment.”); Lindberg, *supra* note 40, at 239 (exploring the intersection of employment and breastfeeding).

51. See MARIA SHRIVER & CTR. FOR AM. PROGRESS, THE SHRIVER REPORT 17 (Heather Boushey & Ann O'Leary eds., 2009), available at http://cdn.americanprogress.org/wp-content/uploads/issues/2009/10/pdf/awn/a_womans_nation.pdf; see also CAROLYN B. MALONEY & CHARLES E. SCHUMER, U.S. CONG. JOINT ECON. COMM., WOMEN AND THE ECONOMY 2010 4 (2010), available at http://jec.senate.gov/public/?a=Files.Serve&File_id=8be22cb0-8ed0-4a1a-841b-aa91dc55fa81 (providing empirical data that demonstrates the shift in workforce demographics).

52. Press Release, Senator Jeff Merkley, Merkley: Health Care Amendment Looks Out for Nursing Mothers (June 23, 2009), available at <http://www.merkley.senate.gov/newsroom/press/release/?id=921fc624-42df-42c8-bffe-1c9c3e941e8f>.

53. SHEALY ET AL., *supra* note 33 (“Approximately 70% of employed mothers with children younger than 3 years work full time. One-third of these mothers return to work within 3 months after birth and two-thirds return within 6 months.”).

business case,⁵⁴ some employers have voluntarily created lactation-supportive workplace practices.⁵⁵

These voluntary business practices are bolstered by an increasing number of public policy efforts to foster a wider implementation of policies and practices that support breastfeeding at work. Indeed, the federal government has undertaken a variety of approaches to increase the initiation and continuation rates of women breastfeeding by making it easier to breastfeed at work.⁵⁶ For

54. See *The Business Case for Breastfeeding*, U.S. DEP'T HEALTH & HUMAN SERVICES, <http://www.womenshealth.gov/breastfeeding/government-in-action/business-case-for-breastfeeding/business-case-for-breastfeeding-for-business-managers.pdf> (last visited Mar. 21, 2014); U.S. BREASTFEEDING COMM., *supra* note 13, at 9–11. Lactation programs have a strong return on investment because they help to increase job satisfaction, lower absenteeism and tardiness rates, lower health care costs, increase post-maternity reentry rates, and reduce training costs as a result of better retention rates. See Gardner, *supra* note 9, at 271 (describing a UCLA School of Nursing study that found that nursing mothers had a twenty-seven percent lower rate of absenteeism and that “[o]ne day absences were three times more common in the mothers of formula-fed infants”). An HMO study found that formula-fed children accumulated \$1,435 more in health care claims than children who were breastfed exclusively for at least six months. *Id.* Others have noted the economic benefits afforded to employers by accommodating nursing workers. See, e.g., Mohler, *supra* note 30, at 163 (observing that “notable employer benefits include fewer missed work days, reduced health care costs, fewer instances of employee turnover . . . increased employee loyalty” and a positive reputation within the community); see also Chrstrup, *supra* note 10, at 477 (characterizing breastfeeding as “economically frugal”).

55. See, e.g., *Healthy Babies Make Happy Moms and Excellent Employees!*, CORPORATE VOICES FOR WORKING FAMILIES, <http://www.corporatevoices.org/lactation>.

56. See, e.g., 42 U.S.C. § 1790(a) (2006) (enacted “to promote breastfeeding as the best method of infant nutrition, foster wider public acceptance of breastfeeding . . . , and assist in the distribution of breastfeeding equipment to breastfeeding women”); DIVISION OF MATERNAL AND CHILD HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT OF THE SURGEON GENERAL'S WORKSHOP ON BREASTFEEDING & HUMAN LACTATION 63 (1984), available at <http://profiles.nlm.nih.gov/ps/access/NNBCGG.pdf> (reporting that a “national breastfeeding promotion initiative directed to all those who influence the breastfeeding decisions and opportunities of women involved in school, job training, professional education, and employment is needed”). More recent policy initiatives also support breastfeeding more generally. For example, the White House Task Force on Childhood Obesity supports breastfeeding-friendly policies. EXEC. OFFICE OF THE PRESIDENT OF THE U.S., SOLVING THE PROBLEM OF CHILDHOOD OBESITY WITHIN A GENERATION 13–15 (2010), available at http://www.letsmove.gov/sites/letsmove.gov/files/TaskForce_on_Childhood_Obesity_May2010_FullReport.pdf. Likewise, the First Lady's *Let's Move!* initiative promotes breastfeeding as a method to reduce childhood obesity. Press Release, The White House, Office of the First Lady, First Lady Unveils Let's Move! Child Care to Ensure Healthy Start for Youngest Children (June 8, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/06/08/first-lady-unveils-lets-move-child-care-ensure-healthy-start-youngest-ch>. Similarly, in February 2011, the IRS, for the first time, identified pumps and other breastfeeding supplies as medical expenses that are eligible for a tax deduction. I.R.S. Announcement 2011-14 (Feb. 10, 2011), available at <http://www.irs.gov/pub/irs-drop/a-11-14.pdf>. But see Emily F. Suski, Note, *In One Place, But Not Another: When the Law Encourages Breastfeeding in Public While Simultaneously Discouraging it at Work*, 12 UCLA WOMEN'S L.J. 109, 113 (2001) (observing that, by promoting breastfeeding “but failing to

example, Healthy People 2020, a Department of Health and Human Services project that develops science-based federal objectives to improve the country's health,⁵⁷ recently sought to increase breastfeeding rates by encouraging more employers to implement supportive breastfeeding policies.⁵⁸ Additionally, the Surgeon General issued an updated "Call to Action to Support Breastfeeding" in 2011, which reiterated that supportive workplaces are necessary to "enable[] mothers to continue breastfeeding as long as they desire."⁵⁹ This call for supportive workplace practices echoed the World Health Organization and United Nations Children's Fund's 1990 joint policy statement, which was adopted by over thirty countries and contained a requirement for "imaginative legislation protecting the breastfeeding rights of working women and established means for its enforcement."⁶⁰

C. Early Litigation and Legislative History

Despite efforts to encourage breastfeeding-friendly business practices and supportive policy initiatives, women continued to experience problems with breastfeeding at work, including harassment, discrimination, the denial of time or private space to pump, and termination from employment. Some women challenged their employers' actions. These women brought cases under Title VII of the Civil Rights Act of 1964 (Title VII),⁶¹ Title VII as amended by the

encourage it in the workplace," the law has a "fragmented approach" that "exclude[s] women from work").

57. *About Healthy People*, HEALTHY PEOPLE 2020, <http://healthypeople.gov/2020/about/default.aspx> (last updated Dec. 17, 2012).

58. *Maternal, Infant, and Child Health*, HEALTHY PEOPLE 2020, <http://healthypeople.gov/2020/topicsobjectives2020/objectiveslist.aspx?topicId=26> (last updated Aug. 28, 2013).

59. Kolinsky, *supra* note 9, at 344 (describing an earlier blueprint effort from the Department of Health and Human Services). *See generally* SURGEON GENERAL'S CALL TO ACTION, *supra* note 41.

60. *Innocenti Declaration*, *supra* note 18; *see also* INNOCENTI RESEARCH CENTRE, UNICEF, 1990–2005: CELEBRATING THE INNOCENTI DECLARATION ON THE PROTECTION, PROMOTION AND SUPPORT OF BREASTFEEDING vii, 11 (2005), *available at* http://www.unicef.org/nutrition/files/Innocenti_plus15_BreastfeedingReport.pdf (elaborating on UNICEF's intent to create "imaginative legislation" to promote supportive workplace practices).

61. Before the PPACA was enacted, courts had not determined that a nursing worker was in the protected category for Title VII protection. *See, e.g.*, *Derungs v. Wal-Mart Stores Inc.*, 374 F.3d 428, 439 (6th Cir. 2003) (rejecting the plaintiffs' argument that a policy that prohibited breastfeeding in public would have a disparate impact because the policy differentiated between breastfeeding women and non-breastfeeding women, two subgroups of the larger protected group of women); *Martinez v. N.B.C., Inc.*, 49 F. Supp. 2d 305, 308–09 (S.D.N.Y. 1999) (holding that the failure to provide a location in which the plaintiff could express milk was not disparate treatment because there was no similarly situated group of men to use as comparators); *Pitts-Baad v. Valvoline Instant Oil Change*, No. 2012 CA 00028, 2012 WL 4946433, at *6 (Ohio Ct. App. Oct. 15 2012) (rejecting a sex-plus theory based on the failure to accommodate expression because it "would elevate breast milk pumping—alone—to a protected status"). *But see* *Donaldson v.*

Pregnancy Discrimination Act (PDA),⁶² the Family and Medical Leave Act (FMLA),⁶³ and the Americans with Disabilities Act (ADA).⁶⁴ At the time of

American Banco Corp., 945 F. Supp. 1456, 1463 (D. Colo. 1996) (allowing a sexual harassment claim to survive summary judgment).

62. Plaintiffs also unsuccessfully brought Title VII claims that argued that lactation was a “related medical condition” to pregnancy under 42 U.S.C. § 2000e(k). See, e.g., *E.E.O.C. v. Houston Funding II, Ltd.*, No. H-11-2442, 2012 WL 739494, at *1 (S.D. Tex. Feb. 2, 2012) (holding that all “pregnancy-related conditions end[]” with the delivery and that lactation is not protected by Title VII), *vacated*, 717 F.3d 425 (5th Cir. 2013); *Fejes v. Gilpin Ventures, Inc.*, 990 F. Supp. 1487, 1492 (D. Colo. 1997) (holding that “child rearing concerns after pregnancy are not [covered] medical conditions”); *Wallace v. Pyro Mining Co.*, No. 90-6259, 1991 WL 270823, at *1 (6th Cir. Dec. 19, 1991) (holding that a breastfeeding claim under the PDA is only possible if a condition is medically necessary); *McNill v. New York City Dep’t of Correction*, 950 F. Supp. 564, 569 (S.D.N.Y. 1996) (concluding that the medical condition of the plaintiff’s son did not qualify under the PDA); see also Thomas H. Barnard & Adrienne L. Rapp, *The Impact of the Pregnancy Discrimination Act on the Workplace—From a Legal and Social Perspective*, 36 U. MEM. L. REV. 93, 123–24 (2005) (arguing that lactation is a pregnancy-related physical condition subject to PDA protection); Elissa Aaronson Goodman, Note, *Breastfeeding or Bust: The Need for Legislation to Protect a Mother’s Right to Express Breast Milk at Work*, 10 CARDOZO WOMEN’S L.J. 146, 157–58 (2003) (observing that “few women have made a showing that their decision to breastfeed was, in fact, based on a medical necessity”). On May 30, 2013, the Fifth Circuit held that lactation discrimination was covered under the PDA. *Houston Funding II*, 717 F.3d at 426. Analogizing the physical impact of lactation to the effects of menstruation, the court held that an adverse employment decision motivated by lactation imposes a burden on women that men do not and cannot suffer, which can be the basis of a Title VII claim. *Id.* at 429–30. The court also held that, because lactation is a physiological condition of pregnancy, it is covered under the PDA. *Id.* at 428–29; see also Brief for Appellant at *10, *Houston Funding II*, 717 F.3d 425 (No. 12-20220) (arguing that the PDA should cover discrimination against female employees based on expressing milk because “[f]iring a female worker because she is lactating” is “the essence of sex discrimination”). See *supra* note 61.

