

PROVIDING URGENT MATERNAL PROTECTIONS FOR
NURSING MOTHERS ACT

JULY 22, 2021.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. SCOTT of Virginia, from the Committee on Education and
Labor, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 3110]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 3110) to amend the Fair Labor Standards Act of 1938 to expand access to breastfeeding accommodations in the workplace, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Providing Urgent Maternal Protections for Nursing Mothers Act” or the “PUMP for Nursing Mothers Act”.

SEC. 2. BREASTFEEDING ACCOMMODATIONS IN THE WORKPLACE.

(a) EXPANDING EMPLOYEE ACCESS TO BREAK TIME AND PLACE.—The Fair Labor Standards Act of 1938 (29 U.S.C. 201 et seq.) is amended—

(1) in section 7, by striking subsection (r);

(2) in section 15(a)—

(A) by striking the period at the end of paragraph (5) and inserting “; and”; and

(B) by adding at the end the following:

“(6) to violate any of the provisions of section 18D.”;

(3) in section 16(b) by striking “7(r)” each place the term appears and inserting “18D of this title”; and

(4) by inserting after section 18C the following:

“SEC. 18D. BREASTFEEDING ACCOMMODATIONS IN THE WORKPLACE.

“(a) An employer shall provide—

“(1) a reasonable break time for an employee to express breast milk each time such employee has need to express breast milk for the 2-year period beginning on the date on which the circumstances related to such need arise; and

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

“(b)(1) Subject to paragraph (2), an employer shall not be required to compensate an employee receiving break time under subsection (a)(1) for any time spent during the workday for such purpose unless otherwise required by Federal or State law or municipal ordinance.

“(2) Break time provided under subsection (a)(1) shall be considered hours worked if the employee is not completely relieved from duty during the entirety of such break.

“(c) An employer that employs fewer than 25 employees shall not be subject to the requirements of this section, if such requirements would 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.

“(d) No provision of this section or of any order thereunder shall excuse non-compliance with any Federal or State law or municipal ordinance that provides greater protections to employees than the protections provided for under this section.

“(e)(1) Subject to paragraph (2), before an employee commences an action to recover liability under section 16(b) for a violation of paragraph (a)(2), the employee shall inform the employer of the failure to provide adequate place and provide the employer with 10 calendar days after such notice is provided to come into compliance with subsection (a)(2) with respect to such employee.

“(2) Paragraph (1) shall not apply in the case that—

“(A) the employee has been discharged because the employee has made a request for break time or place under this section or has opposed any employer conduct related to this section; or

“(B) the employer has indicated that the employer has no intention of complying with subsection (a)(2).

“(f) The circumstances described in subsection (a)(1) arise if an employee—

“(1) begins providing breast milk for a nursing child; or

“(2) gives birth, including to—

“(A) a stillborn child; or

“(B) a child over whom the employee does not retain legal custody.”.

(b) CLARIFYING REMEDIES.—Section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)) is amended by striking “15(a)(3)” each place the term appears and inserting “7(r) or 15(a)(3)”.

(c) GUIDANCE.—Not later than 60 days after the date of enactment of this Act, the Secretary of Labor shall issue guidance with respect to employer compliance with section 18D of the Fair Labor Standards Act of 1938, as amended by this Act, which shall be similar, with respect to specific examples of compliance, to the guidance relating to “Supporting Nursing Moms at Work” published on the website of

the Office on Women’s Health of the Department of Health and Human Services as of such date of enactment.

SEC. 3. EFFECTIVE DATE.

(a) EXPANDING ACCESS.—The amendments made under section 2(a) shall take effect on the date that is 120 days after the date of enactment of this Act.

(b) REMEDIES AND CLARIFICATION.—The amendments made under section 2(b) shall take effect on the date of enactment of this Act.

PURPOSE AND SUMMARY

Despite the health benefits of breastfeeding for both mothers and infants, too many nursing employees face obstacles to pumping breast milk in the workplace, making it difficult to continue breastfeeding while employed. Break time and a private space to express breast milk are critical for supports for breastfeeding employees. Enacted in 2010, the break time for nursing mothers provision under the *Fair Labor Standards Act of 1938*¹ (FLSA) requires employers to provide nursing employees with reasonable break time and non-bathroom space free from view and intrusion to express breast milk while at work.² Gaps in the law limit access to these protections and leave employees unable to recover in court when their employers fail to comply with the law’s requirements. H.R. 3110, the *Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act*, would extend these protections to more employees and ensure employees can recover appropriate forms of relief in court when employers violate the law. Strengthening the law in this way will promote the health and well-being of nursing employees and infants.

H.R. 3110, as amended in markup, has been endorsed by nearly 150 organizations, including: 1,000 Days; 2020 Mom; A Better Balance; Academy of Breastfeeding Medicine; Academy of Nutrition and Dietetics; Alabama Breastfeeding Committee; Alaska Breastfeeding Coalition; Alimentacion Segura Infantil; American Academy of Family Physicians; American Academy of Nursing; American Academy of Pediatrics; American Association of University Women; American Civil Liberties Union; American College of Obstetricians and Gynecologists; American Federation of Teachers; American Public Health Association; API Breastfeeding Task Force; Arizona Youth Partnership; Association of Maternal & Child Health Programs; Association of State Public Health Nutritionists; Baby And Me LC; Baby Cafe Bakersfield; Baby Cafe USA; Baby-Friendly USA, Inc.; Barry Pediatrics; Beaufort-Jasper-Hampton; Comprehensive Health Services; BetaCarrotTeen; Birthing Miracles Pregnancy Services LLC; Black Breastfeeding Caucus; Black Mothers’ Breastfeeding Association; Breastfeed Durham; Breastfeed Macomb; Breastfeed Orange NC; Breastfeeding Coalition of Palm Beach County; Breastfeeding Coalition of Washington; Breastfeeding Education and Support Team of the Easter Upper Peninsula; Breastfeeding Family Friendly Communities; Breastfeeding Hawaii; Breastfeeding Task Force of Greater Los Angeles; Breastfeeding USA; Bright Future Lactation Resource Centre Ltd.; Bronx Breastfeeding Coalition; California Breastfeeding Coalition; Center for Health Equity, Education, and Research; Cen-

¹ 29 U.S.C. §§ 201–219.

² The Patient Protection and Affordable Care Act, Pub. L. No. 111–148, 124 Stat. 577 § 4207; 29 U.S.C. § 207(r).

ter for WorkLife Law; Centro Pediatrico de Lactancia y Crianza; CHI Mercy Hospital; Coalition of Labor Union Women; Coalition of Oklahoma Breastfeeding Advocates; Connecticut Breastfeeding Coalition; Connecticut Women's Education and Legal Fund; Constellation Consulting, LLC; Courthouse Lactation Space Task Force of the Florida Association for Women Lawyers; Dancing For Birth, LLC; District of Columbia Breastfeeding Coalition; Equal Rights Advocates; Every Mother, Inc.; Florida Breastfeeding Coalition; Florida Outreach Childbirth Education Program; Geelo Wellness; Genesee County Breastfeeding Coalition; Harambee Village Doulas; HealthConnect One; Healthy Children Project, Inc.; Human Milk Banking Association of North America; Hurley Medical Center; Indiana Breastfeeding Coalition; Indianapolis Urban League; Indigenous Breastfeeding Counselor; InterCare Community Health Network; InterCare Community Health Network, Women, Infants, and Children Program; International Board of Lactation Consultant Examiners; International Breastfeeding Institute; International Childbirth Education Association; Justice for Migrant Women; Kansas Breastfeeding Coalition; La Leche League Alliance; La Leche League USA; Lactation Improvement Coalition of Kentucky; Lactation Lighthouse; Lactation Training Lab; LactPower; Learn Lactate Grow; Maryland Breastfeeding Coalition; Maternity Care Coalition; Metro Detroit/Wayne County Breastfeeding Coalition; Metropolitan Hospital; Michigan Breastfeeding Network; Missouri Breastfeeding Coalition; Mom Congress; Mom2Mom Global; MomsRising; Montana State Breastfeeding Coalition; Montefiore WIC Program; Mother Heart Birth Services; Mothers' Milk Bank Northeast; Mother's Own Milk Matters; National Association of Pediatric Nurse Practitioners; National Birth Equity Collaborative; National Education Association; National Employment Law Project; National Lactation Consultant Alliance; National Organization for Women; National Partnership for Women & Families; National WIC Association; National Women's Law Center; Native Breastfeeding Council; NETWORK Lobby for Catholic Social Justice; New Hampshire Breastfeeding Task Force; New Jersey Breastfeeding Coalition; New Mexico Breastfeeding Task Force; New York Statewide Breastfeeding Coalition; Next Generation Lactation Service; North Carolina Breastfeeding Coalition; Nourished Beginnings; Nursing Mothers Counsel, Inc.; Nurture.; Nurturely; Nutrition First; NYC Breastfeeding Leadership Council, Inc.; Ohio Breastfeeding Alliance; Precious Jewels Moms Ministries; pumppotting; Reaching Our Sisters Everywhere, Inc; Sacramento Breastfeeding Coalition; San Diego County Breastfeeding Coalition; Search Influence; Solutions for Breastfeeding; Southeast Michigan IBCLC's of Color; Speaking of Birth; Tennessee Breastfeeding Coalition; The Institute for the Advancement of Breastfeeding and Lactation Education; The New York Milk Bank; U.S. Breastfeeding Committee; U.S. Chamber of Commerce; Underwood Early Learning Center LLC; Virginia Breastfeeding Advisory Committee; Virginia Breastfeeding Coalition; West Virginia Breastfeeding Alliance; Western Kansas Birthkeeping; WIC Nutrition, Sonoma County Indian Health Project, Inc.; Wisconsin Breastfeeding Coalition; Women Employed; Women-Inspired Systems' Enrichment; Women's Law Project; Women's Rights and Empowerment Network; YWCA of the University of Illinois; and ZERO TO THREE.

COMMITTEE ACTION

112TH CONGRESS

On August 1, 2011, Representative Carolyn Maloney (D–NY–12) introduced H.R. 2758, the *Breastfeeding Promotion Act of 2011*. The bill amended the *Civil Rights Act of 1964*³ to include lactation as protected conduct under such Act and amended the FLSA to extend the nursing mother break time and space protections to certain statutorily excluded workers. The bill was referred to the House Committee on Education and the Workforce, where it was referred to the Subcommittee on Health, Employment, Labor, and Pensions and to the Subcommittee on Workforce Protections. The bill had 16 Democratic cosponsors. No further action was taken on the bill.

On August 1, 2011, Senator Jeff Merkley (D–OR) introduced S. 1463, the *Breastfeeding Promotion Act of 2011*, as a companion bill to H.R. 2758. The bill was referred to the Senate Committee on Health, Education, Labor and Pensions. The bill had five Democratic cosponsors. No further action was taken on the bill.

113TH CONGRESS

On May 9, 2013, Representative Maloney introduced H.R. 1941, the *Supporting Working Moms Act of 2013*. The bill amended the FLSA to extend the nursing mother break time and space protections to statutorily excluded workers. The bill was referred to the House Committee on Education and the Workforce. The bill had 23 Democratic cosponsors. No further action was taken on the bill.

On May 13, 2013, Senator Merkley introduced S. 934, the *Supporting Working Moms Act of 2013*, as a companion bill to H.R. 1941. The bill was referred to the Senate Committee on Health, Education, Labor and Pensions. The bill had three Democratic cosponsors. No further action was taken on the bill.

114TH CONGRESS

On November 19, 2015, Representative Maloney introduced H.R. 4113, the *Supporting Working Moms Act of 2015*. This bill was identical to the version introduced in the 113th Congress. The bill was referred to the House Committee on Education and the Workforce. The Education and the Workforce Committee referred the bill to the Subcommittee on Workforce Protections. The bill had 21 Democratic cosponsors. No further action was taken on the bill.

