



California's new lactation-accommodation law: Senate Bill 142

YOUR CHEAT SHEET ON SB 142 WHICH EXPANDS EXISTING LAW TO SPECIFY ADDITIONAL LACTATION-ACCOMMODATION REQUIREMENTS, INCLUDING BREAK-TIME, SPACE, REMEDIES, AND POLICIES

Effective January 1, 2020, California's lactation-accommodation law provides greater protections to employees, in particular by providing more specific requirements for breaks and lactation-spaces. While California has had a lactation-accommodation law on the books since 2002, it provided limited rights to employees seeking to express breast milk. However, Senate Bill 142 ("SB 142") has expanded the law to specify additional lactation-accommodation

requirements, including break-time, space, remedies, and policies.

Break-time

Prior to SB 142, Labor Code section 1030 required that an employer must provide a reasonable amount of break-time to allow employees to express breast milk, and stated that the break-time, if possible, should run concurrently with any break-time already provided to the employee. (Lab. Code, § 1030.) In other

words, if feasible, non-exempt employees would use their rest breaks. Break-time that does not run concurrently with authorized rest time is unpaid. (*Ibid.*)

SB 142 amended Section 1030 to specify that the employer must provide the break-time *each time* the employee needs to express milk. (*Ibid.*)

It is important to note that Labor Code section 1032, which was unchanged by SB 142, states that "[a]n employer is

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not required to provide break-time under this chapter if to do so would seriously disrupt the operations of the employer.”

Expansion of lactation-space requirements

SB 142 provided much more stringent standards for the type of lactation-space employers are required to provide, taking an additional step from last year’s additions to these requirements.

Until December 31, 2018, Labor Code section 1031 only required that “[t]he employer shall make reasonable efforts to provide the employee with the use of a room or other location, other than a toilet stall, in close proximity to the employee’s work area, for the employee to express milk in private. The room or location may include the place where the employee normally works if it otherwise meets the requirements of this section.”

Beginning January 1, 2019, the language “other than a toilet stall” was changed to “other than a bathroom,” and additional language was added to Section 1031 to permit an employer to make a temporary lactation-space available so long as (1) the employer is unable to provide a permanent lactation location; (2) the temporary location is private and free from intrusion while an employee expresses milk; (3) the temporary location is used only for lactation purposes while an employee expresses milk; and (4) the temporary location otherwise meets the requirements of state law concerning lactation accommodation. The 2019 amendments to Section 1031 also provided the ability of employers to demonstrate that providing the use of a location other than a bathroom would impose an undue hardship and required such employers to make reasonable efforts to provide an employee the use of a location other than a toilet stall.

The amendments from SB 142 that took effect January 1, 2020, went even further in establishing the duty of employers to provide lactation-spaces.

SB 142 eliminated the language in Labor Code section 1031, subdivision (a) only requiring that an employer make

reasonable efforts to provide an employee with a location to express milk in private. (Lab. Code, § 1031, subd. (a).) By striking the phrase “make reasonable efforts to,” SB 142 changed California law now to *mandate* employers provide a lactation-space (“An employer *shall provide* an employee with the use of a room or other location for the employee to express milk in private”). (Lab. Code, § 1031, subd. (a) (emphasis added).) This is a significant new protection.

The bill also struck the language allowing an employer that provides a *temporary* lactation location to be compliant with the law if other conditions were met. (Lab. Code, § 1031.)

Section 1031(b) now requires that a lactation-space not be a bathroom, be in close proximity to the employee’s work area, be shielded from view, and be free from intrusion while the employee is expressing milk. (Lab. Code, § 1031, subd. (b).)

The law also now requires employers to provide employees expressing milk access to a sink with running water and a refrigerator suitable for storing milk (or another cooling device) in close proximity to the employee’s workplace. (§ 1031, subd. (d).) Other notable new improvements assert a lactation room must:

- Be safe, clean, and free of hazardous materials;
- Contain a surface to place a breast pump and personal items;
- Contain a place to sit; and
- Provide access to electricity or alternative devices, such as extension cords or charging stations needed to operate an electric or battery-powered breast pump. (§ 1031, subd. (c).)

Furthermore, SB 142 amended the Labor Code to mandate, where a multi-purpose room is used for lactation along with other uses, the use of the room for lactation shall take priority over the other uses. (Lab. Code, § 1031, subd. (e).)

In short, SB 142 altered Section 1031 far more than any other section, expanding the rights of employees to suitable lactation-spaces.

Prohibition against discrimination, harassment, and retaliation

SB 142 adds a provision to Labor Code section 1033 making it unlawful for an employer to discriminate or retaliate against an employee for exercising their rights under the lactation-accommodation law. (Lab. Code, § 1033, subd. (b).) SB 142 also added language providing that “[t]he denial of reasonable break-time or adequate space to express milk in accordance with this chapter shall be deemed a failure to comply for purposes of Section 226.7 [which addresses missed rest and meal breaks].” (Lab. Code, § 1033, subd. (a).) Section 1033 permits an aggrieved employee to file a complaint with the Labor Commissioner. (Lab. Code, §§ 1033, subds. (a-b).)