63. Breastfeeding does not qualify for job-protected time off under the FMLA. See, e.g., *Erickson v. AMN Healthcare Serv.*, No. 09cv910 BTM (CAB), 2010 WL 2618850, at *3 (S.D. Cal. June 25, 2010) (holding that “pumping breast milk is not protected by the FMLA”). Nonetheless, if nursing workers can afford to take unpaid leave and are otherwise eligible under the statute, the FMLA may help certain women initiate breastfeeding and to continue breastfeeding during the up to twelve weeks of FMLA-authorized leave after the birth of a child. 29 U.S.C. §§ 2611(2), (4), 2612(a) (2006); 29 C.F.R. § 825.110(a) (2013). After returning to work, eligible nursing employees may take leave intermittently to breastfeed in one-hour increments with their employer’s permission, but only to the extent the leave relates to pregnancy. 29 U.S.C. § 2612(b)(1) (2006 & Supp. V 2012); 29 C.F.R. § 825.203(b).

64. Nursing workers are not employees “with a disability” under the ADA as enacted. 42 U.S.C. §§ 12102(2), 12111(8) (2006 & Supp. V 2012); *Bond v. Sterling, Inc.*, 997 F. Supp. 306 (N.D.N.Y. 1998) (using the ADA’s definition of disability to determine that breastfeeding is not a disability under state law and stating that “[i]t is simply preposterous to contend a woman’s body is functioning abnormally because she is lactating”); *Christrup*, *supra* note 10, at 487–88 (observing that breastfeeding is related to pregnancy such that it is not covered under the ADA; further articulating some of the concerns with alleging that breastfeeding is a disability); *Eldredge*, *supra* note 12, at 889, 898 (same); Goodman, *supra* note 62, at 167–68 (setting forth arguments for and against ADA claims for nursing workers). It is unclear how these cases will be interpreted under the ADA, as amended by the ADA Amendments Act of 2008, which expressly includes

these cases, existing federal law failed to protect nursing workers, allowing employment barriers to continue.⁶⁵

As these cases progressed—and ultimately failed—Congress considered legislation to create or clarify protections for breastfeeding workers. This legislation proposed amendments to the FMLA, Title VII, or the FLSA to provide traditional labor standards that enable women to work while breastfeeding and to address the discrimination these women experienced at work.

For example, in 1998, the New Mothers' Breastfeeding Promotion and Protection Act was introduced, which would have amended the FMLA by adding lactation breaks to the list of reasons for which a covered employer had to provide unpaid, job-protected leave to eligible employees.⁶⁶ The legislation also proposed the creation of a tax credit for any employer expenses related to providing a place for breastfeeding workers to express milk.⁶⁷

In addition, Congresswoman Carolyn D. Maloney, among others, has repeatedly proposed legislation to amend Title VII to prohibit discrimination against women who are breastfeeding and to encourage employers to support nursing workers with tax credits.⁶⁸ In 2001, Representative Maloney introduced

physiological conditions, dictates that any such condition be assessed in its active state, and has the stated goal of making it easier for people to access its protections. *See* 42 U.S.C. § 12102 (4)(D); 29 C.F.R. § 1630.2(h)(1),(j)(1)(vii) (2013). *See generally* Kevin Barry, Brian East & Marcy Karin, *Pleading Durability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1 (2013); Chai R. Feldblum, Kevin Barry & Emily A. Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. C.L. & C.R. 187, 238–39 (2008) (discussing how the amendments seek to broaden the definition of “disability”).

65. By contrast, twenty-four states have laws that address breastfeeding at work. *See Breastfeeding Laws*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/issues-research/health/breastfeeding-state-laws.aspx> (last updated May 2011). Many of these laws contain provisions that were included in proposed federal legislation. *See id.*; Marcia L. McCormick, *Gender, Family, and Work*, 30 HOFSTRA LAB. & EMP. L.J. 309, 331–33 (2013). Other state law claims also may exist. *See* Suski, *supra* note 56, at 139–40 (describing potential tort claim for wrongful discharge in violation of public policy and calling for coverage under state unemployment insurance systems). *But see* Baker v. Ohio Bureau of Emp't Servs., 685 N.E.2d 1325, 1326–27 (Ohio Ct. App. 1996) (concluding that the breastfeeding mother's decision to quit was not based on just cause); Perdrix-Wang v. Emp't Sec. Dep't, 856 S.W.2d 636, 639 (Ark. Ct. App. 1993) (en banc) (holding that quitting for the purpose of being able to breastfeed does not constitute good cause for unemployment compensation purposes).

66. *See* New Mothers' Breastfeeding Promotion Act of 1998, H.R. 3531, 105th Cong. § 6 (1998) (proposing to provide a breastfeeding worker with up to one hour per eight hour work day to express milk and a proportional amount of time for a shift shorter or longer than eight hours); *see also* Family and Medical Leave Expansion Act, H.R. 1369 110th Cong. (2007) (expanding the FMLA to provide breaks unless the employer can demonstrate undue hardship); Healthy Lifestyles and Prevention America Act, S. 1074 109th Cong. § 217 (2005) (same).

67. H.R. 3531 § 4.

68. Breastfeeding Promotion Act, H.R. 285, 107th Cong. §§ 103, 201(a) (2001); Pregnancy Discrimination Act Amendments of 2001, S. 256, 107th Cong. § 2(1) (2001); Pregnancy Discrimination Act Amendments of 2000, H.R. 3861, 106th Cong. § 2(b)(2) (2000); Pregnancy

the Breastfeeding Promotion Act to prohibit discrimination against breastfeeding women at work and promote accommodations for the expression of milk at work by offering a tax credit to employers who provided a location for its workers to do so.⁶⁹ The bill would have amended Title VII by adding lactation to the definition of “because of sex” or as a premise on which discrimination “on the basis of sex” is prohibited.⁷⁰ Representative Maloney reintroduced the Breastfeeding Promotion Act in 2003, 2007, and 2009 and also regularly reintroduced her prior legislation.⁷¹ Similarly, Senator Olympia Snowe repeatedly introduced the Pregnancy Discrimination Act Amendments, which contained similar language to amend Title VII.⁷²

Finally, in 2009, Representative Maloney and Senator Jeff Merkley introduced a House and Senate bill respectively that combined traditional labor standards and employment discrimination provisions for breastfeeding working women.⁷³ These companion bills included the same provisions as Representative Maloney’s 2001 bill, as well as an amendment to the FLSA requiring employers with fifty or more employees to provide breastfeeding employees with break time and private areas to express breast milk.⁷⁴ In 2010, Senator Merkley included the proposed FLSA amendment from his 2009 bill as part of a larger health care reform bill.⁷⁵ That proposal later became section

Discrimination Act Amendments of 2000, S. 3023, 106th Cong. § 2(1) (2000); Pregnancy Discrimination Act Amendments of 1999, H.R. 1478, 106th Cong. § 2(1) (1999); New Mothers’ Breastfeeding Promotion Act of 1998, H.R. 3531, 105th Cong. § 4 (1998).

69. See H.R. 285 §§ 102(b), 201(a).

70. *Id.* (proposing an amendment to 42 U.S.C. § 2000e(k)).

71. Breastfeeding Promotion Act of 2009, H.R. 2819, 111th Cong. (2009); Breastfeeding Promotion Act of 2007, H.R. 2236, 110th Cong. (2007); Breastfeeding Promotion Act, H.R. 2790, 108th Cong. (2003); Pregnancy Discrimination Act Amendments of 2005, H.R. 2122, 109th Cong. (2005); see also bills listed *supra* note 68.

72. See Pregnancy Discrimination Act Amendments of 2003, S. 418, 108th Cong. (2003); Pregnancy Discrimination Act Amendments of 2001, S. 256, 107th Cong. (2001); Pregnancy Discrimination Act Amendments of 2000, 106th Cong. (2000).

73. See H.R. 2819, 111th Cong. §§ 101, 501 (2009); S. 1244, 111th Cong. §§ 101, 501 (2009).

74. See H.R. 2819, §§ 101, 501; S. 1244, §§ 101, 501. Compare 29 U.S.C. § 207 (2006 & Supp. V 2012), with S. 1244, § 501(a), and H.R. 2819, § 501(a). Had this legislation been adopted, it would have been more comprehensive than the PPACA because it included mandatory accommodations, antidiscrimination protections, and employer incentives.

75. See Press Release, Breastfeeding Amendment Adopted Unanimously During Markup of Health Care Reform Legislation, *supra* note 52; Mary Agnes Carey, Phil Galewitz, & Laurie McGinley, Kaiser Health News, *7 Items You Didn’t Know Were in the Senate Bill*, NBC NEWS (Nov. 30, 2009 3:31:49 PM), <http://www.msnbc.msn.com/id/34209992/nsfhealth-health-care/> (describing the nursing workers amendment as being in the “congressional tradition” of “adding pet interests that otherwise might not pass to a big bill that at least will be put up for a vote”); see also Nicole Kennedy Orozco, Note, *Pumping at Work: Protection from Lactation Discrimination in the Workplace*, 71 OHIO ST. L.J. 1281, 1293 (2010).

4207 of the PPACA, the first federal law to specifically address breastfeeding at work.⁷⁶

II. THE PPACA'S CHANGES TO THE FLSA

With the PPACA, Congress adopted traditional labor standards and accommodations that require employers to support women who pump milk at work, with the goal of promoting breastfeeding by and economic security for low-income workers.⁷⁷ Since March 23, 2010, the PPACA has required employers to provide reasonable break time and a private location, other than a restroom, for certain employees to express milk for up to one year after a child's birth.⁷⁸ In December 2010, the Department of Labor (Department) issued a Request for Information seeking public comment and published preliminary guidance on a number of the new law's provisions.⁷⁹

A. *The FLSA's New Provisions*

The PPACA amended the FLSA to create two new rights for breastfeeding workers: the ability to take job-protected breaks to express milk and access to a private space in which to express.⁸⁰

1. *Break Time*

Section 4207 of the PPACA states that “[a]n employer shall provide a reasonable break time for an employee to express breast milk for her nursing child for one year after the child's birth each time such employee has need to express the milk.”⁸¹ The statute does not define what constitutes “reasonable break time” or determine how to evaluate whether a woman “needs to express” breast milk.⁸²

76. 29 U.S.C. § 207(r). However, every year since 1999, Congresswoman Maloney has included the “Right to Breastfeed Act” in the appropriations process. KAREN M. KEDROWKI & MICHAEL E. LIPSCOMB, *BREASTFEEDING RIGHTS IN THE UNITED STATES* 65–66 (2008). The Act states that “a woman may breastfeed her child on any portion of Federal property where the woman and her child are otherwise authorized to be.” *See* Right to Breastfeed Act, H.R. 1848, 106th Cong. § 2 (1999). In practice, this has given federal employees a limited right to breastfeed at work. KEDROWKI & LIPSCOMB, *supra*, at 64–65.