On November 19, 2015, Senator Merkley introduced S. 2321, the *Supporting Working Moms Act of 2015*, as a companion bill to H.R. 4113. The bill was referred to the Senate Committee on Health, Education, Labor and Pensions. The bill had seven Democratic cosponsors and one Republican cosponsor. No further action was taken on the bill.

115TH CONGRESS

On July 14, 2017, Representative Maloney introduced H.R. 3255, the *Supporting Working Moms Act of 2017*. This bill was identical to the version introduced in the 113th Congress. The bill was referred to the House Committee on Education and the Workforce.

³ 42 U.S.C. § 2000e.

The bill had 22 Democratic cosponsors. No further action was taken on the bill.

On November 14, 2017, Senator Merkley introduced S. 2122, the *Supporting Working Moms Act of 2017*, as a companion bill to H.R. 3255. The bill was referred to the Senate Committee on Health, Education, Labor and Pensions. The bill had 12 Democratic cosponsors and 1 Republican cosponsor. No further action was taken on the bill.

116TH CONGRESS

On January 9, 2020, Senator Merkley introduced S. 3170, the *Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act*. The bill amended the FLSA by extending nursing mother break time and space protections to statutorily excluded employees, clarifying that pumping breaks must be paid if the employee is not completely relieved of duty during the break or if employers are otherwise required to pay for break time under other federal, state or local laws, and allowing employees to seek legal and equitable relief in court for violations. The bill was referred to the Senate Committee on Health, Education, Labor and Pensions. The bill had five Democratic cosponsors and one Republican cosponsor.

On January 13, 2020, Representative Maloney introduced H.R. 5592, the *Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act*, as a companion bill to S. 3170. The bill was referred to the House Committee on Education and Labor. The bill had five Democratic cosponsors and one Republican cosponsor.

On January 28, 2020, the House Committee on Education and Labor's Subcommittee on Health, Employment, Labor, and Pensions and Subcommittee on Workforce Protections held a joint hearing entitled "*Expecting More: Addressing America's Maternal and Infant Health Crisis*." The hearing examined the maternal and infant health crisis in the United States, particularly among Black women and other women of color, and addressed how H.R. 5592, the *Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act* would close gaps in the federal break time and space law. The witnesses were Stacey D. Stewart, President and CEO, March of Dimes, Arlington, VA; Nikia Sankofa, Executive Director, United States Breastfeeding Committee, Washington, DC; and, Dr. Joia Crear Perry, MD, President, National Birth Equity Collaborative, New Orleans, LA.

117TH CONGRESS

On May 11, 2021, Representative Maloney introduced H.R. 3110, the *Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act*. Similar to the 116th Congress, the bill amends the FLSA by extending nursing mother break time and space protections to statutorily excluded employees, clarifying that pumping breaks must be paid if the employee is not completely relieved of duty during the break or if employers are otherwise required to pay for break time under other federal, state or local laws, and allowing employees to seek legal and equitable relief in court for violations. The bill has three Democratic cosponsors and three Republican cosponsors. The bill was referred to the House Committee on Education and Labor.

On May 17, 2021, Senator Merkley introduced S. 1658, the *Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act*, as a companion bill to H.R. 3110. The bill has three Democratic cosponsors and one Republican cosponsor. The bill was referred to the Senate Committee on Health, Education, Labor and Pensions.

On March 18, 2021, the House Committee on Education and Labor's Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce Protections held a joint hearing entitled "*Still Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination*" (2021 Joint Subcommittee Hearing) during which the subject matter of H.R. 3110 was considered in anticipation of the legislation being reintroduced this Congress. The Joint Subcommittee heard testimony relevant to H.R. 3110 from Dina Bakst, Co-Founder and Co-President, A Better Balance: The Work & Family Legal Center, New York, NY, and, Camille A. Olson, Partner, Seyfarth Shaw LLP, Chicago, IL.

On May 26, 2021, the House Committee on Education and Labor met for a full committee markup of H.R. 3110, the *Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act*. The Committee adopted an amendment in the nature of a substitute (ANS) offered by Representative Alma Adams (D-NC-12). The ANS incorporated the provisions of H.R. 3110 with the following additions: (1) a provision to clarify that nothing in the bill excuses noncompliance with other federal or state laws or municipal ordinances that provide greater break time or space protections; (2) a provision to change the current undue hardship exemption to apply to employers with fewer than 25 employees, rather than employers with fewer than 50 employees under current law; (3) a provision to require employees to inform their employers about inadequate space ten days before filing suit for violating place requirements; and, (4) a provision to require the U.S. Secretary of Labor to issue guidance with specific examples of how to comply with the requirements of the law based on current guidance for providing break time and space from the U.S. Department of Health and Human Services (HHS) Office of Women's Health (OWH).

Ranking Member Virginia Foxx (R-NC-05) offered a substitute amendment to the ANS (Foxx ANS). The Foxx ANS (1) removed certain categories of employees, including agricultural employees and transportation employees, from nursing mother break time and space protections; (2) removed provisions allowing employees to seek legal and equitable relief; (3) removed a provision clarifying that if other federal, state, or local laws require that break time be paid, an employer must compensate an employee for such break time; (4) made remedies effective 120 days after enactment; (5) included a provision stipulating that time where an employee is not completely relieved of duty is only considered "hours worked" to the extent that such time is spent on "such activities"; (6) included a provision to hold the employer harmless for violating both break time and place requirements if the employer receives notice that they are in violation and remedies the violation within 30 days; and, (7) required the Government Accountability Office to issue a report to Congress evaluating the implementation and expansion of protections under the Act. The amendment was defeated by a vote of 17 Yeas and 29 Nays.

Representative Andy Levin (D–MI–09) offered an amendment to the ANS to ensure an employee is covered by break time and space protections when they begin nursing a child, including an adopted child, or when they give birth, even if the infant is stillborn or the employee does not retain custody of the infant. Additionally, the amendment changed the duration of the protections from one year after the child’s birth (under current law and the ANS) to two years after the employee gives birth or begins providing breast milk for a nursing child. The amendment was adopted by a vote of 44 Yeas and 3 Nays.

H.R. 3110 was reported favorably, as amended, to the House of Representatives by a vote of 28 Yeas and 19 Nays.

COMMITTEE VIEWS

REASONABLE BREAK TIME AND A PRIVATE SPACE TO EXPRESS BREAST MILK ARE CRITICAL SUPPORTS FOR NURSING EMPLOYEES

Breastfeeding plays an important role in both maternal and infant health outcomes. The benefits of breastfeeding for infants include lower risks of asthma, obesity, and sudden infant death syndrome, among others.⁴ For mothers, breastfeeding reduces the risks of type 2 diabetes and ovarian and breast cancer, among other benefits.⁵

The American Academy of Pediatrics recommends that infants be exclusively breastfed for the first six months after birth and continue to be breastfed, alongside food, for one year.⁶ The vast majority of mothers in the U.S. start out breastfeeding their infants. According to the most recent data from the Centers for Disease Control and Prevention (CDC), 84 percent of infants born in 2017 began breastfeeding.⁷ Yet, only 58.3 percent of these infants were breastfed at six months and 35.3 percent were breastfed at the one-year mark.⁸ There are also significant disparities in breastfeeding rates for Black and White infants. Among infants born in 2015, at six months of age, Black infants breastfed at a rate of 44.7 percent compared to 62 percent of White infants.⁹

Workplace supports for women returning to their jobs after giving birth have a direct impact on breastfeeding outcomes.¹⁰ Women in the U.S. often return to work during the critical one-year period for breastfeeding, likely as a result of economic need, social norms,

⁴ OFFICE OF WOMEN’S HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MAKING THE DECISION TO BREASTFEED: WHAT ARE THE HEALTH BENEFITS OF BREASTFEEDING FOR MOTHERS?, <https://www.womenshealth.gov/breastfeeding/making-decision-breastfeed> (last visited Jun. 10, 2021).

⁵ *Id.*

⁶ The American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk* 129 PEDIATRICS 1, 1 (2012), <https://pediatrics.aappublications.org/content/pediatrics/129/3/e827.full.pdf>.

⁷ CENTERS FOR DISEASE CONTROL AND PREVENTION, BREASTFEEDING REPORT CARD UNITED STATES, 2020 4 (2020), <https://www.cdc.gov/breastfeeding/pdf/2020-Breastfeeding-Report-Card-H.pdf>.

⁸ CDC, *supra* note 8.

⁹ Jennifer L. Beauregard et al., *Racial Disparities in Breastfeeding Initiation and Duration Among U.S. Infants Born in 2015*, 68(34) MORBIDITY AND MORTALITY WEEKLY REPORT 745, 745–46 (2019), <https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6834a3-H.pdf>.

¹⁰ Katy B. Kozhimannil et al., *Access to Workplace Accommodations to Support Breastfeeding after Passage of the Affordable Care Act*, 26 WOMEN’S HEALTH ISSUES 6 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4690749/pdf/nihms715360.pdf>.

or preference.¹¹ According to the most recent data from the U.S. Census Bureau, from 2000 to 2007, 57 percent of women returned to work within six months of giving birth to their first child and 64 percent within a year.¹²

Yet, women often face barriers to pumping breast milk in the workplace.¹³ Dina Bakst, testifying at the 2021 Joint Subcommittee Hearing, explained:

Some workers reduce their schedules, are terminated, or are forced out of the workplace, foregoing vital income and familial economic security because their workplaces are so hostile to their need to express milk. Others simply stop breastfeeding altogether, sometimes even before entering the workplace, perceiving (typically correctly) the challenges as insurmountable. Too many who continue in their jobs struggle with harassment, health repercussions, and dwindling milk supply to feed their babies.¹⁴

In a national survey of women who gave birth in 2011 and 2012, nearly half of women indicated that their employment plans after giving birth impacted their breastfeeding decisions, and 33 percent reported that employment was an obstacle to breastfeeding.¹⁵ Low-income women, who are disproportionately women of color, may face greater hurdles to maintaining employment and breastfeeding based on the conditions of employment, such as limited break time, frequent customer contact, limited facilities for pumping, or unsupportive supervisors.¹⁶

Workplace supports can help women balance breastfeeding and employment. According to a 2016 study, six months after the birth of their child, women with access to reasonable break time were 2.6 times more likely to breastfeed exclusively and 3 times more likely to breastfeed at all than women who did not have access to break time and space.¹⁷ Guaranteed break time to express milk is critical because nursing women have a biological need to express breast milk at regular intervals throughout the day, even when they are away from their child. Employees denied reasonable break time when needed can experience pain, engorgement, leakage, clogged ducts, or a potentially dangerous infection.¹⁸ This may require medical intervention, medication, hospitalization, or, in the worst cases, surgery.¹⁹ Failure to pump breast milk can also diminish milk supply.²⁰ According to the CDC, “pumping at the same times or as often as [a] baby normally breastfeeds should help [a moth-

¹¹TALLESE D. JOHNSON, U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961–2008 13 (2011), <https://www.census.gov/prod/2011pubs/p70-128.pdf>.

¹²Johnson, *supra* note 11, at 14.

¹³Liz Morris, et. al., *Exposed: Discrimination Against Breastfeeding Workers*, UC HASTINGS RESEARCH PAPER NO. 328, 7 (2019), <http://dx.doi.org/10.2139/ssrn.3341649>.

¹⁴*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination Before H. Subcomm. On Civil Rights and Human Servs. & H. Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Labor*, 117th Cong. (2021) (written testimony of Dina Bakst, Co-Founder and Co-President, A Better Balance: The Work & Family Legal Center, at 17) [Hereinafter Bakst Testimony] (citation omitted).

¹⁵Kozhimannil, *supra* note 10, at 5.

¹⁶Kozhimannil, *supra* note 10, at 3.