Prior to SB 142, Section 1033 only provided for a civil penalty for violations of the law and allowed the Labor Commissioner to issue citations.

Exemption for certain employers

First, if the employer cannot provide a lactation location within the employer’s workspace, an employer in a multi-tenant building or a multi-employer worksite may comply with the law by providing a space shared among multiple employers within the building or worksite. (Lab. Code, § 1031, subd. (f)(1).)

Second, employers or general contractors that utilize a multi-employer worksite are required to either provide lactation accommodations or a safe and secure location for subcontractor employers to provide lactation accommodations on the worksite, within two business days of a written request from an employee of a subcontractor for an accommodation. (Lab. Code, § 1031, subd. (f)(2).)

Third, an agricultural employer, as defined in section 1140.4, is compliant if it provides an employee requesting to express milk with a private, enclosed, and shaded space, including an air-conditioned cab of a truck or tractor. (Lab. Code, § 1031, subd. (g).)

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Fourth, an employer does not violate the law if it assigns a lactation location that is temporary due to the employer's operational, financial, or space limitations. (Lab. Code, § 1031, subd. (h).) These temporary spaces cannot be a bathroom and must be in close proximity to the employee's work area, shielded from view, free from intrusion while the employee is expressing milk, and otherwise meet the provisions of the law. (*Ibid.*)

Finally, an employer with fewer than 50 employees may establish it is exempt from any of the lactation room requirements if it proves the provisions impose an undue hardship "by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." (Lab. Code, § 1031, subd. (i).) If the undue hardship is proven, the employer is still obligated to make reasonable efforts to provide the employee the use of a room or other location, which is not a bathroom, in close proximity to the employee's work area, for the employee to express milk in private. (*Ibid.*)

Lactation-accommodation policies

SB 142 added a new Labor Code section requiring employers to develop and implement a policy regarding lactation accommodation to include:

- A statement about an employee's right to request lactation accommodation;
 - The process to make the request;
 - An employer's obligation to respond to the request; and
 - A statement about an employee's right to file a complaint with the Labor Commissioner.
- (Lab. Code, § 1034, subd. (a).)

Employers must distribute the policy to new employees upon hiring and when an employee queries about parental leave and must include the policy in an employee handbook or set of policies that the employer makes available to employees. (Lab. Code, § 1034, subds. (b-c).) If an employer cannot provide break-time or a location, the employer must provide a written response to the employee. (Lab. Code, § 1034, subd. (d).)

The process to request a lactation accommodation is comparable to FEHA's

requirement for a timely good faith interactive process when an employee seeks a reasonable accommodation. (2 Cal. Code Regs., § 11069.) Similar to navigating the interactive process requirements, employers are susceptible to violating Labor Code section 1034 due to a number of different factors, such as lack of awareness of the new additions to the law and failure to create and *implement* a policy. (*Ibid.*; Lab. Code, § 1034.) (*italics added.*) Even if an employer creates a lactation accommodation policy, it is susceptible to falling short on proper training on the policy to implement the detailed components laid out in Section 1031.

Increased damages for non-compliance

Whistleblower retaliation claim

Unlike before, an employee is now entitled to report a violation to the Labor Commissioner's office, making it a protected activity. (Lab. Code, § 1033, subd. (c).) This means any aggrieved employee, who reports the denial of a lactation accommodation, possesses a whistleblower retaliation claim against an employer for any adverse action.

Premium payment for non-exempt employees

Under existing Labor Code section 226.7, an employer that fails to provide a meal or rest or recovery period as required by law is required to pay the employee one additional hour of pay at the employee's regular rate of pay for each workday that the break is not provided. By incorporating section 226.7 into section 1033, subdivision (a), SB 142 raises the stakes for employers that fail to provide a lactation accommodation. Whether in a civil suit or a labor commissioner proceeding, the denial of reasonable break-time or adequate space to express breast milk shall be deemed a violation amounting to one hour of a non-exempt employee's regular rate of pay. (*Ibid.*) It is critical to note this is inapplicable to exempt employees since section 226.7 does not pertain to exempt employees.

Civil penalty for each day of violation

The bill amended Labor Code section 1033, subdivision (c) to allow for additional penalties. The Labor

Commissioner is entitled to impose a civil penalty in the amount of \$100.00 *for each day* that the employee is denied break-time or adequate space to express milk pursuant to Section 1197.1. (*Ibid.*) Before this amendment, the civil penalty was \$100.00 "for each violation" without specification as to how to quantify the violations.

Limitation of lactation-accommodation protections

Labor Code section 1030 by its language protects "an employee desiring to express breast milk *for the employee's infant child*" (*emphasis added*), thereby excluding lactation accommodations for employees lactating for non-normative purposes. For instance, employees who are lactating for the benefit of infants not their own, are excluded from the protections of SB 142.

By limiting which employees are protected, the Labor Code has the inescapable effect of also limiting which types of families can access the benefits of breast milk for their own children. After all, employees who are lactating for reasons other than feeding their own infants may be doing so for their own benefit, but they may also be donating or selling breast milk to other families who need it. Donor milk may be the only option for adoptive parents, male parents in same-sex relationships, single fathers, or mothers who have a medical condition that prevents them from breastfeeding (such as a mastectomy). Restricting the ability of non-traditional families to provide breast milk to their children by failing to protect all lactating employees disadvantages these families.