77. 29 U.S.C. § 207(r).

78. 29 U.S.C. § 207(r), (r)(1)(B).

79. *See* Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010). 1, 857 comments were submitted in response to this request for information; the authors read all publicly available comments. *Reasonable Break Time for Nursing Mothers*, REGULATIONS.GOV, <http://www.regulations.gov/#!documentDetail; D=WHY-2010-0003-0001> (last updated Feb. 22, 2011).

80. 29 U.S.C. § 207(r)(1).

81. *Id.* § 207(r)(1)(A).

82. *See generally id.* § 207(r).

The Department's preliminary interpretation of the law is that breastfeeding workers typically need two to three breaks during an eight-hour shift to express milk.⁸³ According to the Department, the length of the break needed may vary, but expressing breast milk typically will take fifteen to twenty minutes.⁸⁴ Moreover, in determining what constitutes "reasonable break time," employers should consider the availability of a sink and refrigerator, the time it takes to walk to retrieve supplies and travel to the designated space, and whether those supplies have to be unpacked and assembled.⁸⁵ Further, the Department encourages employees and employers to communicate their expectations and develop a mutual understanding about the length and frequency of breaks taken for this purpose.⁸⁶

Although the PPACA does not dictate the manner in which an employee is to communicate her intent to exercise her rights to break time and space to express milk, the Department suggested that workers should "facilitate an employer's ability to provide appropriate space for expressing milk" by providing employers with advance notice of their intent to take breaks.⁸⁷ The FMLA contains a similar notice provision that requires employees to provide thirty days notice of the need for foreseeable leave.⁸⁸ However, unlike the FMLA, the Department's guidance does not address whether an employee should communicate with her employer each time she needs to use her break time for lactation or each time her lactation needs change. What is reasonable or necessary for a worker

83. *See* Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80075 (explaining that the Department consulted with public health officials to conclude that a nursing baby needs to feed every two to three hours and thus a nursing mother must continue to produce milk on a basis consistent with this timing or she may lose the ability to breastfeed).

84. *Id.*

85. *Id.* After milk is expressed by hand or pump it must be refrigerated. Christup, *supra* note 12, at 267.

86. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80075. Based upon experience with similar language in the FMLA regarding scheduling of intermittent leave, this proposal is likely to lead to confusion and litigation. *See* 29 U.S.C. § 2612(b) (2006) (stating that leave for the birth of an employee's son or daughter or placement of a son or daughter with the employee for adoption or foster care "shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise").

87. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80077; *see also* Miller v. Roche Sur. & Cas. Co., Inc., 502 F. App'x 891, 894 (11th Cir. 2012) (holding that an email to a colleague mentioning the law generally and the need for space and coverage to pump was insufficient notice to trigger protection under the PPACA).

88. *See* 29 U.S.C. § 2612(e)(1) (describing how, if the leave is foreseeable based on expected birth or placement, the employee shall provide the employer with not less than 30 days' notice); 29 U.S.C. § 2612(e)(2) (describing how, if the leave is foreseeable, the employee must make reasonable effort to avoid disrupting the operations of the employer).

breastfeeding a three-month-old child may be different than what is reasonable or necessary for a worker breastfeeding a ten-month-old child.⁸⁹

The Department also stated that an employer may ask an expectant mother if she intends to exercise her rights under the PPACA, asserting that doing so “informs the employee of their rights under the law.”⁹⁰ This statement is logically flawed. It assumes that asking an employee if she plans to take lactation breaks equates to notifying her of her rights to take both lactation breaks and to take them in a private location at her workplace.⁹¹ It also ignores the reality that having an employer ask this question may have the effect of intimidating the expecting mother into either choosing not to breastfeed or limiting how much she plans to breastfeed.

Finally, the Department does not consider expressing milk to be a reason that qualifies an employee to take FMLA leave.⁹² Therefore, any break time taken under the PPACA will not count against any FMLA leave to which the employee may be entitled.⁹³ Moreover, the Department states that an employer may violate Title VII if it treats employees who take breaks to express milk under the PPACA differently than employees who take breaks for personal reasons under a disparate treatment theory.⁹⁴ This is important because the PPACA does not provide employment discrimination protection, and previous attempts to bring breastfeeding cases under Title VII failed.⁹⁵

2. Private Space

The PPACA requires all employers to provide “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.”⁹⁶ The

89. See, e.g., Letter from Jacqueline Marlette-Boras, Director, Office of the Maryland WIC Program, to Montaniel Navarro, FLSA Branch Chief, Wage and Hour Division, U.S. Department of Labor (Feb. 22, 2011), available at <http://www.regulations.gov/#!documentDetail;D=WHD-2010-0003-1214> (noting the different experiences of breastfeeding infants of different ages).

90. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80077.

91. The FMLA regulations regarding an employer’s duty to provide an employee notice of her rights under the FMLA are instructive. See 29 C.F.R. § 825.300(a)(3), (b) (2013) (describing an employer’s duty to post notice explaining the law’s provisions, to include notice in any employee handbooks, and to notify the employee of her eligibility to take FMLA).

92. This is because expressing milk does not constitute bonding with and caring for a newborn child, nor is caring for a newborn child by expressing milk deemed a serious health condition for the purposes of the FMLA. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80077; see also *supra* note 63 (providing an overview of previous failed attempts to use the FMLA for this purpose).

93. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80077.

94. *Id.*

95. See *supra* notes 61–62 (providing an overview of previous failed attempts to use Title VII).

96. 29 U.S.C. § 207(r)(1)(B) (Supp. V 2012).

Department interprets this provision to mean that an employer should provide a room if possible, and, if a room is not available, use partitions and curtains to achieve the required privacy.⁹⁷ Windows must be covered and the door should be locked or marked with a sign.⁹⁸

Although employers are not required to maintain a permanent room or space dedicated for lactation, a designated, private space must be available when necessary.⁹⁹ The Department interprets the statute to require an employer to provide a space for lactation even if the employee is not at her primary work location, but rather is working at another location or client worksite.¹⁰⁰ The Department also interprets the PPACA as requiring the provisions of a space in which to safely store the milk.¹⁰¹ While employers are not required to provide refrigeration, they must permit breastfeeding workers to bring a pump for expressing milk and an insulated container for storing the milk, as well as a place to store these supplies.¹⁰²

B. Limitations on the FLSA Amendment

The PPACA's time and space rights are limited in three ways. First, the law creates an affirmative defense for employers with fewer than fifty employees, which allows an employer to avoid providing time and space for lactation if doing so would impose an undue hardship on the business. Second, the PPACA does not protect all workers. Finally, the law offers limited remedies or means of enforcement if an employer violates its provisions.

1. The Affirmative Undue Hardship Defense

The PPACA's break time and space accommodation requirements are mandatory for employers with fifty or more employees.¹⁰³ By contrast, employers with fewer than fifty employees need not provide these accommodations if they can demonstrate an undue hardship.¹⁰⁴ The employer bears the burden of establishing that it qualifies for this defense *vis-à-vis* the

97. See Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80075–76 (noting that the ante room or lounge area connected to a bathroom would meet the statutory requirements, provided that there is a wall separating the rooms; conversely, locker rooms more likely would not meet the requirements).

98. *Id.*

99. *Id.* at 80076.

100. *Id.* at 80077. Although this Department guidance is helpful, it is incomplete and leaves many questions unanswered. For example, although an employer is required to provide a room if possible, it is unclear from whose perspective “possible” is defined. It is also unclear what “free from intrusion” means. For example, it is unclear if aural privacy is required or whether a shared room that supports multiple employees who are or need to express milk suffices.

101. *Id.* at 80076.

102. *Id.*

103. 29 U.S.C. § 207(r) (Supp. V. 2012).

104. *Id.* § 207(r)(3).

number of employees and that compliance with the statute's requirements would meet the required level of hardship.¹⁰⁵ With respect to calculating the number of employees for purposes of this defense, the PPACA adopts the FLSA's definition of "employee," which includes both full- and part-time workers.¹⁰⁶ In addition, the Department instructs employers to count all employees at all work sites.¹⁰⁷ With respect to demonstrating the requisite level of hardship, the PPACA requires a "significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."¹⁰⁸ The Department believes that few employers will be successful in asserting this defense given the limitations in the law's requirements and the high burden an employer must overcome to assert the defense.¹⁰⁹

2. Eligibility Limitations

The PPACA contains three important eligibility limitations: by class, type of breastfeeding, and employer size. First, the PPACA contains two provisions that limit coverage by class. The first class limitation is explicitly identified in the text of the statute: the protections are limited to non-exempt employees.¹¹⁰ A "non-exempt" employee is one who is not exempt from the FLSA's overtime protections based on salary, position, or some other factor.¹¹¹ Teachers and administrators in elementary and secondary schools, a large number of who are women of child-rearing age, also are deemed non-exempt employees.¹¹² Generally, non-exempt workers are hourly employees who earn less than \$455

105. *Id.*

106. *See* 29 U.S.C. § 203(e)(1) (2006); § 207(r)(3).

107. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80077.

108. 29 U.S.C. § 207(r)(3).

109. 75 Fed. Reg. at 80077 ("Employers with fewer than 50 employees may not presume that having a smaller workforce by itself sufficiently demonstrates that compliance would pose a significant difficulty or expense[.]").

110. 29 U.S.C. § 213(a) (2006); *see* Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80074 (noting that only employees who are not exempt from section 7 of the FLSA are entitled to break time). However, all federal workers are covered in an effort to ensure consistency. Memorandum from John Berry, Director, United States Office of Personnel Management to Heads of Executive Departments and Agencies (Dec. 22, 2010), *available at* <http://www.dol.gov/whd/nursingmothers/NMothersFederalEmplymnt.pdf> (requiring agencies to allow exempt employees to use these protections "to ensure consistent treatment of nursing mothers within the Federal workforce").

111. 29 U.S.C. § 213(a); *see Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, (July 2008), U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, http://www.dol.gov/whd/regs/compliance/fairpay/fs17a_overview.pdf.

112. 29 U.S.C. § 213(a)(1); *see Fast Facts*, NAT'L CENTER FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=28> (observing that over three-quarters of public school teachers are women; forty-four percent of which are under the age of 40).

a week and work in non-supervisory positions.¹¹³ By itself, this limitation excludes approximately twelve million otherwise eligible salaried women from qualifying for the PPACA's breastfeeding protections.¹¹⁴ Despite this acknowledged limitation, the Department "hopes that employers will provide this right to express breastfeeding to all workers, regardless of [their] status under the FLSA."¹¹⁵

The law also implicitly limits coverage by class by providing that break time need not be paid.¹¹⁶ According to the Department, although the statute does not require compensation during breaks, if employers otherwise pay employees during breaks, "an employee who uses [her] break time to express milk must be paid in the same way that other employees are compensated for break time."¹¹⁷ Moreover, if the employer only permits breaks of twenty minutes or less, the break time must be counted as hours worked in calculating whether the employee has satisfied the FLSA's minimum overtime and wage requirements.¹¹⁸ The Department also encourages employers to provide flexible

113. See J. Bradley Sedaris, *Wage and Hour Myths: Illuminating the Truth Behind Misconceptions of the Fair Labor Standards Act*, 72 ALA. LAW. 462, 465 (2011) (describing how a salaried worker could be a non-exempt worker).