¹⁷Kozhimannil, *supra* note 10, at 6.

¹⁸Tara Haelle, *Women Who Have To Delay Pumping Risk Painful Breast Engorgement*, NPR (May 26, 2016, 1:53 PM), <https://www.npr.org/sections/health-shots/>.

¹⁹Haelle, *supra* note 18.

²⁰Morris, *supra* note 13, at 37.

er’s] body make about the amount of milk [her] baby needs.”²¹ Breaks are generally needed about two to three times per 8-hour shift for approximately 15 to 20 minutes at a time.²²

A private space to express breast milk is also critical for nursing employees. According to a 2016 study, women who were provided a private space were 3.8 times as likely to maintain exclusive breastfeeding each month and continued breastfeeding 1.36 months longer than women who were not provided with break time or a private space.²³ Breastfeeding mothers must feel safe in order to let down breast milk, and a reasonable guarantee of privacy is a key part of that safety.²⁴ If a nursing mother feels unsafe or emotionally distressed, her production of oxytocin may be inhibited, which can create a physiological barrier to lactation.²⁵

There is a strong business case for providing break time and space for nursing employees. Supporting the health of mothers and infants through breastfeeding may translate into less absenteeism from employees needing to take sick leave to care for themselves or their infants as well as lower health care or insurance costs.²⁶ Employers may also see less turnover from workers who are able to maintain breastfeeding and employment, allowing employers to save money on turnover costs and retain talent.²⁷ Employers may also benefit from a workforce that feels supported and is more satisfied and loyal.²⁸

The COVID–19 pandemic has had a disproportionate impact on women’s employment as industries dominated by women have been hardest hit. During the first ten months of the pandemic, women, especially women of color, lost more jobs than men.²⁹ Women lost 55 percent of the 9.6 million net jobs lost in 2020.³⁰ An estimated 2.1 million women left the workforce between January and December 2020.³¹ This includes 564,000 Black women and 317,000 Latinas.³² All the jobs that were lost in December 2020 were women’s jobs.³³ Between February and April 2020, mothers of children under the age of six saw a nine-percentage point increase in unemployment—a 20 percent larger increase than unemployment growth

²¹ U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, PUMPING BREAST MILK, <https://www.cdc.gov/nutrition/infantandtoddlernutrition/breastfeeding/pumping-breast-milk.html> (last visited Jun. 10, 2021).

²² U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, HOW MUCH AND HOW OFTEN TO BREASTFEED, <https://www.cdc.gov/nutrition/infantandtoddlernutrition/breastfeeding/how-much-and-how-often.html> (last visited Jun. 10, 2021); Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80075 (Dec. 21, 2010).

²³ Kozhimannil, *supra* note 10, at 6.

²⁴ Morris, *supra* note 13, at 48.

²⁵ Kathryn G. Dewey, *Maternal and Fetal Stress Are Associated with Impaired Lactogenesis in Humans*, 131 J. NUTRITION 3012S, 3013S (2001); WORLD HEALTH ORGANIZATION, INFANT AND YOUNG CHILD FEEDING: MODEL CHAPTER FOR TEXTBOOKS FOR MEDICAL STUDENTS AND ALLIED HEALTH PROFESSIONALS 11–12 (2009), <https://www.ncbi.nlm.nih.gov/books/NBK148970/>.

²⁶ NEW YORK STATE DEPARTMENT OF HEALTH, MAKING IT WORK FOR EMPLOYERS 3, <https://www.breastfeedingpartners.org/images/pdf/ForEmployersFINAL.pdf>; Julie Smith-Gagen, *The Association of State Law to Breastfeeding Practices in the US*, 23 MATERNAL AND CHILD HEALTH J 2034, 2034 (2014).

²⁷ *Id.*

²⁸ *Id.*

²⁹ DIANA BOESCH AND SHILPA PHADKE, WHEN WOMEN LOSE ALL THE JOBS: ESSENTIAL ACTIONS FOR A GENDER-EQUITABLE RECOVERY 1 (2021), <https://www.americanprogress.org/issues/women/reports/2021/02/01/495209/women-lose-jobs-essential-actions-gender-equitable-recovery/>.

³⁰ CLAIRE EWING-NELSON, ALL OF THE JOBS LOST IN DECEMBER WERE WOMEN’S JOBS 3 (2021), <https://nwlc.org/wp-content/uploads/2021/01/December-Jobs-Day.pdf>.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1.

among fathers.³⁴ This is a critical moment to advance policies that ensure workers can balance employment and motherhood and return to work.

According to a 2014 analysis of survey data, “[l]aws requiring workplaces to provide private areas and break times to breastfeed or pump were associated with increased proportions of infants who were ever breastfed and infants who were breastfed for 6 months or longer.”³⁵ For these reasons, it is critical that federal employment law guarantee nursing employees reasonable break time and a private space to express breast milk at work. As Ms. Bakst testified, “harsh workplace conditions for breastfeeding parents represent a fundamental unfairness and inequity in our legal system—and reinforce the stereotype that motherhood and employment are irreconcilable.”³⁶

CURRENT FEDERAL LAW HAS LIMITED COVERAGE AND ENFORCEABILITY

Section 4207 of the *Patient Protection and Affordable Care Act*³⁷ added subsection (r) to section 7 of the FLSA to require employers to provide: (1) reasonable break time, which does not need to be paid, for an employee to express milk for one year after a child’s birth, and (2) non-bathroom space free from view and intrusion for nursing employees to express breast milk while at work.³⁸ Unfortunately, gaps in the law limit access to these protections and leave employees unable to seek appropriate forms of relief in court when their employers violate the law.

The provision providing break time for nursing mothers was added to section 7 of the FLSA, which generally requires employers to pay covered, non-exempt employees overtime compensation. Section 13 of the FLSA, however, includes provisions excluding certain employees, including teachers,³⁹ certain nurses,⁴⁰ certain agricultural workers,⁴¹ and certain “white-collar” workers,⁴² from section 7.⁴³ As a result, employees who are exempted from section 7 pursuant to section 13 are excluded from 7(r) protections for nursing mothers. The Economic Policy Institute estimates 8.65 million women of childbearing age are excluded from nursing mother protections.⁴⁴

Current law also limits how employees can recover in court when their employers fail to comply with break time and space requirements. Under the FLSA, employers are liable to employees for violations of section 7, including violation of section 7(r) break time and space requirements, and employees may recover for such liabil-

³⁴ Liana Christin Landivar et al., Early Signs Indicate That COVID-19 Is Exacerbating Gender Inequality in the Labor Force, 6 *Socius: Sociological Research for a Dynamic World* 1, 2 (2020), <https://journals.sagepub.com/doi/full/10.1177/2378023120947997>.

³⁵ Smith-Gagen, *supra* note 26, at 2040.

³⁶ Bakst Testimony at 17.

³⁷ Pub. L. No. 111-148, 124 Stat. 577.

³⁸ 29 U.S.C. § 207(r).

³⁹ 29 U.S.C. § 213(a)(1).

⁴⁰ *Id.*

⁴¹ 29 U.S.C. § 213(b)(12).

⁴² 29 U.S.C. § 213(a)(1).

⁴³ *Id.*

⁴⁴ E-mail from Margaret Poydock, Policy Analyst, Economic Policy Institute, to House Education and Labor Committee Staff, (March 4, 2021, 10:49 EST) (on file with staff).

ity in state or federal court.⁴⁵ However, employers are liable for “the amount of unpaid minimum wages, or the unpaid overtime compensation, as the case may be.”⁴⁶ As the U.S. Department of Labor (DOL) has noted, “because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks.”⁴⁷

H.R. 3110 WOULD EXTEND BREAK TIME AND SPACE PROTECTIONS TO
ADDITIONAL WORKERS

Extending Protections to Currently Exempt Employees

H.R. 3110 would amend the FLSA to strike section 7(r) and move nursing employee break time and space provisions to a newly created section 18D of the FLSA. By moving these protections out of section 7, workers who are exempt from section 7 pursuant to section 13 are no longer exempt from break time and space protections. This amendment to the law would require employers in additional industries to come into compliance and provide break time and space protections to their employees, and it would ensure millions more workers have access to these vital protections.

The DOL’s guidance on break time protections, which is based on consultation with lactation experts at federal public health agencies, estimates nursing mothers will need two to three breaks during an eight-hour shift.⁴⁸ Providing break time can be as simple as implementing good management and communication practices so that coverage can be provided when employees need to take breaks, similar to when employees need to take meal, rest, or restroom breaks. Supervisors can also work with breastfeeding employees to develop schedules that meet their needs. For example, for teachers, agricultural workers, airline employees, and transportation employees, this could mean taking scheduled breaks that are planned in advance.⁴⁹

Compliance with private space requirements is also achievable for industries that would be newly subject to break time and space requirements under H.R. 3110. Under the DOL’s guidance, where it is not practicable to provide a private room, employers can comply by creating a space with partitions or curtains, a place to sit, and a flat surface.⁵⁰ An employer is not required to maintain a permanent space dedicated to nursing mothers.⁵¹ As amended, H.R. 3110 would require the U.S. Secretary of Labor (Secretary) to issue guidance with specific examples of how employers can comply based on current guidance for providing break time and space from OWH. The Secretary should ensure this guidance includes a non-exhaustive list of specific examples based on OWH guidance on how employers of newly covered employees, including agriculture employees, transportation employees, airline employees, nurses,

⁴⁵ 29 U.S.C. § 216(b).

⁴⁶ *Id.*

⁴⁷ Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80078 (Dec. 21, 2010).

⁴⁸ *Id.* at 80075.

⁴⁹ New York State Department Of Health, *supra* note 26, at 9–13.

⁵⁰ Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80075.

⁵¹ *Id.* at 80076.

and teachers, can comply with the place requirements under the law.

For example, according to OWH, employers of transportation employees, which could include delivery drivers and transit workers, can provide privacy shields to be used in the cab of a vehicle or partner with local businesses along a transportation route to provide employees with a private, non-bathroom space.⁵² OWH also highlights how the TriMet transportation company in Oregon has accommodated bus drivers by creating portable lactation spaces located along their bus drivers' routes.⁵³ For employers of agriculture workers, OWH states that pop-up privacy tents, the cab of farming equipment or company vehicles with covered windows, or small buildings in the field are a workable solution.⁵⁴ For employers of medical professionals, such as nurses, OWH suggests a private patient room, portion of a lounge area, storage area, or conference room.⁵⁵ For teachers, OWH states that "commitment by school administration to provide a sub or floater teacher for employees who are breastfeeding is one of the keys to success" and recommends employers make use of the school's nurse's office, part of a conference room, or a teacher resource room.⁵⁶

At least 15 states and the District of Columbia have standalone laws requiring break time and space for breastfeeding workers to pump that are comparable to existing federal requirements.⁵⁷ Of these state-level laws, only one law has industry or occupation-specific carve outs.⁵⁸ This means that in 14 states and the District of Columbia, employers who would be newly subject to federal break time and space requirements are already subject to similar state-level requirements. For example, agricultural employers in California, where one-third to one-half of farmworkers in the U.S. reside,⁵⁹ are already required to provide break time and space for nursing employees. In the city of Los Angeles, municipal transpor-

⁵² OFFICE ON WOMEN'S HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SUPPORTING NURSING MOMS AT WORK SOLUTIONS FOR TRANSPORTATION 1-2, https://owh-wh-d9-dev.s3.amazonaws.com/s3fs-public/documents/snm_transportation_solutions.pdf (last visited June 11, 2021).

⁵³ OFFICE ON WOMEN'S HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, TRANSPORTATION, <https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries/transportation> (last visited June 11, 2021).