However, not all hope is lost because an employee may successfully bring a lactation-accommodation claim under the Fair Employment and Housing Act (FEHA). For example, in *Gonzales v. Marriott Int'l, Inc.* (C.D. Cal. 2015) 142 F.Supp. 3d 961, 965, an employee, who gave birth under a gestational-surrogacy agreement and after her obligation to send breast milk to the parents of the child had ended, continued to express breast milk to donate, alleged successfully

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a claim for failure to make a reasonable accommodation for a condition related to pregnancy in violation of the FEHA because she asserted that her employer prevented her from taking lactation breaks, even though she offered to provide health-care provider documentation. The plain statutory language of the FEHA and its history did not limit the lactation-accommodation requirements prescribed to employees who express breast milk for their own infant children. (Gov't Code, § 12945.)

Reasonable accommodation related to pregnancy under the FEHA

An alternative cause of action may be established through the FEHA for denial of a lactation accommodation. The essential elements of a failure to accommodate claim under Government Code section 12945, subdivision (a)(3)(A) are: (1) employee had a condition related to pregnancy, childbirth, or a related medical condition; (2) employee was a qualified individual in that she could perform the essential functions of the job; (3) employee was refused a reasonable accommodation; and (4) the accommodation was requested with the advice of a health care provider.

Lactation is considered a condition related to pregnancy, childbirth, or a related medical condition. (Cal. Code Regs. tit. 2, § 11035(d); *Gonzales, supra* 142 F.Supp. 3d 961, 965.) Government Code section 12993 allows an employee the right to recover compensatory damages if her employer fails to reasonably accommodate a condition related to pregnancy, childbirth, or a related medical condition, if she so requests, with the advice of her healthcare provider. (See *Gonzales, supra* 142 F.Supp. 3d 961, 965.)

In comparison with the FEHA, an employee denied a lactation accommodation has stronger protections under the Labor Code. The FEHA requires employers to provide employees with a reasonable accommodation, absent a nondiscriminatory reason, and engage in a timely good faith interactive process. (Gov. Code, §§ 12900-12996.)

This allows an employer an opportunity to opt-out of its obligation to provide a lactation accommodation for reasons such as an unreasonable accommodation or an unauthenticated accommodation. (See Gov. Code, §§ 12900-12996.)

Unlike the FEHA, where an employer need only provide a *reasonable* accommodation, the Labor Code expressly mandates an employer to provide a lactation accommodation. (Lab. Code, § 1030.) An employee is not required to submit documentation from a medical provider or obligated to engage in an interactive process. (Lab. Code, §§ 1030-1034.) However, other related causes of action under the FEHA need to be properly explored for lactation accommodation violations are inherently intertwined with issues of disability, race, sex, gender, sexual orientation, and religion. (*Ibid.*) Therefore, an employee shall in all likelihood possess a stronger claim under the Labor Code.

Comparison to the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(r)

Under the FLSA, federal law mandates that employers provide *reasonable* break-time for an employee to express breast milk for her nursing child *for one year* after the child's birth every time such employee has need to express the milk. (29 U.S.C. § 207(r)(1).) The FLSA provides narrower protections than the Labor Code because an employee expressing breast milk is limited to only a reasonable break-time and restricted to the accommodation for only one year after an infant's birth. In contrast, SB 142 removed the reasonable break-time language and the Labor Code is silent regarding how long an employee may express breast milk. (*Ibid.*) However, the FLSA and the Labor Code both prohibit employers from providing a bathroom as the room for an employee to express breast milk. (*Ibid.*; Lab. Code, § 1031.)

The FLSA requirement of break-time for nursing mothers to express breast milk does not preempt California law because it does not provide greater

protections to employees. (29 U.S.C. § 207(r)(4).) For example, the FLSA does not provide break-time beyond one year after the child's birth and the employer has discretion to determine "reasonable break-time." (29 U.S.C. § 207(r)(1).) Beyond break-time and lactation-space requirements, the FLSA does not include language regarding specifics of a lactation room, policy requirements, or remedies for aggrieved employees. Furthermore, damages under the FLSA are limited to unpaid minimum wages pursuant to section 207(r) to unpaid minimum wages. (29 U.S.C., § 216(b).) Therefore, if applicable, it may be advisable to pursue a violation of a lactation accommodation pursuant to the Labor Code rather than the FLSA.

Conclusion

Whether an employee has a claim under California's lactation-accommodation law should be determined by analyzing multiple factors, including whether the employer's lactation room is in compliance, whether the employer properly engaged with the employee for a lactation accommodation, whether the employer has created and implemented proper policies, whether the employee was provided the break-time necessary to express breast milk, and whether the employee has been discriminated or retaliated against for exercising her lactation rights. Despite the lack of case law on lactation accommodations, employees have significant lactation accommodation protections from which they can bring a legal action for damages and penalties.

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