114. Press Release, Senator Jeff Merkley, Merkley Introduces Breastfeeding Legislation and Highlights Portland Police Bureau's Commitment to Working Mothers (May 13, 2013), available at <http://www.merkley.senate.gov/newsroom/press/release/?id=516937a6-9599-4f90-aad1-2b844883481b>.

115. Melvina C. Ford, Senior Policy Advisor, U.S. Dep't of Labor, Wage & Hour Division, Written Testimony for the Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities Meeting (Feb. 15, 2012), available at <http://www1.eeoc.gov/eeoc/meetings/2-15-12/ford.cfm?renderforprint=1>. The federal government has elected to follow this suggestion. See Memorandum from John Berry, Director, United States Office of Personnel Management to Heads of Executive Departments and Agencies, *supra* note 110.

116. 29 U.S.C. § 207(r)(2) (Supp. V. 2012).

117. See Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80074 (Dec. 21, 2010); *Fact Sheet #73: Break Time for Nursing Mothers under the FLSA*, U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, (Aug. 2012), <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf>.

118. See Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80075. In addition, employees must be completely relieved of duty for breaks to be unpaid. *Id.* A number of comments submitted in response to the Department's preliminary guidance contained statements of workers' interest in doing light duty work that involved reading or using a computer while pumping. See, e.g., Melanie Higgins, *Comment on the Wage and Hour Division (WHD) Notice: Reasonable Break Time for Nursing Mothers*, REGULATIONS.GOV (Jan. 24, 2011), <http://www.regulations.gov/#!documentDetail;D=WHD-2010-0003-0099>; Kerri Sullivan, *Comment on the Wage and Hour Division (WHD) Notice: Reasonable Break Time for Nursing Mothers*, REGULATIONS.GOV (Jan. 31, 2011), <http://www.regulations.gov/#!documentDetail;D=WHD-2010-0003-0246>; Catherine Truxillo, *Comment on the Wage and Hour Division (WHD) Notice: Reasonable Break Time for Nursing Mothers*, REGULATIONS.GOV (Feb. 8, 2011), <http://www.regulations.gov/#!documentDetail;D=WHD-2010-0003-0641>.

scheduling for employees who seek to make up for unpaid break time used to express milk.¹¹⁹

Second, the PPACA protects only one type of breastfeeding. The statute requires employers to provide break time “for an employee to *express* breast milk.”¹²⁰ However, expressing milk by pumping to preserve it for later consumption is only one type of breastfeeding. The term “breastfeeding” refers to feeding a child via milk produced or stored in a woman’s body. This may be done by expressing milk or by the process of suckling, whereby a child attaches to the mother’s body to eat.¹²¹ The PPACA addresses only the expression of milk, not suckling.¹²²

Third, the law uses a new type of employer threshold requirement to limit its scope. Before the PPACA, federal employment and discrimination law took one of two approaches to limiting eligibility based on employer coverage. One approach, found in the majority of federal employment laws, requires employers to have a defined number of employees before the substantive requirements apply. For example, Title VII and the ADA only apply if an employer has at least fifteen employees.¹²³ The Age Discrimination in Employment Act (ADEA) only applies if an employer has at least twenty employees.¹²⁴ The FMLA only applies if an employer has at least fifty employees in a seventy-five mile radius.¹²⁵ The other approach applies the statute’s provisions regardless of the number of employees working for a particular employer. For example, provisions of the Uniformed Services Employment and Reemployment Rights Act (USERRA) apply to all employers.¹²⁶ By contrast, the PPACA uses a hybrid model by combining the two approaches. The PPACA applies to all employers,

119. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80075. The breaks must be paid if the employer pays employees for other break times. *Id.*

120. 29 U.S.C. § 207(r)(1)(A) (emphasis added).

121. Kolinsky, *supra* note 9, at 337 (discussing the mechanics of producing breast milk); *see also* KEDROWKI & LIPSCOMB, *supra* note 76, at 2 (arguing that different definitions of “breastfeeding” may lead to varying legal consequences); U.S. BREASTFEEDING COMM., *supra* note 13, at 5–6. Pumping devices vary in cost, speed, and size. *Id.* at 6. Other options to breastfeed include bringing a child to work, having someone else bring a child to work, or leaving work to go to a child. KEDROWKI & LIPSCOMB, *supra* note 76, at 16.

122. *See* 29 U.S.C. § 207(r)(1)(A). This also has class implications, given the expense associated with purchasing pumps, bottles, or other items necessary to use expression as a food source for a child.

123. Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253 (codified as amended at 42 U.S.C. § 2000e (2006)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 101(5)(a), 104 Stat. 327, 330 (codified as amended at 42 U.S.C. § 12111(5)(A) (2006)).

124. Age Discrimination and Employment Act of 1967, Pub. L. No. 90-202, § 11(b), 81 Stat. 602, 605 (codified as amended at 29 U.S.C. § 630(b) (2006)).

125. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 101, 107 Stat. 6, 8 (codified as amended at 29 U.S.C. § 2611(2)(B)(ii) (2006)).

126. Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, § 4303, 108 Stat. 3149, 3150–51 (codified as amended at 38 U.S.C. § 4303(4)(a) (2006)).

regardless of the number of employees at a particular worksite, but the undue hardship defense only applies to employers with less than fifty employees.¹²⁷

Finally, all employment laws contain some type of eligibility restriction. The PPACA, however, is the first law to cover such a small group of primarily low-income workers who choose to engage in a particular activity (breastfeeding) that society wants to encourage by offering protections to engage in a specific form of that activity (expression) at work, while also allowing small employers to opt out of supporting the activity.

3. Limited Remedies and Enforcement Mechanisms

The PPACA does not specify a penalty for an employer that violates the break time or space requirements. Instead, the PPACA incorporates the FLSA's penalty provision, which states:

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.¹²⁸

Thus, while the FLSA provides a private right of action for employees to recover unpaid wages, in most instances the failure to provide lactation breaks or space to a nursing mother will not result in lost wages. Typically, designated break time is unpaid and the failure to provide space is not associated with unpaid wages or other compensation. The FLSA also imposes a civil penalty for willful or repeated violations that may now include violations of PPACA provisions.¹²⁹ However, in reality, the PPACA lacks a reliable enforcement mechanism because there is no penalty available and proof of willful or repeated violations will be difficult—if not impossible—to obtain.¹³⁰

A nursing worker who has been discharged or discriminated against because she attempted to enforce her break time or space rights may still file a retaliation complaint with the Department or file a private cause of action seeking remedies

127. No further guidance is provided on how to count employees for this threshold. *See* 29 U.S.C. § 207(r)(3).

128. 29 U.S.C. § 216(b) (2006).

129. *See* 29 U.S.C. § 216(e)(2) (2006) (“Any person who repeatedly or willfully violates section 206 or 207, relating to wages, shall be subject to a civil penalty not to exceed \$1,100 for each such violation.”); *see also* Sarah Andrews, *Lactation Breaks in the Workplace: What Employers Need to Know About the Nursing Mothers Amendment to the FLSA*, 30 HOFSTRA LAB. & EMP. L.J. 121, 140 (2012) (analyzing this provision).

130. This limited enforcement schema was upheld in one of the few cases decided under the PPACA to date. *See* Salz v. Casey's Mktg. Co., No. 11-CV-3055-DEO, 2012 WL 2952998, at *3 (N.D. Iowa July 19, 2012) (granting motion to dismiss alleged PPACA violations because section 216(b) limits enforcement to unpaid wages).

like reinstatement or lost wages.¹³¹ Additionally, if an employer refuses to comply with the law, a breastfeeding worker may file a claim with the Department, which in turn could seek injunctive relief in federal court to obtain reinstatement, lost wages, and access to break and space to express milk should it so choose.¹³² For example, if an employer terminates a nursing worker because she takes breaks to express milk or because she indicated her intent to take breaks to express, the Department may intervene to enforce her rights under the PPACA.¹³³ Unfortunately, in reality, the combination of limited potential remedies and lack of enforcement resources will hamper the law's utility.

III. A NEW TYPE OF EMPLOYMENT LAW?

By adopting these substantive rights and limitations, Congress combined a mix of employment law concepts to achieve the public health goal of promoting breastfeeding among certain low-income working mothers. Congress could have supported breastfeeding in this population in a number of ways. For example, Congress could have included antidiscrimination provisions for lactating mothers, or new moms generally, if the goal was to overcome the barriers described above. Congress also could have mandated that employers provide on-site day care. Yet, Congress elected not to create such provisions. The inclusion of these specific provisions in the PPACA represents Congress's deliberate choice about how to achieve a public health goal by harkening back to familiar labor standards and employment discrimination provisions, yet integrating these provisions in a form not yet seen before in employment law.

The PPACA not only selectively borrows concepts from existing laws, but it also represents something rarely seen in employment law: at-work protections for a relatively small set of individuals to promote specific out-of-work conduct.¹³⁴ The PPACA clearly promotes breastfeeding by requiring the

131. 29 U.S.C. § 215(a)(3) (2006) (stating that it is unlawful for an employer to discharge or in any other manner discriminate against any employee because she has filed a complaint or instituted any proceeding); Ford, *supra* note 115; *see, e.g.*, Boxum-Debolt v. Office of the Dist. Att'y, No. 12-2641-KHV, 2013 WL5466915 (D. Kan. Sept. 30, 2013).

132. 29 U.S.C. § 217 (2006); Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80078 (Dec. 21, 2010); *see, e.g.*, Salz, 2012 WL 2952998 (relying on this limitation to deny a private lawsuit).

133. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80078 (stating that this would violate 29 U.S.C. § 215(a)(2)).

134. *See* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 369 (2002) (observing that "[m]ost statutes governing the workplace only apply within the context of the employment relationship"). Two additional areas of employment law that create protections to encourage participation in behavior that does not relate to one's current job involve encouraging civilian participation in the militia and seeking services after domestic violence, sexual assault, dating violence, or stalking. *See, e.g.*, 38 U.S.C. § 4301(a)(1) (providing labor standards and antidiscrimination protection "to encourage

provision of job protection for reasonable break time and defined space accommodations for low-income workers to pump milk. These provisions—and the failure to include others that were proffered—represent a shift in the purpose of employment law. This invites the question of whether the new direction represented in this statute is one that should be repeated.

A. “Traditional” Employment Law and Theory

Over the years, scholars and advocates have offered different classifications and theories to justify employment law.¹³⁵ One common way to classify employment laws is to identify them as either traditional labor standards or as discrimination protections. Traditional labor standards require an employer to do—or not do—something for an individual employee “as a condition of engaging in commerce.”¹³⁶ By contrast, employment discrimination provisions prohibit an employer from taking actions based on an employee’s membership in a statutorily defined group, or from implementing a facially neutral policy that has a disparate impact on a statutorily defined group.¹³⁷

noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service”); Victims’ Economic Security and Safety Act, 820 ILL. COMP. STAT. 180/15 1, 3 (2009) (“[E]nabling victims of domestic or sexual violence to maintain the financial independence necessary to leave abusive situations, achieve safety, and minimize the physical and emotional injuries from domestic or sexual violence, and to reduce the devastating economic consequences . . . by entitling employed victims of domestic or sexual violence to take unpaid leave to seek medical help, legal assistance, counseling, safety planning, and other assistance without penalty from their employers [among other things]”).