⁵⁴ OFFICE ON WOMEN'S HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OUTDOOR JOB SITES, <https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries/outdoor-job-sites> (last visited June 11, 2021); OFFICE ON WOMEN'S HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SUPPORTING NURSING MOMS AT WORK SOLUTIONS FOR AGRICULTURE 1-2, https://owh-wh-d9-dev.s3.amazonaws.com/s3fs-public/documents/snm_agriculture_solutions.pdf (last visited June 11, 2021).

⁵⁵ OFFICE ON WOMEN'S HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH CARE, <https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries/health-care> (last visited June 11, 2021).

⁵⁶ OFFICE ON WOMEN'S HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EDUCATION, <https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries/education> (last visited June 11, 2021).

⁵⁷ Arkansas (ARK. CODE ANN. § 11-5-116); California (CAL. LAB. CODE §§ 1030-31); Colorado (COLO. REV. STAT. § 8-13.5-104); Connecticut (CONN. GEN. STAT. § 31-40w); Georgia (GA. CODE ANN. § 34-1-6); Hawaii (HAW. REV. STAT. § 378-92); Illinois (802 ILL. COMP. STAT. §§ 260/10, 15); Maine (ME. REV. STAT. ANN. TIT. 26, § 604); Minnesota (MINN. STAT. § 181.939); New Mexico (N.M. STAT. ANN. § 28-20-2); New York (N.Y. LAB. LAW § 206-c); Oregon (OR. REV. STAT. § 653.077); Rhode Island (R.I. GEN. LAWS § 23-13.2-1); South Carolina (S.C. CODE ANN. § 41-1-130); Tennessee (TENN. CODE ANN. § 50-1-305); Vermont (21 V.S.A. § 305.21); and Washington, D.C. (D.C. CODE ANN. § 2-1402.82.).

⁵⁸ OR. REV. STAT. §§ 653.075, 653.077, 653.256 (2007).

⁵⁹ FARMWORKERS JUSTICE, WHO ARE FARMWORKERS?, <https://www.farmworkerjustice.org/about-farmworker-justice/who-we-serve/> (last visited June 11, 2021).

tation employees can use lactation space at any fire station along their route.⁶⁰

Given that many industries have already figured out how to comply with state-level requirements and employers will have guidance with specific workable solutions, there is no compelling reason to continue to deny protections to exempted employees. While the legislative history of break time and space provisions is scant, there is nothing in the record that suggests that workers who are currently exempt and would be newly covered under H.R. 3110 were excluded because of compliance concerns. Furthermore, in male-dominated industries, women are more likely to face retaliation or hostility for their nursing needs.⁶¹ As many currently excluded industries, such as transportation and agriculture, are male-dominated, providing these employees with break time and space protections is critical.

Lowering the Employee Threshold for the Undue Hardship Exemption

Under current law, employers with fewer than 50 employees are exempt from break time and space requirements “if such requirements would 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.”⁶² Nothing in the record supports the need to maintain the current undue hardship threshold at this level. Hawaii sets its undue hardship threshold at employers with fewer than 20 employees,⁶³ Oregon sets its threshold at 10 or fewer employees (break time only),⁶⁴ and New Mexico,⁶⁵ New York,⁶⁶ and Maine⁶⁷ state laws do not have an undue burden exemption. As amended, H.R. 3110 changes the current undue hardship exemption to apply to employers with fewer than 25 employees. This will help ensure more women have the right to break time and space. Additionally, the new required guidance (discussed above) will help ensure that workplaces that mistakenly used the undue hardship exemption, and thus were improperly denying their workers protections, will have examples for compliance.

Clarifying Situations Under Which Break Time and Space Requirements Apply

As amended, H.R. 3110 includes key clarifications regarding the application of break time and space protections to specific breastfeeding situations. These include situations in which the employee gives birth but does not retain legal custody of the child or following a stillbirth or the employee does not give birth to the child but begins to provide breast milk for a nursing child. This includes, but is not limited to, situations in which the child is adopted, in which case both the biological and adoptive parents would

⁶⁰ OFFICE ON WOMEN’S HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, TRANSPORTATION, <https://www.womenshealth.gov/supporting-nursing-moms-work/lactation-break-time-and-space-all-industries/transportation> (last visited June 11, 2021).

⁶¹ Morris, *supra* note 13, at 17.

⁶² 29 U.S.C. § 207(r)(3).

⁶³ HAW. REV. STAT. § 378–92 (2013).

⁶⁴ OR. REV. STAT. §§ 653.075, 653.077, 653.256 (2007).

⁶⁵ N.M. STAT. ANN. § 28–20–2 (2007).

⁶⁶ N.Y. LABOR LAW § 206–c (2007).

⁶⁷ ME. REV. STAT. ANN. TIT. 26 § 604 (2009).

be covered if they need to express breastmilk, and situations in which the employee is nursing for purposes other than feeding her own child, such as for the purposes of breast milk donation.

For workers who may have lost a child due to stillbirth or who have given up their child for adoption, space and time to pump breast milk are still important for their health and comfort, even if they no longer have the child with them. Inadequate breast milk expression post-partum can lead to pain, engorgement, and, in some, cases, mastitis, which is infection of the breast.⁶⁸ For workers who may no longer physically have the child, expressing breast milk can relieve the discomfort of engorgement. They may also want to donate their breast milk as a way to help them with their grief over a lost child. Hospital Neonatal Intensive Care Units (NICUs) across the country accept donated breast milk as many mothers to premature babies are not able to produce milk.⁶⁹

Extending Break Time and Space Protections to Two Years

H.R. 3110, as amended, would extend break time and space protections to workers to two years after the employee gives birth or begins nursing a child. The American Academy of Pediatrics policy guidance on breastfeeding recommends that children be exclusively breastfed for the first six months of life.⁷⁰ After the six-month period, appropriate foods can be introduced with “continuation of breastfeeding for 1 year or longer as mutually desired by mother and infant.”⁷¹ The American Academy of Family Physicians also supports a longer duration of breastfeeding, noting that “best outcomes can be achieved when breastfeeding continues until the child is two years of age.”⁷²

H.R. 3110 WOULD ENSURE NURSING EMPLOYEES CAN RECOVER
APPROPRIATE RELIEF IN COURT

H.R. 3110, as amended, would subject employers that violate break time and space requirements to legal and equitable relief “including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages.”⁷³ Evidence suggests that strengthening enforcement mechanisms will improve breastfeeding outcomes. A 2014 study of breastfeeding-support laws found that infants in states with workplace pumping laws with enforcement provisions were 225 percent more likely to ever breastfeed and 102 percent more likely to breastfeed for at least six months.⁷⁴

During the 2021 Joint Subcommittee Hearing, Minority witness Camille Olson questioned the appropriateness of expanding the types of relief available for workers for violations of break time and space requirements in courts. Ms. Olson argued that “[e]mployees currently may bring a private right of action (including the right

⁶⁸ MELODIE M. BLACKMON ET AL., ACUTE MASTITIS 4 (2021).

⁶⁹ American Academy of Pediatrics, *Donor Human Milk for the High-Risk Infant: Preparation, Safety, and Usage Options in the United States*, 139(1) PEDIATRICS 2 (2017), <https://pediatrics.aappublications.org/content/pediatrics/139/1/e20163440.full.pdf>.

⁷⁰ American Academy of Pediatrics, *Breastfeeding and the Use of Human Milk*, 129(3) PEDIATRICS e827, e832 (2012), <https://pediatrics.aappublications.org/content/pediatrics/129/3/e827.full.pdf>.

⁷¹ *Id.* at e832.

⁷² AAFP Releases Position Paper on Breastfeeding, AM. FAM. PHYSICIAN (2014), <https://www.aafp.org/afp/2015/0101/afp20150101p56.pdf>.

⁷³ 29 U.S.C. § 216(b).

⁷⁴ Smith-Gagen, *supra* note 26, at 2039.

to bring a collective action on behalf of themselves and others similarly situated) when their employer's violation of Section 7(r) results in unpaid wages or when they suffer retaliation for complaining of a violation of Section 7(r)'s requirements."⁷⁵ This analysis is flawed for several reasons.

First, as discussed above, recovery only for unpaid minimum wages or overtime compensation renders employees unable to enforce current break time and space requirements in a private right of action. As a court surmised in an opinion dismissing such a case, "there does not appear to be a manner of enforcing the express breast milk provisions."⁷⁶

Second, even if unpaid minimum wage or overtime compensation were recoverable, lost wages are often an inadequate or inappropriate form of relief for certain economic harms. For instance, an employer's refusal to allow for breaks could leave an employee unable to both remain employed and continue breastfeeding, forcing the employee to resign. Or, an employer could fire an employee for taking breaks to express milk or for informing her employer she intends to take such breaks. In a report from the Center for WorkLife Law, emergency room nurse Barbara shared how she was forced to leave her job after six years of service after being repeatedly bullied and denied adequate break time and space to pump.⁷⁷ Although this job loss could lead to significant economic harm, especially for low-wage workers, current law does not allow employees to seek appropriate relief in court to make them whole. H.R. 3110 would allow workers to seek legal and equitable relief for economic harm, including backpay, front pay, liquidated damages, and reinstatement.

Allowing for legal and equitable relief under H.R. 3110 will also allow nursing employees to recover for harm to their physical and mental health. Employees who are denied reasonable break time may experience pain, engorgement, leakage, clogged ducts, or a potentially dangerous infection that may require medical intervention, medication, hospitalization, or, in the worst cases, surgery.⁷⁸ In a report from the Center for WorkLife Law, former New York City police officer Simone Teagle shared her story of being denied the ability to pump during her entire nine-hour shift.⁷⁹ Officer Teagle noted, "I had blood in my milk from waiting so long" and "a fever, aches and pains, and other flu-like symptoms." She also stated she had "super-painful" mastitis, "but I had to keep working."⁸⁰ H.R. 3110 would allow workers like Simone to seek compensatory damages, including for medical costs or emotional distress, and punitive damages for this type of harm.

Third, while the FLSA's current anti-retaliation provisions are critical, they are not enough. An employee can, in fact, seek legal and equitable relief if her employer discharges or discriminates against her for filing a complaint regarding break time and space

⁷⁵ *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination Before H. Subcomm. on Civil Rights and Human Servs. & H. Subcomm. on Workforce Prots. of the H. Comm. on Educ. and Labor*, 117th Cong. (2021) (written testimony of Camille A. Olson, Partner, Seyfarth Shaw LLP, at 38) [Hereinafter Olson Testimony].

⁷⁶ *Salz v. Casey's Mktg. Co.*, No. 1:11-cv-3055-DEO, 2012 WL 2952998, at *7 (N.D. Iowa July 19, 2012).

⁷⁷ Morris, *supra* note 13, at 7.

⁷⁸ Blackmon, *supra* note xx, at 4.

⁷⁹ Morris, *supra* note 13, at 7.

⁸⁰ *Id.*

protections.⁸¹ However, the employee must be aware of her rights, actually make a complaint, and be retaliated against for such complaint. If an employee is merely fired for taking or seeking to take breaks, she cannot recover under the FLSA's anti-retaliation provisions. A report from the Center for WorkLife Law includes the story of Marina, a taqueria cashier whose employer forbid her from returning to work until she weaned her infant.⁸² She was fired after telling her employer that she needed to work. With four children to support, Marina was unable to find another night job and had no child care during the day. She was forced to take on loans and rely on charitable services for food. Unless Marina was aware of her rights under current law and made a complaint before she was fired, she would not be allowed to maintain a retaliation complaint. H.R. 3110 ensures workers like Marina can seek appropriate relief under similar circumstances.