Employment law arguably also has incentivized certain behavior in whistleblower situations. Under whistleblower laws, employers are prohibited from retaliating against employees who disclose illegal, corrupt, or wasteful activity. *See, e.g.*, Whistleblower Protection Act of 1989, Pub. L. No. 101–12, § 3 103 Stat. 16, 29 (codified as amended at 5 U.S.C. §§ 1218–19, 1221 (2012)) (providing a right of action for terminated whistleblowers). However, whistleblower protections are clearly linked to employment because they encourage employees to report illegal or unsafe activities at their workplaces, and, thus, are distinguishable from the other non-job related behavior.

135. *See* Befort, *supra* note 134, at 378 (arguing that recent employment laws have either created minimum workplace standards or prevented employers from discriminating against members of a protected category); James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1743 n.204 (1999) (same); Samuel R. Bagenstos, *Employment Law and Social Equity*, 112 MICH. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2208883>.

136. Workplace Flexibility 2010, Workplace Flexibility: An Overview of Nondiscrimination Models 33 (Fall 2007) (on file with authors). Some scholars call this type of law, under which an employer either has the duty to act or is prohibited from acting, a “minimum rights statute” or “minimum standards.” *See, e.g.*, Bagenstos, *supra* note 135, at 120; William R. Corbett, *The Need for A Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 130–31 (2003); Benjamin I. Sachs, *Employment Law As Labor Law*, 29 CARDOZO L. REV. 2685, 2701–02 (2008) (comparing minimum rights statutes to labor law’s collective rights approach); Noah D. Zatz, *The Minimum Wage As A Civil Rights Protection: An Alternative To Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 3 (2009).

137. *See* Befort, *supra* note 134, at 379; Corbett, *supra* note 136, at 141.

Traditional labor standard laws include the FLSA, which requires employers, inter alia, to pay employees a minimum wage and overtime pay and prohibits child labor;¹³⁸ the FMLA, which requires some employers to provide job-protected, unpaid leave for defined family or medical reasons;¹³⁹ the Occupational Safety and Health Act (OSH Act), which requires employers to provide a safe and healthy environment by conforming to minimum standards;¹⁴⁰ the Employee Retirement Income Security Act, which requires employers that provide health and retirement plans to employees to follow designated minimum standards;¹⁴¹ and the Worker Adjustment and Retraining Notification Act, which requires large employers to notify employees before closing the business or engaging in mass layoffs.¹⁴² A labor standard may apply to conduct for all employees (like the OSH Act) or only for a select group of employees (like the FMLA).¹⁴³

Traditional employment discrimination laws include Title VII, which prohibits discrimination based on race, sex, or national origin;¹⁴⁴ the ADEA, which prohibits discrimination based on the age of an employee or applicant who is at least forty years old;¹⁴⁵ and the ADA, which prohibits discrimination based on the disability or perceived disability of an employee or applicant.¹⁴⁶ The development of disparate impact and mixed-motive theories has served to strengthen the effectiveness of employment discrimination laws. Yet, these laws are different from traditional labor standards because they also prohibit actions

138. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201 *et seq.* (2006 & Supp. V 2012)).

139. 29 U.S.C. § 2601 *et seq.* (2006 & Supp. V 2012).

140. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. § 651 *et seq.* (2006 & Supp. V 2012)).

141. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. § 1001 *et seq.* (2006 & Supp. V 2012)).

142. Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (codified as amended at 29 U.S.C. § 2101 *et seq.* (2006 & Supp. V 2012)); *see also* Evan Hudson-Plush, Note, *WARN's Place in the FLSA/Employment Discrimination Dichotomy: Why A Warning Cannot Be Waived*, 27 CARDOZO L. REV. 2929, 2957-58 (2006) (explaining why WARN is a labor standard, in comparison to the FLSA). *See generally* Workplace Flexibility 2010, *supra* note 136; Corbett, *supra* note 136, at 130-31 ("Other examples include . . . the Employee Polygraph Protection Act (EPPA), which prohibits employers from requiring employees to take polygraph examinations, or from taking adverse employment actions based on the results, except under certain circumstances").

143. Workplace Flexibility 2010, *supra* note 136; *see also* Sachs, *supra* note 136, at 2701-02 (comparing labor standards to labor law's collective rights approach).

144. 42 U.S.C. § 2000e-2(a) (2006).

145. 29 U.S.C. § 631(a) (2006).

146. 42 U.S.C. § 12112(a) (2006 & Supp V 2012).

motivated by an employee's membership in a protected group or employment policies that have a disparate impact on that group.¹⁴⁷

Some scholars designate accommodations as a distinct third category of employment law.¹⁴⁸ Others classify accommodation provisions as a subset of one of the other two categories of employment law or along with the other employment law provisions with which they are affiliated. Following the latter categorization, an accommodation provision may be a labor standard if it is viewed as a separate, stand-alone protection, or it may be an employment discrimination provision if Congress conferred the right to an accommodation directly in a discrimination statute. An example of a labor standard accommodation is found in USERRA, which requires employers to accommodate a person who incurred or aggravated a disability while serving in the military by making "reasonable efforts" to re-qualify the person for the position to which he or she is entitled to return.¹⁴⁹ The failure to provide this accommodation may be actionable.¹⁵⁰ An example of an employment discrimination accommodation provision is found in the ADA, which defines "discrimination," in part, as the failure to make a reasonable accommodation to an applicant or employee.¹⁵¹ Additionally, an accommodation provision that is

147. Corbett, *supra* note 136, at 130–31; Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1818 (2005) ("[A]ntidiscrimination jurisprudence . . . teaches that civil rights statutes are intended to punish bad actors instead of directing defendant-employers to fix broader societal wrongs"); Hudson-Plush, *supra* note 142, at 2952–58 ("A dichotomy thus exists between labor standard statutes that set minimum standards and supersede contractual outcomes, and employment discrimination statutes which do not seek to supplant private contractual outcomes, but to eliminate wrongful conduct and barriers to labor market efficiency.").

148. See, e.g., Elizabeth F. Emens, *Framing Disability*, 2012 U. ILL. L. REV. 1383, 1403–04 (2012); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 644–45 (2001); Roberts, *supra* note 5, at 1301; Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations As Antidiscrimination*, 153 U. PA. L. REV. 579, 593 (2004).

149. 38 U.S.C. § 4313(b)(2)(B) (2006). According to USERRA, an employee shall be promptly reemployed . . . (3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service— (A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or (B) . . . in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.

Id. § 4313(a)(3)(A)–(B).

150. See, e.g., *Brown v. Prairie Farms Dairy, Inc.*, 872 F. Supp. 2d 637, 640 (M.D. Tenn. 2012).

151. 42 U.S.C. § 12112(b) (2006 & Supp. V 2012) ("[T]he term 'discriminate against a qualified individual on the basis of disability' includes— (5) (A) not making reasonable accommodations . . . or (B) denying employment opportunities to a job applicant or employee who

an employment discrimination provision may also function like a traditional labor standard or affirmative right.¹⁵² Similarly, some laws contain components of both labor standards and employment discrimination provisions. For example, USERRA contains a labor standard that requires employers to provide up to five years of job protection to certain workers and an employment discrimination provision that prevents employers from taking employment actions because of a worker's membership in the military.¹⁵³

Classifying a provision as either a labor standard or an employment discrimination provision is important because the theories underlying different types of employment law vary. The main theories that have developed to defend and explain employment law are: to regulate the employment relationship to address imbalances of bargaining power, to address economic efficiency, and to promote social equality. The theory that the government may regulate the employment relationship to address imbalances of bargaining power between employees and employers is often used to justify employment law, especially labor standards.¹⁵⁴ This theory is most persuasive when considering laws that require employers to undertake costs that have a broad impact, such as minimum wage and overtime protections. Commentators have clarified that "[t]hese minimum labor standard laws eliminate societal concerns from the competitive process so that employers do not compete on these standards."¹⁵⁵ As the Senate similarly explained, "labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers."¹⁵⁶ Additionally, labor standards are necessary to maximize economic efficiency.¹⁵⁷ Indeed, some scholars argue that individual employment law should be evaluated by its effect on the efficiency of labor markets.¹⁵⁸

is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation . . .").

152. Workplace Flexibility 2010, *supra* note 136, at 24.

153. Compare 38 U.S.C. § 4312(a)(2) (2006 & Supp. V 2012) (exemplifying a reemployment provision), with 38 U.S.C. § 4311(a) (2006) (exemplifying an antidiscrimination provision).

154. See Stewart J. Schwab, *The Law and Economics Approach to Workplace Regulation*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 91, 111 (Bruce E. Kaufman ed., 1997).

155. Hudson-Plush, *supra* note 142, at 2950, 2952 (making this observation with respect to the FLSA and FMLA and explaining that the "fundamental difference is that labor standard statutes . . . are meant to supercede private contractual outcomes, while employment discrimination statutes are not meant to override private contracts, but to remedy a societal wrong"); see also Corbett, *supra* note 136, at 128 (explaining that the FLSA "established minimum rights," such as "a minimum wage, a maximum number of hours before overtime was due, and minimum wages for engaging in work and for certain types of work").

156. S. Rep. No. 103-3, at 5 (1993), reprinted in 1993 U.S.C.C.A.N. 7.

157. Bagenstos, *supra* note 135, at 106.

158. See, e.g., Henry N. Butler & Keith W. Chauvin, *Economic Analysis of Labor Markets: A Framework for Analyzing Employment Law Issues*, 8 KAN. J.L. & PUB. POL'Y, 1, 4 (1999); Seth

Conversely, the main theory justifying employment discrimination provisions is the advancement of social equality by increased access to the workplace for historically disadvantaged groups.¹⁵⁹ This theory posits that some employer costs are justified to promote social equity. Historically, commentators have defended employment discrimination provisions as a mechanism to address systemic patterns of stigma and subordination by targeting a practice of discrimination and occupational segregation that supports those patterns.¹⁶⁰ Under this theory, employment discrimination provisions and workplace accommodations are necessary to overcome systemic patterns of stigma and subordination.

Employment law scholars also debate whether accommodation and employment discrimination provisions are distinct concepts.¹⁶¹ Many scholars argue that employment discrimination requirements and accommodation mandates are different because employment discrimination provisions prohibit employers from acting on prejudice, whereas accommodations prohibit employers from acting on their desire to save money.¹⁶² Others argue that the ADA accommodation and antidiscrimination provisions are similar because both seek “to overcome systemic patterns of stigma and subordination by targeting a practice of occupational segregation that undergirds those patterns.”¹⁶³ In this view, an accommodation is a discrimination requirement with which “employers make individualized changes in facially neutral rules, structures, or tasks to enable a protected class member to perform a given job and produce as much output as non-accommodated coworkers.”¹⁶⁴

This theory is also used to justify Title VII and the expenses incurred by employers subjected to them.¹⁶⁵ The legislative history of employment discrimination statutes typically identifies the historical discrimination and subordination of members of the targeted groups in society and at work, and statistical and other documentation of the stigma and the long-term economic impact of workplace exclusion and discrimination that contributed to

D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 37 (2000).

159. See Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 839 (2003).

160. See, e.g., Befort, *supra* note 134, at 392.

161. See *supra* note 152 and accompanying text.

162. See, e.g., Waterstone, *supra* note 147 (highlighting the distinction between antidiscrimination and accommodation approaches and observing that courts seem uncomfortable with the accommodation approach).

163. Bagenstos, *supra* note 159, at 830.

164. *Id.* at 836.

165. See, e.g., Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2479–81 (1994); Befort, *supra* note 134, at 400.

class-based inequality.¹⁶⁶ These statutes address systemic, class-based subordination through the provision of accommodations and protections from discrimination at work for groups who have experienced discrimination based on membership in a protected category. Consequently, some scholars assess their effectiveness in terms of achieving social equity.¹⁶⁷ Therefore, accommodations may be a form of antidiscrimination requirements that recognize that it is sometimes necessary to make structural changes to the workplace to achieve the goal of overcoming past discriminatory animus through meaningful inclusion.

Some scholars have postulated that this theory has two variations: the difference model and the sameness model. The difference model of equality posits that differential or preferential treatment may be necessary to ensure equality; the sameness model of equality posits that employees should be treated the same regardless of their membership in a protected class.¹⁶⁸ Title VII is an example of an employment discrimination statute that attempts to address historical societal discrimination by requiring employers to treat employees the same regardless of gender, race, color, national origin, or religion.¹⁶⁹ The ADA incorporates both a sameness model, by prohibiting covered employers from treating individuals with disabilities differently from similarly situated individuals, and a difference model, by providing preferential treatment in the form of a reasonable accommodation.¹⁷⁰ The ADA represents both models, recognizing that, in some instances, differential treatment of individuals with disabilities is necessary to ensure equal opportunity and to address historical barriers to access to the workplace.¹⁷¹

Other approaches to employment discrimination law involve the application of the antisubordination and anticlassification principles to constitutional equal protection law.¹⁷² The antisubordination theory asserts that social stratification

166. See Abrams, *supra* note 165, at 2479–81 (discussing the stigma and gender-based discrimination that women may face in the workplace); Befort, *supra* note 134, at 365–66 (providing demographic data for workers in 1950).

167. See, e.g., Befort, *supra* note 134, at 458 (describing the narrow impact of the Equal Pay Act); Abrams, *supra* note 165, at 2479–80 (describing Title VII and the theory of equality for women in employment).

168. See, e.g., Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 10–11 (1996).

169. See, e.g., Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation Under the Americans With Disabilities Act*, 55 ALA. L. REV. 951, 954 (2004).

170. See 42 U.S.C. § 12112(b)(5)(A) (2006 & Supp. V 2012); Ball, *supra* note 173, at 955 (citing Karlan & Rutherglen, *supra* note 168, at 10–11); see also Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019, 1021–22 (7th Cir. 1997) (noting that the ADA contains “distinct” disparate treatment and failure to provide reasonable accommodation claims).

171. Ball, *supra* note 173, at 955.

172. See Jack M. Balkin & Reva B. Siegel, *The American Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 12 (2003).

prevents true equality and that equal access to rights and privileges, such as employment and employment discrimination law, should address social stratification by providing protections to historically oppressed groups.¹⁷³ By contrast, the anticlassification principle asserts that the government should not classify individuals on the basis of group identification.¹⁷⁴ Both theories argue that, historically, employment discrimination law was best explained by antistatutory theory, but that the anticlassification principle more accurately explains recent discrimination laws.¹⁷⁵

Finally, employment laws have also been used to challenge the male worker norm by attempting to address the reality that the workplace remains designed for male workers, as reflected in work hours, wages, structures, and other disadvantages to caregivers, including breastfeeding mothers.¹⁷⁶

B. Analyzing the PPACA with a Labor Standard Lens

The PPACA contains elements of both labor standards and employment discrimination provisions. Despite the incorporation of these concepts, the PPACA cannot be justified by the employment law theories underlying traditional labor standards; it simply does not fit within the economic efficiency or regulation to address bargaining imbalances theories.

The PPACA's breastfeeding provisions, placed in a federal healthcare law, are intended to promote breastfeeding. The PPACA achieves this goal through provisions that resemble labor standards. Requiring employers to comply with some statutorily defined floor of rights involving the hours and location of work is a classic labor standard provision.

Yet, the PPACA is different than most labor standards. One difference relates to the small group of workers who are afforded these rights based on employee choices: the choice to have children and the choice to breastfeed. Further, the PPACA limits its protections to those in a strategically defined group. This is a discrimination concept—not a labor standard concept. Indeed, “outside of the antidiscrimination precinct, individual employment law does not protect particular classes or axes of identity. Its protections are, in an important sense,

173. *Id.* at 9.

174. *Id.* at 10.

175. Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 975–76, 983–87 (2012) (arguing that recent changes to the ADA, Title VII, and the enactment of the Genetic Non-Discrimination Act reflect a shift in statutory equality law toward anticlassification values by emphasizing anticlassification provisions and deemphasizing certain antistatutory provisions).

176. The “ideal worker” is a worker “who works full time and overtime and takes little or no time off for childbearing or child rearing.” JOAN WILLIAMS, UNBENDING GENDER 1 (2000); see also Robin R. Runge, *Redefining Leave From Work*, 19 GEO. J. ON POVERTY L. & POL'Y 445, 445–47 (2012); Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 311–18 (1999).

universal.”¹⁷⁷ Similarly, in some respects, employment discrimination provisions are a type of traditional labor standard that relate to a protected group.¹⁷⁸ Applying this principle to the PPACA moves the law outside of traditional labor standard territory. At its core, the PPACA provisions only apply to a particular type of worker: non-exempt breastfeeding mothers with children under the age of one.

However, if the failure to provide universal coverage systematically precludes a statute from qualifying as a labor standard, it would be problematic for the FMLA, which is frequently used as one of the model labor standard statutes.¹⁷⁹ Although the groups covered by the FMLA are different than the group defined in the PPACA, the FMLA contains its own, much-criticized eligibility restrictions, such as the failure to cover small employers, part-time workers, or most contingent workers (all of which are covered under the PPACA), as well as the failure to provide wage replacement or coverage for caregiving generally.¹⁸⁰ These limitations, including their disproportionate impact on women, are the subject of continued debate.¹⁸¹ Nonetheless, they cannot automatically be the basis of classifying a law differently.

Moreover, the quintessential labor standards law—the FLSA—uses group membership for certain protections.¹⁸² While some of the FLSA’s protections are universal (like the prohibition on using child labor or minimum wage protections),¹⁸³ the FLSA also contains exemptions to the overtime provisions, which have been expanded through regulatory interpretation over the years.¹⁸⁴ These exemptions exist because, in the 1930s, Congress observed that employees who made a particular wage or had managerial experience had different needs than those without these characteristics.¹⁸⁵ These are the very

177. Bagenstos, *supra* note 135, at 105.

178. See, e.g., Workplace Flexibility 2010, *supra* note 136 (noting that labor “standards may serve as alternatives to nondiscrimination models, or nondiscrimination models might serve as complements to or components of a labor standard.”).

179. See, e.g., *id.*; Corbett, *supra* note 136, at 130–31.

180. See 29 U.S.C. § 2611 (2)(A)–(B) (2006); see also Michelle A. Travis, *What A Difference A Day Makes, or Does It? Work/Family Balance and the Four-Day Work Week*, 42 CONN. L. REV. 1223, 1250–51 & n.155 (2010) (listing articles in which “scholars have criticized the FMLA for its limited coverage on a variety of different grounds” that and summarizing their respective critiques of these limitations).

181. See, e.g., Runge, *supra* note 176, at 449–50; Travis, *supra* note 180, at 1232–34.

182. See, e.g., 29 U.S.C. § 213 (a)(1) (2006) (exempting some classes of employees from benefiting from minimum wage and maximum hour requirements).

183. 29 U.S.C. § 212(a)–(b) (2006) (child labor); 29 U.S.C. § 206(a)(1) (minimum wage).

184. 29 U.S.C. § 213(a)(1–17); 29 C.F.R. § 541 (2013).

185. See Garrett Reid Krueger, Comment, *Straight-Time Overtime and Salary Basis: Reform of the Fair Labor Standards Act*, 70 WASH. L. REV. 1097, 1098–99 (1995); see also Hansen, *supra* note 34, at 907 (observing that “women who are most vulnerable to loss of income, especially the working poor, would be unable to afford unpaid breaks and might forego expressing milk”); Harry G. Hutchison, *Waging War on “Unemployables”? Race, Low-Wage Work, and Minimum Wages:*

same class-based exemptions that are incorporated into and limit the PPACA,¹⁸⁶ so they cannot be used as the basis for declaring that the PPACA is not a traditional labor standard any more than they are used to declare that the FLSA is not a traditional labor standard. However, the PPACA's limitations go further than the FLSA's. Even with their coverage limitations, traditional labor standards affect the entire workforce. The FLSA's minimum wage and overtime provisions apply to *all* employees who are non-exempt. Similarly, the FMLA applies to *all* employees who experience serious health conditions or need to care for a family member with one and then it has coverage limitations. The PPACA provisions are different by requiring unpaid break time and a location for a very small population of workers for a limited purpose and for a limited time.

Accordingly, because the PPACA resembles a traditional labor standard, while also looking like something else, it is helpful to examine the theories that justify labor standards to determine whether the PPACA can be classified as a labor standard. Arguably, the PPACA is designed to maximize economic efficiency. Requiring employers to provide break time and a location to express milk during work hours is economically efficient because it enables a segment of the workforce to return to work after giving birth and maintain full-time employment. Without the ability to express milk at work, many new mothers are unable to return to the workforce. Losing these productive employees and expending the costs to recruit, hire, and train new employees is not cost efficient.¹⁸⁷ The PPACA responds to the failure of the free market and former public policies to alter workplace structures to allow breastfeeding workers to remain employed. In this way, the PPACA regulates the employment relationship by providing standards and accommodations to improve retention and lower turnover.

Similarly, the PPACA maximizes economic efficiency by providing an undue hardship defense. The defense exempts small employers from the PPACA's break time and space requirements if they are unduly burdensome after

The New Evidence, 29 HOFSTRA LAB. & EMP. L.J. 25, 46–47 (2011) (noting the FLSA's "explicit commitment to low-wage workers" and a potential antipoverty justification for the law).

186. 29 U.S.C. § 213. An effort is underway to make these protections less class-based by expanding them to salaried workers. See Supporting Working Moms Act 2013, S. 934, 113th Cong. (2013); Supporting Working Moms Act of 2013, H.R. 1941, 113th Cong. (2013). One of the bill's sponsors estimates that this would "expand [the PPACA's provisions] to cover approximately 12 million salaried women who work in traditional office environments." Press Release, Senator Jeff Merkley, *supra* note 114. There are also current proposals to create other protections to achieve integration and attachment of working parents and pregnant working women, in particular. See, e.g., Pregnant Workers Fairness Act, H.R. 1975 113th Cong. (2013) (requiring employers to provide the same types of accommodations for pregnant women as people with disabilities get under the ADA); Pregnant Workers Fairness Act, S. 942 113th Cong. (2013) (same).