Ms. Olson argued at the 2021 Joint Subcommittee Hearing that providing workers with appropriate types of relief under the law would lead to the proliferation of individual and collective lawsuits with delayed recovery for workers.⁸³ Evidence from state-level laws does not support this argument. In the states with standalone break time and space laws that allow employees to recover appropriate legal and equitable remedies in court, such provisions serve as a strong deterrent to violations of the protections, and there is very limited litigation. Hawaii, Minnesota, Vermont, and the District of Columbia have standalone break time and space laws that are comparable to federal requirements yet allow an employee to seek legal and equitable remedies in court. Only six cases have been filed in these states: three in Minnesota since its law went into effect in 2014 and three in the District of Columbia since its law went into effect in 2007.⁸⁴ Legal experts believe that one reason why litigation rates are so low in these jurisdictions is that employers have been more likely to comply to avoid legal liability.⁸⁵

It is important to note that allowing for compensatory and punitive damages does not mean damages will be unlimited. While circuit courts are split on whether punitive damages are recoverable under current provisions of the FLSA that provide for legal relief, courts do not generally award unjustifiable or excessive damages.⁸⁶ Furthermore, under H.R. 3110, relief would only be provided "as may be appropriate to effectuate the purposes of section" 18D.⁸⁷ This serves as a guardrail against excessive punitive damages.⁸⁸

At the 2021 Joint Subcommittee Hearing, Ms. Olson expressed concern with employers being held accountable for what she deemed "technical violations" that do not result in monetary damages, such as "a claim that the provided space did not properly

⁸¹ 29 U.S.C. § 215(a)(3).

⁸² Morris, *supra* note 13, at 7.

⁸³ Olson Testimony at 38.

⁸⁴ LIZ MORRIS AND JESSICA LEE, COMPLIANCE OR COMPLAINTS? THE IMPACT OF PRIVATE ENFORCEABILITY OF LACTATION BREAK TIME AND SPACE LAWS 5 (2021), <https://worklifelaw.org/wp-content/uploads/2021/06/Compliance-or-Complaints-Lactation-Litigation-Report.pdf>.

⁸⁵ *Id.* at 6.

⁸⁶ Carol Abdelmeseeh and Deanne M. DiBlasi, *Why Punitive Damages Should be Awarded for Retaliatory Discharge Under the Fair Labor Standards Act*, 21 HOFSTRA LABOR AND EMPLOYMENT LAW J. 715, 734 (2004).

⁸⁷ 29 U.S.C. § 216(b).

⁸⁸ Abdelmeseeh and DiBlasi, *supra* note 86, at 734.

shield the employee from view.”⁸⁹ However, failing to provide a space shielded from view and free from intrusion is not merely a technical violation; this protection is key for nursing workers. Privacy and cleanliness are vital to supporting breastfeeding workers. Letting down milk to pump or breastfeed is a physiological process that requires the mother to feel safe.⁹⁰ Unsanitary conditions or non-private spaces, such as rooms with glass windows and no curtains, or rooms with no lock or privacy sign, can prevent a breastfeeding mother from being able to express breast milk.⁹¹ A nursing employee who feels unsafe or emotionally distressed may experience inhibited production of oxytocin, creating a physiological barrier to lactation.⁹²

Shielding nursing workers from view is easy to accomplish and inexpensive. It can be as simple as taping butcher paper over windows, using a curtain, setting up a pop-up tent, or placing visors in a vehicle. There is no requirement under current law or H.R. 3110 that a room with four walls be provided. It is also relatively simple to ensure that someone has been provided a space that is free from intrusion. An employer could put a handwritten sign on the door instructing others not to enter or install a simple \$10 sliding lock.

It is highly unlikely that an employer would be sued for a one-time intrusion. It is true that, even if proper steps have been taken, a one-time intrusion from an inconsiderate or confused coworker is possible. However, it is highly unlikely that such a situation alone would lead to a lawsuit. According to the Center for WorkLife Law:

Irregular violations that are remedied without delay, such as an accidental intrusion, have not led to litigation. This is likely due to a lack of desire on the part of employees to sue their current employer who acted in good faith, but also because attorneys are unlikely to take cases with no actual economic damages, especially when the employer acted reasonably.⁹³

None of the six state-level cases filed were filed simply because the nursing worker had been interrupted or intruded upon once or twice. In all six of the cases brought at the state level, plaintiffs alleged actual economic damages, such as job loss.⁹⁴

Finally, Ms. Olson argued at the 2021 Joint Subcommittee Hearing that the DOL was “better suited to quickly and sufficiently enforce such technical violations of Section 7(r).”⁹⁵ While the DOL’s Wage and Hour Division (WHD) plays a critical role in enforcing the FLSA, the agency is responsible for enforcing provisions of more than a dozen statutes and executive orders for workers in more than 10 million workplaces.⁹⁶ As the current Administration has stated, “WHD cannot intervene in all the cases where it is

⁸⁹ Olson Testimony at 34.

⁹⁰ Dewey, *supra* note 25, at 3013S; World Health Organization, *supra* note 25, at 11–12.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Morris and Lee, *supra* note 84, at 6.

⁹⁴ *Id.* at 3.

⁹⁵ Olson Testimony at 34.

⁹⁶ U.S. DEPARTMENT OF LABOR, FY 2022 CONGRESSIONAL BUDGET JUSTIFICATION WAGE AND HOUR DIVISION 10 (2021), <https://www.dol.gov/sites/dolgov/files/general/budget/2022/CBJ-2022-V2-09.pdf>.

needed.”⁹⁷ Congress long ago recognized that employees need the ability to go to court to enforce key workplace rights under the FLSA. Furthermore, as noted above, the violations mentioned by Ms. Olson are not merely “technical.”

Under H.R. 3110, as amended, before filing suit against an employer for violating place requirements, an employee must have informed her employer that space was inadequate and provided the employer with 10 days to comply with place requirements. This provision would not prohibit employees from recovering for harm, nor does this provision provide employers with a general “grace period” for compliance. The employer must be in compliance as soon as the employee needs a place. This provision is only operable where the employee seeks to file suit in court against the employer for place requirement violations. In informing the employer that space is inadequate, the employee does not need to be well-versed in the details of the law, quote its provisions, or send a formal letter. Furthermore, this requirement does not apply if the employee has been discharged, including constructively discharged, for asking for a space or if the employer has indicated they have no intention of complying. Nor would this provision prevent the DOL from exercising its existing enforcement authority or a state or local employment or labor agency from enforcing its respective laws or ordinances.

In contrast, the Foxx ANS proposed to hold the employer harmless for violating both break time and place requirements if the employer receives notice they are in violation and violations are fixed within 30 days. Because this provision in the Foxx ANS was not tied to litigation, it would have effectively provided employers with a 30-day grace period before they had to comply with both break time and space requirements. Employers do not need 30 days to comply with these protections and forcing a nursing employee to wait this period of time could cause her to lose her milk supply.⁹⁸ Additionally, this provision would have impacted the current limited enforcement of the law. Under current law: “If an employer refuses to comply with the requirements of section 7(r), however, the Department may seek injunctive relief in federal district court, and may obtain reinstatement and lost wages for the employee.”⁹⁹ Because the 30-day delay provision in the Foxx ANS was not tied to private litigation, the Secretary would have been subject to the delay before enforcement. This would, in effect, have rolled back current law.

In addition, the 30-day delay provision in the Foxx ANS could have resulted in an employer escaping liability for discharged employees. For example, under the Foxx ANS, a nursing employee could have asked for break time and space on June 1, been fired on June 2, and if the employer started making a space available for *other* employees before July, the employer would not have been liable for harm to the fired employee. Similarly, under the Foxx ANS, the nursing employee could have asked for break time and space on June 1, and the employer could have told her “no” on June 2. The nursing worker could have made the hard decision

⁹⁷ *Id.* at 11.

⁹⁸ WIC BREASTFEEDING SUPPORT, U.S. DEPARTMENT OF AGRICULTURE, LOW MILK SUPPLY, <https://wicbreastfeeding.fns.usda.gov/low-milk-supply> (last visited Jun. 9, 2021).

⁹⁹ 29 U.S.C. § 217; Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80078.

that she could not maintain breastfeeding and keep that job, forcing to her resign. If the employer started making a space available for *other* employees before July, the employer would have been off the hook for the employee who was constructively discharged. These are terrible results that would have left nursing workers worse off.

H.R. 3110 makes the expansion of the types of relief recoverable by employees in court effective upon enactment for employers who already are subject to break time and space requirements and have been for more than ten years. Expansion of protections to currently excluded employees does not take effect until 120 days after enactment.

H.R. 3110 MAKES ADDITIONAL KEY CLARIFICATIONS TO SUPPORT
NURSING EMPLOYEES

H.R. 3110, as amended, clarifies that if a worker is not completely relieved of duty during break time, such time is considered compensable “hours worked” used to determine the amount of pay due to an employee under the FLSA’s minimum wage and overtime requirements.¹⁰⁰ This clarification is consistent with current regulations and guidance.¹⁰¹ Current guidance from the DOL regarding break time for nursing mothers states: “The FLSA’s general requirement that the employee must be completely relieved from duty applies; if a nursing employee is not completely relieved from duty during a break to express breast milk, the time must be compensated as work time.”¹⁰²

The Foxx ANS asserted that time that an employee was not relieved of duty was considered hours worked, and thus compensable, “only to the extent of the time spent on such activities.” This provision could have required an employer to ascertain exactly how much time during a nursing employee’s pumping break she actively pumped breast milk, which is a grievous violation of the nursing employee’s privacy. If a worker is worried about her boss monitoring her activities during her pumping break, she may not be able to produce breast milk.

H.R. 3110, as amended, makes clear that if other federal, state, or local laws require that break time be paid, an employer must compensate an employee for such break time. Guidance from the DOL in 2010 highlights how language stating break time for nursing mothers need not be paid interacts with other regulations around break time under the FLSA:

[I]f the employer permits short breaks, usually 20 minutes or less, the time must be counted as hours worked when determining if the FLSA requirements for payment

¹⁰⁰“The Act requires that employees must receive at least the minimum wage and may not be employed for more than 40 hours in a week without receiving at least one and one-half times their regular rates of pay for the overtime hours. The amount employees should receive cannot be determined without knowing the number of hours worked.” U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, FACT SHEET #22: HOURS WORKED UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2008), <https://www.dol.gov/sites/dolgov/files/WH/legacy/files/whdfs22.pdf>.

¹⁰¹“Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked.” 29 C.F.R. §785.16; “The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.” 29 C.F.R. §785.19.

¹⁰²Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80075.

of minimum wage and/or overtime have been satisfied. See 29 CFR 785.18. Where an employer already provides paid breaks, an employee who uses that break time to express milk must be paid in the same way that other employees are compensated for break time.

Additional time used beyond the authorized paid break time could be uncompensated. For example, if an employer provides a 20 minute paid break and a nursing employee uses that time to express milk and takes a total of 25 minutes for this purpose, the five minutes in excess of the paid break time does not have to be compensated.¹⁰³

H.R. 3110, as amended, includes a provision to ensure that nothing in the bill excuses noncompliance with other federal or state laws or municipal ordinances that provide greater break time or space protections. The FLSA generally establishes baseline wage and hour protections. Break time and space protections in the FLSA are baseline protections nursing workers need to balance their nursing needs and employment. Other federal, state, or local laws may build on those baseline protections or allow workers to negotiate with their employers to put in place higher workplace standards. For example, Title VII of the *Civil Rights Act* may confer certain rights onto pregnant or nursing employees.¹⁰⁴ This bill makes clear such protections remain applicable.

CONCLUSION

By expanding access to enforceable break time and space protections for nursing employees, H.R. 3110 will support and promote the health and well-being of new mothers and infants.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section specifies that the title of the bill may be cited as the *Providing Urgent Maternal Protections for Nursing Mothers Act*.

Section 2. Breastfeeding accommodations in the workplace

Section 2(a) amends the *Fair Labor Standards Act of 1938* by striking section 7(r) and moving the provisions for break time and space for nursing mothers to a new section 18D. By moving these protections out of section 7, workers who are exempt from section 7 pursuant to other FLSA provisions (e.g., agricultural employees, airline employees, and certain “white collar” employees) are no longer exempt from break time and space protections.