187. See *supra* note 54 (summarizing the business case for breastfeeding-supportive workplaces).

consideration of the relevant cost, employer size, and efficiency.¹⁸⁸ However, the limited scope of the PPACA significantly limits any possible economic efficiency. Further, the potential economic advantage an employer otherwise may gain is limited by the space requirement, the loss in productivity of an employee during the time of expression, and her travel time to and from the designated expression location.

However, the PPACA rectifies economic imbalances in the same way as the FLSA.¹⁸⁹ The FLSA was meant “to correct and as rapidly as practicable to eliminate” work “conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”¹⁹⁰ The sponsors of the PPACA used a similar rationale. Specifically, members of Congress sought to advance the public health benefits of mothers who breastfeed their children by ensuring that breastfeeding mothers can express at work.¹⁹¹ Moreover, the targeting of non-exempt employees also indicates that the PPACA addresses imbalances of bargaining power between low-income employees and their employers. However, the limited scope of the PPACA’s labor standard weakens this argument.

The law’s ability to mitigate the imbalance of bargaining power between employees and employers is also undercut by its failure to include a strong enforcement mechanism. Both the government and individuals, through litigation and other means, usually enforce traditional labor standards when necessary. For example, employees who are denied FMLA leave have a private right of action against their employers to seek redress and obtain relevant remedies.¹⁹² Similarly, the FLSA, the OSH Act, and USERRA all provide a private right of action or an administrative complaint process through which employees may enforce underlying substantive rights and obtain relevant remedies.¹⁹³ Under USERRA, the Department created a national Ombudsman Services Program through which a neutral and free mediator is available to assist

188. 29 U.S.C. § 207 (r)(3) (Supp. V 2012).

189. See Hudson-Plush, *supra* note 142, at 2952–58 & n. 173 (quoting Taylor v. Progress Energy, Inc., 415 F.3d 364, 374–75 (4th Cir. 2005)) (justifying the FMLA’s minimum leave labor standard because “labor standards are necessary . . . to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly”). *But see* Zatz, *supra* note 136, at 5 (criticizing the economic justification of the FLSA and reframing it as a discrimination law).

190. 29 U.S.C. § 202(a)–(b) (2006); see Hutchison, *supra* note 185, at 46–47 (quoting Juan C. Botero, *The Regulation of Labor*, 119 QUARTERLY J. ECON. 1339, 1342 (2004)) (arguing that the law may need to intervene “to protect the interests of workers and to help assure a minimum standard of living . . . because ‘free labor markets are imperfect’ and provide an opportunity for employers to extract rents by abusing workers, which is a source of ‘injustice and inefficiency.’”); Krueger, *supra* note 189, at 1109.

191. See, e.g., Press Release, Senator Jeff Merkley, *supra* note 114.

192. 29 U.S.C. §§ 2615(a)(1), 2617(a)(2) (2006).

193. 29 U.S.C. §§ 216(b), 217 (2006); 29 U.S.C. § 660 (2006); 38 U.S.C. §§ 4322, 4323(a) (2006 & Supp. V 2012).

an employee in enforcing his rights or negotiating with his employer.¹⁹⁴ The PPACA does not contain any of these enforcement mechanisms and relevant remedies, which weakens its potential status as a labor standard.¹⁹⁵ Without an effective enforcement mechanism and the availability of penalties, qualifying workers are protected by nothing more than a symbolic statement of support. Consequently, the PPACA fails as a labor standard.

C. Analyzing the PPACA with a Discrimination Law Lens

The PPACA does not fit as an employment discrimination law. Although the PPACA may be a new type of antidiscrimination law that addresses social inequity by targeting a class of workers without a shared immutable characteristic or historical experience of workplace discrimination, it ultimately fails because it does not contain any antidiscrimination protections and it provides only defined, controlled accommodations to promote breastfeeding for a small subset of the worker population for a limited time period.

The text of the PPACA explicitly fails to prohibit discrimination against nursing workers; breastfeeding women are still not a protected class. Moreover, the PPACA does not require that employers provide an affirmative reasonable accommodation as developed under the ADA jurisprudence to meet the needs of women who are nursing or breastfeeding. Rather, it requires employers to provide unpaid break time for one specified purpose, thereby defining and limiting what constitutes a “reasonable” accommodation for employers with at least fifty employees. Also unlike the ADA, the failure to provide break time and appropriate space is a violation of the PPACA, it is not a cognizable form of discrimination against nursing workers.

Nonetheless, the statute does borrow concepts from employment discrimination law. For example, the undue hardship defense for small employers and the time and space labor standards can be framed as requirements of structural equality.¹⁹⁶ The time and space requirements are affirmative accommodations under which employers must change their structures to support breastfeeding, similar to the ADA’s reasonable accommodation provision.¹⁹⁷ Accordingly, some may argue that this is a stealth antidiscrimination law.

194. 38 U.S.C. § 4321 (2006); *What is USERRA*, ESGR, <http://www.esgr.mil/USERRA/What-is-USERRA.aspx> (last visited Mar. 21, 2014).

195. *But see* Andrews, *supra* note 129, at 137 (observing that the FLSA’s provision of attorneys’ fees may incentivize litigation under this provision).

196. Linda Hamilton Krieger, *Foreword—Backlash Against the ADA Interdisciplinary Perspectives and Implication*, 21 BERKELEY J. EMP. & LAB. L. 1, 5 (2000) (noting the “structural equality” the ADA was designed to achieve).

197. *Compare* 29 U.S.C. § 207(r)(1) (Supp. V 2012) (requiring employers to provide reasonable break time and a location for nursing mothers to express breast milk), *with* 42 U.S.C. § 12111(a) (2006) (defining the “reasonable accommodations” that employers must provide to employees with disabilities).

Yet, the PPACA does not provide a traditional accommodation because it is not individualized (even if a woman is eligible for an accommodation because she is part of a defined group). The only possible accommodation is break time and a location to express. This is the strongest argument for declaring that the PPACA is a labor standard. Employers need only make two defined accommodations; accommodations need not be further tailored to the worker. Time and space are it.

Moreover, the accommodation required by the PPACA is distinguishable from the ADA's accommodation in several key ways. First, the ADA encourages the employer and the employee to define an accommodation that is most appropriate for that individual.¹⁹⁸ Under the ADA, a request for a reasonable accommodation by an individual is the beginning of an informal, interactive process between an individual and an employer, which is used to determine whether a particular accommodation is reasonable for the employee and whether the accommodation would impose an undue hardship on the employer.¹⁹⁹ The goal of this interactive process is to find an accommodation that will enable the individual with a disability to perform essential job functions.²⁰⁰ This collaborative procedure is necessary because the ADA does not define one specific accommodation. Instead, the law provides examples for guidance, such as adjustments to the workplace, changes in work hours, or a leave of absence.²⁰¹ In practice, the interactive process creates accommodations beyond the provided examples. For example, different employees with the same or similar disability may request different accommodations that meet their individual needs.

Although the PPACA envisions that the employer and the employee will work together to determine the frequency and length of breaks, they are not encouraged to collaborate to create a different accommodation. The PPACA allows for some individuality in the frequency and length of the breaks, and the location may vary from employer to employer, but the employee cannot be accommodated by being permitted to pump at home or to bring her child to work to suckle during breaks, or by mandating day care.

The second key difference is that the ADA accommodation must be reasonable and the employer must have the ability to implement it without "undue hardship."²⁰² The PPACA's time and space accommodations are per se reasonable for larger employers, but they may be an undue hardship for smaller employers. In this respect, the same provision uses both a traditional labor standard and an employment discrimination provision depending on the

198. 42 U.S.C. § 12112(b)(5)(A)–(B) (2006 & Supp. V 2012).

199. See 29 C.F.R. § 1630.2(o)(3) (2013).

200. See *id.*

201. See *id.* § 1630.2(o)(2)(i)–(ii).

202. *Id.* § 1630.2(o)(4); see Bagenstos, *supra* note 159, at 836–37.

employer. The time and space requirements are traditional labor standards that must be provided if a nursing worker's employer has at least fifty employees.²⁰³ But the law contains an undue hardship affirmative defense, and the underlying antidiscrimination justifications for it, if the nursing mother works for an employer that employs fewer than fifty employees.²⁰⁴

Arguably, the PPACA's undue hardship defense represents the next evolution of employment law. The fewer-than-fifty-employees requirement limits the defense's applicability while simultaneously establishing that there is no viable defense for larger employers that fail to provide the required accommodations. Using the number of employees as a proxy for assessing undue hardship is a departure from the ADA and Title VII, which must be considered when applying ADA and Title VII case law to the PPACA.

Even though these laws also contain an employee threshold requirement for coverage, the ADA applies to *all* workers with disabilities, not just those with a specific defined disability, and Title VII applies to *all* workers that are members of the protected class, not just those that can be classified in one type of religion.

Because the PPACA contains semblances of employment discrimination protections, the theories underlying discrimination law must be analyzed to determine whether the PPACA is an employment discrimination law. The PPACA accommodates a subgroup of individuals to promote breastfeeding among that group. It also addresses a specific social inequality experienced by a subset of new mothers who may be unable to continue working if their employers do not accommodate their decision to breastfeed. The time and place requirements increase the probability that this sub-group of working mothers will remain in the workforce. However, the PPACA is not neutral. The provisions do not provide systemic protection to all working mothers or all low-income mothers, or all low-income mothers or all caregivers, nor does it protect working mothers from discrimination, regardless of whether or not they breastfeed.²⁰⁵

Further, feminist scholars argue that ensuring inclusion of mothers in the workforce, thereby addressing social inequalities, requires both accommodation

203. 29 U.S.C. § 207(r)(1), (3) (Supp. V 2012).

204. *Id.* § 207(r)(3).

205. See Zatz, *supra* note 136, at 23, 32 (citing Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799 (2003); Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859 (2008)) (raising concerns about class-based employment law, in part based on the "traditional hostility to class analysis"); see also Hansen, *supra* note 34, at 893–95 (describing the creation of and potential impact of a "two-tier system" of addressing breastfeeding based on class); Runge, *supra* note 176, at 470–73 (noting that the law does not address the documented discrimination experienced by women as caregivers).

of pregnancy and prohibition of pregnancy-based discrimination.²⁰⁶ This requires recognition that sex-based segregation begins with pregnancy, but continues through child bearing.²⁰⁷ Without accommodation, pregnancy causes women to temporarily, or even permanently leave the workforce, contributing to subordination of women in the workplace and the wage gap.²⁰⁸ Failure to accommodate pregnancy and child rearing limits working mothers' abilities to amass the skills, expertise, and seniority necessary to progress in or pursue their careers. Scholars and advocates criticize the PDA for wrongly assuming that intentional discrimination is the primary barrier facing working women who choose to have children.²⁰⁹ Instead, advocates argue that effective workplace laws must require employers to accommodate women during both pregnancy and afterward to enable them to retain and flourish in their employment.²¹⁰

By providing an accommodation for breastfeeding workers to express at work, it could be argued that the PPACA attempts to address the sex-based discrimination experienced by working women who are pregnant or mothers. The PPACA provides the accommodation to minimize absence from the workplace that the PDA does not²¹¹ by enabling breastfeeding mothers to return to work after giving birth. However, the PPACA does not provide maternity leave, nor does it accommodate all pregnant workers. Rather, it provides a workplace accommodation for mothers who choose to breastfeed for a limited time, not for all new mothers, and not for pregnancy or caregiving generally.

Congress could have created a set of provisions to address systemic discrimination. It could have required employers to provide daycare centers, paid parental leave, control over break time to all workers, or traditional antidiscrimination protection. The PPACA's approach is unique because it carves out a sub-group from a class of individuals that has experienced discrimination and provides it with accommodations that resemble traditional labor standards. Additionally, the law defines membership in the protected class by voluntary, individual actions: the decisions to have children, to breastfeed, and to work. By ensuring that mothers who breastfeed will not be fired for doing so, the law elevates this group of mothers above others. A situation may arise in which an employer discriminates against a mother who has chosen not to breastfeed, while a mother in the same workplace who exercises her right to take

206. See, e.g., Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2155 (1994).

207. *Id.* at 2155.

208. *Id.* at 2156; Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 31, 2012, at A25.

209. See, e.g., Heather Boushey, *The Role of the Government in Work-Family Conflict*, FUTURE OF CHILDREN, Fall 2011, at 163, 171 (critiquing the PDA's failure to require affirmative steps by employers).

210. See, e.g., Bakst, *supra* note 208.

211. See *supra* note 62. But see Hudson-Plush, *supra* note 142, at 2968 ("Employment discrimination statutes set no such floor; they simply seek to remedy an inefficient social evil that exists in the workplace.").

breaks to breastfeed is protected. Separating this class of workers by individual choices they make about how to nourish their children will not improve workplace opportunities for all mothers or all caregivers. It may, however, achieve its public health goal of promoting breastfeeding.

The PPACA as enacted did not amend Title VII, which might have integrated working mothers into the workforce more effectively. Rather, the PPACA is a piecemeal approach, both in the protections it provides (accommodations without employment discrimination protections for a limited period of time) and the group of individuals that it protects (new mothers who choose and are able to breastfeed for up to a year). Essentially, the PPACA defines a new class that deserves workplace protection: breastfeeding mothers. However, it is difficult to argue that breastfeeding mothers as a group have experienced unique systemic discrimination that warrants accommodation.

Nonetheless, many of the bills proposed before the PPACA contained employment discrimination protections.²¹² Some members of Congress believe that without clear protection, nursing workers will continue to experience discrimination without sufficient recourse.²¹³ Consequently, calls to create this new class of protected workers continue.²¹⁴

In sum, the PPACA was not designed to address social inequity by accommodating sub-groups of classes of individuals who have historically experienced workplace discrimination. Rather, it is a law intended to promote the specific act of breastfeeding, but also may address some aspect of discrimination against low-income working mothers. By targeting a narrowly defined sub-group with accommodations to promote a specific behavior, the

212. See *supra* Part I.C.

213. For example, Senator Merkley, one the PPACA's sponsors, expressed concern with the outcome of a state case that failed to offer antidiscrimination protection to nursing workers. See *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622, 623 (Ohio 2009) (per curiam) (rejecting a claim brought by a nursing woman who was fired for unauthorized breaks she took to breastfeed, allegedly in violation of her company's policy, fails because her failure to follow directions was not a pretext for pregnancy discrimination); see also LaNisa Allen, *Comment on the Wage and Hour Division (WHD) Notice: Reasonable Break Time for Nursing Mothers*, REGULATIONS.GOV (Mar. 4, 2011), <http://www.regulations.gov/#!documentDetail;D=WHD-2010-0003-1715> (stating that she was fired for using a restroom break to pump her milk because it was becoming uncomfortable for her to keep working without doing so). Senator Merkley highlighted the result in *Allen* while Congress debated the PPACA. Senator Jeff Merkley, *Why We Must Stand Up for the Right to Breastfeed*, MOMSRISING.ORG (Sept. 9, 2009), <http://www.momsrising.org/blog/why-we-must-standup-for-the-right-to-breastfeed/> ("This ruling . . . reaffirms why it's important that Congress include [the lactation provisions] in the health reform legislation.").

214. See, e.g., Supporting Working Moms Act of 2013, H.R. 1941, 113th Cong. (2013) (proposing to further amend the FLSA to extend the break time and space requirements for milk expression to exempt employees); Supporting Working Moms Act of 2013, S. 934, 113th Cong. (2013) (same); Breastfeeding Promotion Act of 2011, H.R. 2758, 112th Cong. § 102 (2011) (proposing to define "because of sex" to include actions taken on the basis of lactation for Title VII purposes); Breastfeeding Promotion Act of 2011, S. 1463, 112th Cong. § 102 (2011) (same).

PPACA fails to achieve the goal of employment discrimination law, which is to effectively address systemic social inequality.

IV. REJECTION OF THE PPACA'S PIECEMEAL PUBLIC HEALTH APPROACH TO EMPLOYMENT LAW

The lactation provisions of the PPACA fit within the existing employment law that addresses social inequality through traditional labor standards and protections that increase access to the workplace for protected groups. Specifically, these provisions attempt to increase access to the workplace for low-income breastfeeding mothers who are hourly workers by providing unpaid time and a location to pump milk at work. In theory, these protections enable these women to avoid being forced either to stop breastfeeding or to quit their jobs. Instead, they can continue breastfeeding and remain employed. Consistent with this theory is the reality that neither other federal and state laws nor most employers otherwise provide this type of leave.²¹⁵ In this respect, the underlying goal of the PPACA is laudable, especially in light of the political compromises that are often necessary to pass a new labor standard or employment discrimination provision.²¹⁶ However, the statute does not go far enough and consequently fails to fully achieve its goal.

First, a public health law that offers a symbolic piecemeal approach may not be the best way to effectively promote individual rights or better conditions at work. This problem, along with others that intersect with it, needs more than a statute that essentially provides only a congressional statement of support that employers should provide protections, support employees who choose to breastfeed, and help the government meet a public health goal. By providing standard-like rights without an employment discrimination protection or effective enforcement mechanism, the statute does not provide sufficient protections. The employee may only file a complaint with the Department if the employer denies or fails to provide the unpaid break time or location, and her potential damages are significantly limited.²¹⁷ Consequently, the same group of women who are meant to benefit from the statute may be discriminated against because of their status as nursing mothers, without effective recourse. The limited scope of protections and damages make it even harder for her to find a lawyer who would be willing to represent a nursing mother in any claims under the PPACA against her employer.²¹⁸

215. Runge, *supra* note 176, at 472; see *Breastfeeding Laws*, *supra* note 65 (summarizing existing state laws that support breastfeeding).

216. See generally Chai R. Felblum, *Policy Challenges and Opportunities for Workplace Flexibility*, in *WORK-LIFE POLICIES* 251–78 (Ann C. Crouter & Alan Booth eds., 2009) (describing the political atmosphere around consideration of additional legislative proposals for new employment laws).

217. See Andrews, *supra* note 129, at 137–38.

218. Sharon M. Dietrich, *When Working Isn't Enough: Low-Wage Workers Struggle to Survive*, 6 U. PA. J. LAB & EMP. L. 613, 623–24 (2004).

Second, by only providing protection for the act of pumping milk, low-income working mothers may still be discriminated against for any other characteristic related to nursing or child care. For example, if her employer perceives that she is taking too many calls from a child care provider with questions about her child, or that she is leaving too early because she needs to pick up her child from child care, or someone brings her child to her for suckling, she may be harassed or even fired, with limited recourse.

Moreover, although the PPACA purports to protect low-income women by limiting the accommodation to hourly workers, it fails to protect them because the break time for pumping milk is unpaid. This is an inherent disincentive for workers. Further, given that the number of breaks and the location for pumping at the workplace is negotiable, the unequal bargaining power between an hourly worker and her boss, as well as the seemingly sexual nature—to some—of the language that necessarily must be used to ask for breastfeeding protections,²¹⁹ will discourage workers from asking for the necessary number of breaks or the appropriate space, for fear of angering their boss and/or being fired. Hourly workers are almost exclusively at will, and they often live paycheck to paycheck, especially after a child is born and there are new expenses.²²⁰ To require an employee to take unpaid time to breastfeed at work and then to negotiate that time may be enough to cause some workers to stop breastfeeding rather than lose the income from their jobs or risk being perceived as a problem at work.

Finally, many low-income women do not return to work after the birth of a child because the cost of child care exceeds their hourly wage or salary.²²¹ The PPACA does not address this problem. Some of the alternative solutions, if the goal is to ensure access to the workplace for low-income breastfeeding mothers, are to require employers to provide day care, pay for day care while the mother is breastfeeding, or provide paid parental leave.

219. See *supra* notes 39, 43, 44–49 and accompanying text (describing some of the harassment and embarrassment concerns nursing workers have or have experienced with breastfeeding at work).

220. See Dietrich, *supra* note 219, at 617 (discussing the connection between hourly work and poverty and noting that low-income workers may be vulnerable to abuse); see also MARK LINO, CTR. FOR NUTRITION AND PROMOTION, U.S. DEP'T OF AGRICULTURE, EXPENDITURES ON CHILDREN BY FAMILIES, 2012 21 (2013), available at <http://www.cnpp.usda.gov/Publications/CRC/crc2012.pdf> (including USDA's estimate for annual expenditures for the first year of a child born in 2012 to range from \$9520–21,530 depending on income level); Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL'Y 1, 42 (observing that the low-income families "may be one paycheck away from homelessness").

221. See Bornstein, *supra* note 221, at 7–8 (summarizing why childcare is often inaccessible for low-income workers); Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions About Work at Home and in the Market*, 44 SANTA CLARA L. REV. 1029 (2004); Alissa Quart, *Crushed By the Cost of Child Care*, N.Y. TIMES, Aug. 17, 2013, at SR4.

V. CONCLUSION

This Article has explored the creation of a new type of employment law by examining the breastfeeding at work provisions enacted in section 4207 of the PPACA. On its face, section 4207 resembles other federal employment provisions given its shared roots and use of concepts from traditional labor standards and employment discrimination provisions. However, upon closer examination, the combination of rights to break time and space to express milk at work, as well as the limitations on whether all employers must provide them, who is eligible to use them, and how an employee might enforce them or penalize an employer for violating them, are unique. Despite the incorporation of an undue hardship defense for small employers, there is no traditional antidiscrimination provision in the PPACA, and any claim that the law is aimed at addressing historical systemic discrimination against breastfeeding women is weak, at best. The sole goal of this law is to promote a specific type of breastfeeding by non-exempt working mothers to ensure that these women can breastfeed, including participating in the activity outside of work. These limited labor standard-like provisions, in the form of time and space accommodation-like requirements, for such a small subset of working mothers for a limited time represents a dangerous turn away from traditional efforts to use federal employment law to effectively address the broader goal of increasing access to the workplace for women and low-income workers.