The new section 18D includes the following provisions that are *already in existing law*:

- Employers are required to provide a breastfeeding employee with reasonable break time and non-bathroom space free from intrusion and view to express breast milk as needed.
- Employers are not required to compensate an employee for such break time.
- Nothing in this section preempts state laws that provide greater protections.

¹⁰³ *Id.* at 80074–75.

¹⁰⁴ 42 U.S.C. § 2000e; 29 CFR §1604.10(b) (1973).

The new section 18D adds the following *new provisions and changes*:

- Changes the duration of the protections from one year after the child’s birth to two years after the employee gives birth or begins providing breast milk for a nursing child.
- Clarifies that if other federal, state, or local laws require that such break time be paid, an employer must compensate an employee for such break time.
- Clarifies that if an employee is not completely relieved of duty during break time, such time is considered “hours worked” and thus compensable.
- Adds that nothing in this section excuses noncompliance with other federal or state laws or municipal ordinances that provide greater break time or space protections.
- Requires employees to inform their employers about inadequate space 10 days before filing suit for violating place requirements.
- Changes the current undue hardship exemption to apply to employers with fewer than 25 employees rather than employers with fewer than 50 employees.

Section 2(a) also adds that a violation of the new section 18D is a prohibited act under the FLSA.

Section 2(b) amends the FLSA to make employers who violate break time and space protections for nursing mothers liable for legal and equitable relief as appropriate.

Section 2(c) requires the U.S. Secretary of Labor to issue guidance with specific examples of how to comply with the break time and space protections based on current guidance for providing break time and space from the Department of Health and Human Services (HHS) Office of Women’s Health (OWH).

Section 3. Effective date

This section states that amendments made under section 2(a) relating to extending break time and space protections to express breast milk in the workplace shall take effect 120 days after the date of enactment of the Act and that amendments under section 2(b) relating to remedies shall take effect on the date of enactment of the Act.

EXPLANATION OF AMENDMENTS

The amendments, including the amendment in the nature of a substitute, are explained in the descriptive portions of this report.

APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Pursuant to section 102(b)(3) of the *Congressional Accountability Act of 1995*, Pub. L. No. 104–1, H.R. 3110, as amended, applies for the first 120 days after enactment to terms and conditions of employment within the legislative branch by amending the FLSA.

UNFUNDED MANDATE STATEMENT

Pursuant to Section 423 of the *Congressional Budget and Impoundment Control Act* (as amended by Section 101(a)(2) of the *Unfunded Mandates Reform Act*, Pub. L. No. 104–4), the Committee adopts as its own the estimate of federal mandates regarding H.R.

3110, as amended, prepared by the Director of the Congressional Budget Office.

EARMARK STATEMENT

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3110 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as described in clauses 9(e), 9(f), and 9(g) of rule XXI.

ROLL CALL VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 3110:

Date: 5/26/21

COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 1

Bill: H.R. 3110

Amendment Number: 2

Disposition: defeated by a vote of 17-29

Sponsor/Amendment: Foxx ANS \ R-PUMPACT-ANS

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)		X		Mrs. FOXX (NC) (Ranking)	X		
Mr. GRIJALVA (AZ)			X	Mr. WILSON (SC)	X		
Mr. COURNTEY (CT)		X		Mr. THOMPSON (PA)			X
Mr. SABLAN (MP)		X		Mr. WALBERG (MI)	X		
Ms. WILSON (FL)		X		Mr. GROTHMAN (WI)	X		
Ms. BONAMICI (OR)		X		Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)		X		Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)		X		Mr. BANKS (IN)	X		
Mr. DESAULNIER (CA)		X		Mr. COMER (KY)	X		
Mr. NORCROSS (NJ)		X		Mr. FULCHER (ID)	X		
Ms. JAYAPAL (WA)		X		Mr. KELLER (PA)	X		
Mr. MORELLE (NY)		X		Mr. MURPHY (NC)	X		
Ms. WILD (PA)		X		Ms. MILLER-MEEKS (IA)	X		
Mrs. MCBATH (GA)		X		Mr. OWENS (UT)			X
Mrs. HAYES (CT)		X		Mr. GOOD (VA)		X	
Mr. LEVIN (MI)		X		Mrs. MCCLAIN (MI)	X		
Ms. OMAR (MN)		X		Mrs. HARSHBARGER (TN)	X		
Ms. STEVENS (MI)		X		Mrs. MILLER (IL)		X	
Ms. LEGER FERNANDEZ (NM)		X		Mrs. SPARTZ (IN)			X
Mr. JONES (NY)		X		Mr. FITZGERALD (WI)			X
Ms. MANNING (NC)		X		Mr. CAWTHORN (NC)	X		
Mr. MRVAN (IN)		X		Mrs. STEEL (CA)	X		
Mr. BOWMAN (NY)		X		Ms. LETLOW (LA)	X		
Mr. POCAN (WI)		X		<i>Vacancy</i>			
Mr. CASTRO (TX)		X					
Ms. SHERRILL (NJ)		X					
Mr. YARMUTH (KY)		X					
Mr. ESPAILLAT (NY)		X					
Mr. KWEISI MFUME (MD)			X				

TOTALS: Ayes: 17

Nos: 29

Not Voting: 6

Total: 53 / Quorum: / Report:

(29 D - 24 R)

*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 5/26/2021

COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 2

Bill: H.R. 3110

Amendment Number: 3

Disposition: Adopted by a vote of 44 - 3

Sponsor/Amendment: Levin/LEVIMI_031

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)	X			Mrs. FOXX (NC) (Ranking)	X		
Mr. GRIJALVA (AZ)	X			Mr. WILSON (SC)	X		
Mr. COURNTEY (CT)	X			Mr. THOMPSON (PA)			X
Mr. SABLAN (MP)	X			Mr. WALBERG (MI)	X		
Ms. WILSON (FL)	X			Mr. GROTHMAN (WI)	X		
Ms. BONAMICI (OR)	X			Ms. STEFANIK (NY)	X		
Mr. TAKANO (CA)	X			Mr. ALLEN (GA)	X		
Ms. ADAMS (NC)	X			Mr. BANKS (IN)	X		
Mr. DESAULNIER (CA)	X			Mr. COMER (KY)	X		
Mr. NORCROSS (NJ)	X			Mr. FULCHER (ID)	X		
Ms. JAYAPAL (WA)	X			Mr. KELLER (PA)	X		
Mr. MORELLE (NY)	X			Mr. MURPHY (NC)	X		
Ms. WILD (PA)	X			Ms. MILLER-MEEKS (IA)	X		
Mrs. MCBATH (GA)	X			Mr. OWENS (UT)			X
Mrs. HAYES (CT)	X			Mr. GOOD (VA)		X	
Mr. LEVIN (MI)	X			Mrs. MCCLAIN (MI)	X		
Ms. OMAR (MN)	X			Mrs. HARSHBARGER (TN)		X	
Ms. STEVENS (MI)	X			Mrs. MILLER (IL)		X	
Ms. LEGER FERNANDEZ (NM)	X			Mrs. SPARTZ (IN)			X
Mr. JONES (NY)	X			Mr. FITZGERALD (WI)			X
Ms. MANNING (NC)	X			Mr. CAWTHORN (NC)	X		
Mr. MRVAN (IN)	X			Mrs. STEEL (CA)	X		
Mr. BOWMAN (NY)	X			Ms. LETLOW (LA)	X		
Mr. POCAN (WI)	X			<i>Vacancy</i>			
Mr. CASTRO (TX)	X						
Ms. SHERRILL (NJ)	X						
Mr. YARMUTH (KY)	X						
Mr. ESPAILLAT (NY)	X						
Mr. KWEISI MFUME (MD)							

TOTALS: Ayes:

Nos:

Not Voting:

Total: 53 / Quorum: / Report:

(29 D - 24 R)

*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

Date: 5/26/2021

COMMITTEE ON EDUCATION AND LABOR RECORD OF COMMITTEE VOTE

Roll Call: 3

Bill: H.R. 3110

Amendment Number: Motion

Disposition: Adopted by a vote of 28 - 19

Sponsor/Amendment: Bowman/to report to the House with an amendment and with the recommendation that the amendment be agreed to, and the bill as amended, do pass

Name & State	Aye	No	Not Voting	Name & State	Aye	No	Not Voting
Mr. SCOTT (VA) (Chairman)	X			Mrs. FOXX (NC) (Ranking)		X	
Mr. GRJALVA (AZ)	X			Mr. WILSON (SC)		X	
Mr. COURNTEY (CT)	X			Mr. THOMPSON (PA)			X
Mr. SABLAN (MP)	X			Mr. WALBERG (MI)		X	
Ms. WILSON (FL)	X			Mr. GROTHMAN (WI)		X	
Ms. BONAMICI (OR)	X			Ms. STEFANIK (NY)		X	
Mr. TAKANO (CA)	X			Mr. ALLEN (GA)		X	
Ms. ADAMS (NC)	X			Mr. BANKS (IN)		X	
Mr. DESAULNIER (CA)	X			Mr. COMER (KY)		X	
Mr. NORCROSS (NJ)	X			Mr. FULCHER (ID)		X	
Ms. JAYAPAL (WA)	X			Mr. KELLER (PA)		X	
Mr. MORELLE (NY)	X			Mr. MURPHY (NC)		X	
Ms. WILD (PA)	X			Ms. MILLER-MEEKS (IA)		X	
Mrs. MCBATH (GA)	X			Mr. OWENS (UT)			X
Mrs. HAYES (CT)	X			Mr. GOOD (VA)		X	
Mr. LEVIN (MI)	X			Mrs. MCCLAIN (MI)		X	
Ms. OMAR (MN)	X			Mrs. HARSHBARGER (TN)		X	
Ms. STEVENS (MI)	X			Mrs. MILLER (IL)		X	
Ms. LEGER FERNANDEZ (NM)	X			Mrs. SPARTZ (IN)			X
Mr. JONES (NY)	X			Mr. FITZGERALD (WI)			X
Ms. MANNING (NC)	X			Mr. CAWTHORN (NC)		X	
Mr. MRVAN (IN)	X			Mrs. STEEL (CA)		X	
Mr. BOWMAN (NY)	X			Ms. LETLOW (LA)		X	
Mr. POCAN (WI)	X			<i>Vacancy</i>			
Mr. CASTRO (TX)	X						
Ms. SHERRILL (NJ)	X						
Mr. YARMUTH (KY)	X						
Mr. ESPAILLAT (NY)	X						
Mr. KWEISI MFUME (MD)			X				

TOTALS: Ayes: 28

Nos: 19

Not Voting: 5

Total: 53 / Quorum: 27 / Report: 27

(29 D - 24 R)

*Although not present for the recorded vote, Member expressed he/she would have voted AYE if present at time of vote.

*Although not present for the recorded vote, Member expressed he/she would have voted NO if present at time of vote.

STATEMENT OF PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause (3)(c)(4) of rule XIII of the Rules of the House of Representatives, the goals of H.R. 3110 are to improve breastfeeding outcomes in the United States and facilitate labor force participation by nursing workers.

DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII of the Rules of the House of Representatives, the Committee states that no provision of H.R. 3110 establishes or reauthorizes a program of the Federal Government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Pub. L. No. 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

HEARINGS

Pursuant to clause 3(c)(6) of rule XIII of the Rules of the House of Representatives, the Committee on Education and Labor’s Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce Protections held a joint hearing on March 18, 2021, entitled “*Still Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination*,” which was used to develop H.R. 3110, among other bills. The Joint Subcommittee heard testimony relevant to H.R. 3110 from Dina Bakst, Co-Founder and Co-President, A Better Balance: The Work & Family Legal Center, New York, NY, and Camille A. Olson, Partner, Seyfarth Shaw LLP, Chicago, IL.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee’s oversight findings and recommendations are reflected in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND CBO COST ESTIMATE

Pursuant to clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the *Congressional Budget and Impoundment Control Act of 1974*, and pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the *Congressional Budget and Impoundment Control Act of 1974*, the Committee has received the following estimate for H.R. 3110 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 1, 2021.

Hon. ROBERT C. "BOBBY" SCOTT,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3110, the PUMP for Nursing Mothers Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Meredith Decker.

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

H.R. 3110, PUMP for Nursing Mothers Act			
As ordered reported by the House Committee on Education and Labor on May 26, 2021			
By Fiscal Year, Millions of Dollars	2021	2021-2026	2021-2031
Direct Spending (Outlays)	0	0	0
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	0	0
Spending Subject to Appropriation (Outlays)	*	*	*
Statutory pay-as-you-go procedures apply?	No	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2032?	No	Contains intergovernmental mandate?	Yes, Under Threshold
		Contains private-sector mandate?	Yes, Under Threshold
* = between zero and \$500,000.			

Bill summary: H.R. 3110 would amend the Fair Labor Standards Act (FLSA) to require more employers to offer employees who are nursing reasonable break times and to provide them with private lactation areas, other than restrooms, for two years after the birth of a child. The bill would extend those accommodations to groups of workers who are not now covered and would require the Department of Labor (DOL) to issue new guidance for compliance.

Section 207 of the FLSA requires employers to provide eligible employees (mostly hourly workers who are covered by the overtime rules contained in that section) unpaid break time and private lactation areas, other than restrooms, for one year after the birth of a child. Employers of fewer than 50 employees can receive an exemption if they demonstrate that compliance imposes a hardship. All federal agencies must meet similar standards.

H.R. 3110 would expand the current requirements to cover all workers who are nursing: managers and executives; professional, seasonal, and agricultural workers; and any others not currently eligible for accommodations. The bill also would extend the duration of the requirement by one year and lower the threshold for an exemption to employers with fewer than 25 employees.

Federal costs: CBO estimates that the requirement for DOL to issue guidance would have an insignificant cost; any spending would be subject to the availability of appropriated funds.

Mandates: H.R. 3110 contains intergovernmental and private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA). By expanding requirements related to lactation accommodations in the workplace, the bill would impose a mandate on all employers under FLSA jurisdiction. However, CBO estimates, the aggregate cost of complying with the mandates would fall below the annual thresholds established in UMRA for intergovernmental and private-sector mandates (\$85 million and \$170 million in 2021, respectively, adjusted annually for inflation).

Currently, 20 states and the District of Columbia have laws that require the same or greater accommodations for employees who are nursing. Thus, only employers in 30 states with no or more relaxed laws would need to invest additional resources to comply with the bill. The cost of the mandates would be for employers in the private and public sector, including employers no longer eligible for the hardship exemption, to provide accommodations to more employees and for a longer time.

Using census data and information from the Bureau of Labor Statistics, the Department of Health and Human Services (HHS), and the National Institutes of Health, CBO estimates that approximately 14,000 private employers would need to provide additional accommodations or request an exemption under the bill. CBO estimates that 2,000 employers would lose the hardship exemption because they have 25 or more employees.

Guidance from HHS lists several inexpensive methods to provide lactation areas, including sharing spaces among employers; using existing offices, closets, or storage areas; screening off areas in larger spaces; and providing single-person pop-up tents.

CBO estimates that for the aggregate cost of the mandates to exceed the threshold for the private-sector mandate, the cost per private-sector employer, on average, would need to be between about \$12,000 (if all covered employers provided accommodations) and \$85,000 (if all employers with fewer than 25 employees were exempt). Given the costs of the methods listed by HHS, CBO expects that the aggregate cost would fall below the threshold for private-sector mandates.

Because federal law already requires public-sector employers to provide lactation facilities, CBO estimates that the aggregate cost of compliance with the incremental changes in H.R. 3110 would be small. In addition, because public-sector employees accounted for just 12 percent of the U.S. workforce in 2020, CBO estimates that the aggregate cost would fall below the threshold for intergovernmental mandates.

The CBO staff contacts for this estimate are Meredith Decker (for federal costs) and Lilia Ledezma (for mandates). The estimate was reviewed by H. Samuel Papenfuss, Deputy Director of Budget Analysis.

COMMITTEE COST ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison of the costs that would be incurred in carrying out H.R. 3110. However, clause

3(d)(2)(B) of that rule provides that this requirement does not apply when the committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the *Congressional Budget and Impoundment Control Act of 1974*.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, H.R. 3110, as reported, are shown as follows:

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

FAIR LABOR STANDARDS ACT OF 1938

* * * * *

MAXIMUM HOURS

SEC. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks, or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than \$1,000,000 exclusive of excise taxes.

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale;

and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(e) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's in-

terests and properly reimburseable by the employer; and other similar payments to any employee which are not made as compensation for his hours of employment;

(3) sums paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan, meeting the requirements of the Secretary of Labor set forth in appropriate regulations which he shall issue, having due regard among other relevant facts, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Secretary) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a)), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: *Provided*, That the rate so established shall be authorized by regulation by the Secretary of Labor as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time;

and if (i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h)(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(i) No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 6, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate of not less than one and one-half times the regular rate at which he is employed.

(k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of

employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days;

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).

(m) For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37 (as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such em-

ployment, and (2) if employment in such activities is not part of such employee's regular employment.

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if—

(A) such employee is paid at a per-page rate which is not less than—

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p)(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is—

- (1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;
- (2) designed to provide reading and other basic skills at an eighth grade level or below; and
- (3) does not include job specific training.

[(r)(1) An employer shall provide—

[(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

[(B) 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.

[(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

[(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would 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.

[(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.]

* * * * *

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Secretary of Labor issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11(c) or any regulation or order made or continued in effect under the provisions of section 11(d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect[.]; and

(6) to violate any of the provisions of section 18D.

(b) For the purposes of subsection (a)(1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or the unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section **【15(a)(3)】 7(r) or 15(a)(3)** of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section **【15(a)(3)】 7(r) or 15(a)(3)**, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 3(m)(2)(B) shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employees shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this act by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section **【15(a)(3)】 7(r) or 15(a)(3)**.

【Effective on date of enactment, section 2(b) of H.R. 3110 (as reported) provides for an amendment to section 16(b) of the Fair Labor Standards Act of 1938 which is shown above. Section 16(b) of the Fair Labor Standards Act of 1938 is further amended by section 2(a)(3) of such H.R. 3110 (as reported) which takes effect on 120 days after the date of enactment of H.R. 3110 (as reported) pursuant to section 3(a) of the reported bill. Subsection (b) of such section 16 of the Fair Labor Standards Act of 1938, as amended by subsections (a)(3) and (b) of section 2 of H.R. 3110 (as reported), is amended as follows:】

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or the unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section **【7(r)】 18D of this title** or 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section **【7(r)】 18D of this title** or 15(a)(3), including without limitation employment, rein-

statement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. Any employer who violates section 3(m)(2)(B) shall be liable to the employee or employees affected in the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and in an additional equal amount as liquidated damages. An action to recover the liability prescribed in the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employees shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this act by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section [7(r)] 18D of this title or 15(a)(3).

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Sec-

retary under this subsection for the purposes of the statutes of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action. The authority and requirements described in this subsection shall apply with respect to a violation of section 3(m)(2)(B), as appropriate, and the employer shall be liable for the amount of the sum of any tip credit taken by the employer and all such tips unlawfully kept by the employer, and an additional equal amount as liquidated damages.

(d) In any action or proceeding commenced prior to, on, or after the date of enactment of this subsection, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 13(f) is applicable, (2) with respect to work performed in Guam, the Canal Zone, or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 6(a)(3) at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e)(1)(A) Any person who violates the provisions of sections 12 or 13(c), relating to child labor, or any regulation issued pursuant to such sections, shall be subject to a civil penalty not to exceed—

(i) \$11,000 for each employee who was the subject of such a violation; or

(ii) \$50,000 with regard to each such violation that causes the death or serious injury of any employee under the age of 18 years, which penalty may be doubled where the violation is a repeated or willful violation.

(B) For purposes of subparagraph (A), the term “serious injury” means—

(i) permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) permanent loss or substantial impairment of the function of a bodily member, organ, or mental faculty, including the loss of all or part of an arm, leg, foot, hand or other body part; or

(iii) permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand or other body part.

(2) Any person who repeatedly or willfully violates section 6 or 7, relating to wages, shall be subject to a civil penalty not to exceed \$1,100 for each such violation. Any person who violates section 3(m)(2)(B) shall be subject to a civil penalty not to exceed \$1,100 for each such violation, as the Secretary determines appropriate, in addition to being liable to the employee or employees affected for all tips unlawfully kept, and an additional equal amount as liquidated damages, as described in subsection (b).

(3) In determining the amount of any penalty under this subsection, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be

considered. The amount of any penalty under this subsection, when finally determined, may be—

(A) deducted from any sums owing by the United States to the person charged;

(B) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(C) ordered by the court, in an action brought for a violation of section 15(a)(4) or a repeated or willful violation of section 15(a)(2), to be paid to the Secretary.

(4) Any administrative determination by the Secretary of the amount of any penalty under this subsection shall be final, unless within 15 days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of title 5, United States Code, and regulations to be promulgated by the Secretary.

(5) Except for civil penalties collected for violations of section 12, sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provision of section 2 of the Act entitled “An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof and for other purposes” (29 U.S.C. 9a). Civil penalties collected for violations of section 12 shall be deposited in the general fund of the Treasury.

* * * * *

SEC. 18D. BREASTFEEDING ACCOMMODATIONS IN THE WORKPLACE.

(a) An employer shall provide—

(1) a reasonable break time for an employee to express breast milk each time such employee has need to express breast milk for the 2-year period beginning on the date on which the circumstances related to such need arise; and

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

(b)(1) Subject to paragraph (2), an employer shall not be required to compensate an employee receiving break time under subsection (a)(1) for any time spent during the workday for such purpose unless otherwise required by Federal or State law or municipal ordinance.

(2) Break time provided under subsection (a)(1) shall be considered hours worked if the employee is not completely relieved from duty during the entirety of such break.

(c) An employer that employs fewer than 25 employees shall not be subject to the requirements of this section, if such requirements would 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.

(d) No provision of this section or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal

ordinance that provides greater protections to employees than the protections provided for under this section.

(e)(1) Subject to paragraph (2), before an employee commences an action to recover liability under section 16(b) for a violation of paragraph (a)(2), the employee shall inform the employer of the failure to provide adequate place and provide the employer with 10 calendar days after such notice is provided to come into compliance with subsection (a)(2) with respect to such employee.

(2) Paragraph (1) shall not apply in the case that—

(A) the employee has been discharged because the employee has made a request for break time or place under this section or has opposed any employer conduct related to this section; or

(B) the employer has indicated that the employer has no intention of complying with subsection (a)(2).

(f) The circumstances described in subsection (a)(1) arise if an employee—

(1) begins providing breast milk for a nursing child; or

(2) gives birth, including to—

(A) a stillborn child; or

(B) a child over whom the employee does not retain legal custody.

* * * * *

MINORITY VIEWS

INTRODUCTION

Committee Republicans believe that nursing mothers deserve adequate protections in the workplace and support existing breastfeeding accommodations under current law. While it may be appropriate for Congress to review and clarify requirements related to nursing mothers' needs under the *Fair Labor Standards Act* (FLSA or Act), such a change should be thoroughly reviewed by the Committee and not create unreasonable or unintended consequences. H.R. 3110 unfortunately misses the mark in these respects.

In 2010, Congress enacted Section 7(r) of the FLSA¹ as part of the *Patient Protection and Affordable Care Act* (ACA).² Section 7(r) requires certain employers to provide reasonable break time for non-exempt employees to pump breast milk for one year after a child's birth. The provision requires these employers to provide a location to pump breastmilk, other than a bathroom, that is shielded from view and free from coworker or public intrusion. Under current law, a covered employer is not required to compensate an employee for break time taken for the purposes of pumping milk. Section 7(r) potentially exempts employers with less than 50 employees if its requirements would impose an "undue hardship" by either causing significant difficulty or expense in relation to the size, financial resources, nature, or structure of the employer's business. The Section 7(r) nursing accommodation requirements do not apply to the following workers: those in executive, administrative, professional, and outside sales roles; in seafaring or fishing-related activities or operations; agriculture and transportation; and in academic office or teaching positions, including elementary and secondary school teachers.

Supporters of H.R. 3110, the *PUMP for Nursing Mothers Act* (PUMP Act), claim the bill's purpose is to fill unintended gaps in coverage in the 2010 law. Unfortunately, the legislation implements a misguided approach which includes overly broad coverage, excessively punitive requirements relying on gratuitous and disproportionate penalties, and an inappropriate treatment of compensable time.

Committee Republicans support a solution that would respect the unique characteristics and location of certain workplaces while providing common-sense accommodations for nursing mothers. However, by advancing H.R. 3110 on a party-line vote, the Committee majority is choosing to advance a flawed scheme which includes unreasonably expansive mandates. For these reasons, and as set

¹29 U.S.C. § 207(r).

²Pub. L. No. 111-148 (2010).

forth more fully below, Committee Republicans oppose H.R. 3110 in its current form.

CONCERNS WITH H.R. 3110

Significant and Unwarranted Expansion in Scope of Coverage

Under current law, FLSA breastfeeding accommodation requirements have the same scope of application as the Act's overtime requirements. The FLSA exempts certain classes of employees from these requirements based on "duties tests" and salary thresholds to determine whether employees fall within those exempted classes.³ The FLSA also exempts specific jobs from these requirements.⁴

H.R. 3110 strikes Section 7(r) of the FLSA to create a new Section 18D for the Act's breastfeeding accommodation requirements. Section 18D expands the FLSA's coverage related to break time for nursing mothers to apply to all employees covered by the FLSA, including workers in executive, administrative, professional, and outside sales roles; elementary and secondary school teachers; workers in seafaring or fishing-related activities or operations; and agriculture and transportation workers.

As a result, H.R. 3110 would impose one-size-fits-all nursing accommodation requirements on disparate work environments including those found in agricultural, transportation, and shipping-based industries. These mandates will impose substantial logistical barriers for compliance and in certain settings introduce safety concerns based on the nature of specific business operations.

On March 18, 2021, Ms. Camille Olson, Partner at Seyfarth Shaw LLP, testified before the Subcommittee on Civil Rights and Human Services and Subcommittee on Workforce Protections at a hearing on four unrelated bills including the version of the PUMP Act from the 116th Congress.⁵ With regard to the PUMP Act, Ms. Olson discussed the necessity of ensuring that requirements relating to breastfeeding accommodations account for unique or remote work locations:

Providing clear guidance to employers [is needed] in situations where employees are not working at a fixed location, as to how to comply with the Act's obligations. Employees who work in these work environments include commercial airline pilots, patrolling police officers, and delivery drivers (to name a few). How should employers meet their obligations to provide private space for their employees to express milk while they are on duty in these environments?⁶

³29 U.S.C. § 213.

⁴*Id.*

⁵See H.R. 5592, 116th Cong. (2020). Several substantive provisions in H.R. 3110, as reported by the Committee, were not included in the bill as introduced on May 11, 2021, or in the PUMP Act as introduced in the 116th Congress, and were added at the Committee markup on May 26, 2021, by an Amendment in the Nature of a Substitute offered by Rep. Alma Adams (D-NC). Further, H.R. 3110 was introduced two months after the March 18, 2021, joint subcommittee hearing on four disparate bills including the PUMP Act as introduced in the 116th Congress.

⁶*Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing Before the Subcomm. on Civ. Rights & Hum. Serv. & Subcomm. on Workforce Protections of the H. Comm. on Educ. & Lab.*, 117th Cong. (2021) (statement of Camille Olson, Partner, Seyfarth Shaw LLP, at 38) [hereinafter Olson statement].

H.R. 3110's break requirements fail to account for the unique working conditions of remote locations described by Ms. Olson, including occupations in the aviation industry. In 2019, the Federal Aviation Administration (FAA) argued in federal court that mandated meal and rest break requirements are in conflict with personnel duties under FAA safety and staffing requirements:

The [FAA] regulations recognize that flight attendants have “cabin-safety-related responsibilities” that could arise throughout a flight, . . . including in the event of an emergency. . . . These tasks are critical, and federal regulations contemplate that attendants will be on-duty and on-call to perform them during flight. Relieving attendants of all duty while inflight or even taxiing would clearly interfere with the duties prescribed by federal regulations.⁷

H.R. 3110 requires that airline employees, who are currently exempt from FLSA breastfeeding accommodation requirements, have access to a space and time for pumping breast milk, despite the fact that aircraft designs are regulated by the FAA for safety and reliability purposes, with limited ability to add additional spaces. In addition to severe space limitations, the nature of aviation work also requires specific personnel and safety policies at odds with the mandates in H.R. 3110.

Remote or rural airports face unique challenges because of the small planes that operate out of these regions, further limiting the ability to comply with the requirement to provide a private space, other than a bathroom, as mandated by H.R. 3110. Additionally, these planes are operated by small flight crews, with few redundancies in duties among staff, complicating the ability of aviation businesses to maintain appropriate staffing levels and access to services when faced with inflexible government mandated breaks. Air carriers are therefore exempt from current FLSA Section 7(r) requirements.

H.R. 3110 would deny these employers and others facing unique workplace and operational realities, such as agricultural employers, the ability to implement policies that meet their employees' needs. H.R. 3110 treats all nursing mothers and workplaces as if they are the same, despite known differences in employees' needs, industry-specific challenges, and the ability of certain employers to comply. Nursing mothers in these environments have different needs than those working in an office or a warehouse, yet H.R. 3110 fails to allow for those differences.

Dramatic and Disproportionate Expansion of Penalties

H.R. 3110 significantly expands the penalties for employer violations of required nursing accommodation mandates. Under current law, damages for proven violations include unpaid wages and an additional equal amount as liquidated damages, as well as civil penalties for repeated or willful violations.⁸ Under H.R. 3110, remedies are identical to FLSA violations related to discharging or discriminating against an employee for filing an FLSA complaint or

⁷Brief for the United States as Amicus Curiae in Support of Appellants, *Bernstein v. Virgin Am., Inc.*, 990 F.3d 1157 (9th Cir. 2021) (No. 19-15382).

⁸29 U.S.C. § 216(b), (e)(2).

testifying in an FLSA proceeding. These remedies include employment, reinstatement, promotion, and the payment of lost wages and an additional amount as liquidated damages, while also allowing for the recovery of emotional distress damages.⁹

Ms. Olson in her testimony discussed specific concerns about these provisions and noted the Department of Labor is well-positioned to enforce nursing-mother accommodations under current law:

Extending the private right of action to its utmost limit will expose already overburdened courts with a flood of individual and collective actions for technical violations of Section 7(r)—actions with limited, delayed recovery that will serve as little more than vehicles for attorney fees and will add additional costs and burdens to employers with no benefit to workers. The Department of Labor, which has the power to investigate alleged violations and impose penalties for repeated or willful violations of Section 7(r), is better suited to quickly and sufficiently enforce such technical violations of Section 7(r).¹⁰

Committee Republicans are similarly concerned that the penalties mandated by H.R. 3110 go well beyond those set under current law and believe these inflated remedies are not proportionate to the types of breastfeeding-accommodation violations which could occur under the bill. Coupled with the sweeping expansion in coverage described previously, the increased penalties will create large incentives for trial lawyers to file numerous lawsuits against unsuspecting employers for purported violations with the aim of securing quick settlements under the threat of protracted litigation.

Increased Liability for Small Businesses

H.R. 3110 would impose burdens on the entities least able to bear them: small businesses. H.R. 3110 as reported by the Committee drastically cuts the employee threshold for the potential undue hardship exemption by half from its current-law level of fewer than 50 employees¹¹ to a proposed threshold of fewer than 25 employees.¹²

In response, the National Federation of Independent Business (NFIB) sent a letter to the Committee expressing opposition to lowering the small-employer hardship exemption threshold.¹³ Committee Republicans support the views expressed by NFIB in this regard and strongly oppose lowering the threshold which applies to the undue hardship exemption.

Establishes an Inappropriate Compensatory Scheme

Under current law, employers are not required to compensate eligible employees taking breaks for the purposes of expressing breastmilk, unless greater protections are offered under state or

⁹ 29 U.S.C. §§ 215(a)(3), 216(b).

¹⁰ Olson statement, *supra* note 8, at 38.

¹¹ 29 U.S.C. 207(r)(3).

¹² Amendment in the Nature of a Substitute to H.R. 1310, 117th Cong. § 2(a)(4) (2021), https://edlabor.house.gov/imo/media/doc/H.R.%203110_PUMP_ANS.pdf.

¹³ Letter from Kevin Kuhlman, Vice President, Nat. Fed. of Indep. Bus., to Reps. Bobby Scott & Virginia Foxx (May 26, 2021) (on file).

local law.¹⁴ H.R. 3110 calls this requirement into question and creates a new and confusing framework in which an employer may owe pay for time periods that have previously not been considered compensable.

H.R. 3110 imposes a new requirement that individuals must be entirely relieved from work during a break for the purposes of pumping milk in order for break time to be non-compensable. An employee is owed compensation for the entire break in the event that any work is performed—regardless of its proportionate impact or length of time.¹⁵ Therefore, an employee engaging in momentary or intermittent work during their break time, including passive activities such as email, phone, or radio monitoring, be paid for additional time, previously treated as non-compensable, where no work is performed. As such, H.R. 3110 therefore creates circumstances where an employer must closely monitor an employee’s break to establish whether the individual is completely relieved from duty and not engaging in any work during the break. This monitoring could create an unnecessary and unfortunate conflict with a nursing mother’s need for privacy when expressing breastmilk.

H.R. 3110 also exacerbates existing FLSA compliance challenges stemming from adding new mandates to a calcified law that was enacted over 80 years ago. In February 2017, Ms. Christine Walters testified on behalf of the Society for Human Resource Management at a hearing on “Federal Wage and Hour Policies in the Twenty-First Century Economy.” She discussed the challenges of complying with FLSA requirements in the modern workplace:

[T]he FLSA was written before the proliferation of smartphones. Phones and other “smart” devices are nearly universal in today’s workforce, yet continue to present challenges in regards to nonexempt employees. It is not uncommon for nonexempt employees to want to access on-line work platforms remotely after work hours. Because nonexempt employees are only paid for the hours they work, all hours must be closely tracked in order to remain in compliance with the FLSA. . . . This is yet another example of how the FLSA has not kept pace with the 21st century economy.¹⁶

As Ms. Walters highlights, employers already have great difficulty in determining their obligations under the FLSA. Employers would face additional burdens determining compensation under H.R. 3110 under the threat of even greater penalties for “non-compliance.”

In addition, H.R. 3110 creates an inappropriate compensatory scheme incompatible with the FLSA by requiring that an employer compensate an employee for a break for the purposes of expressing breast milk if such compensation is otherwise required by federal law.¹⁷ In comments for the record of the March 18, 2021, joint subcommittee hearing, Mr. Jim Paretto, Shareholder at Littler Mendelson, P.C. Workplace Policy Institute, described the poten-

¹⁴ 29 U.S.C. § 207(r)(2).

¹⁵ H.R. 3110, 117th Cong. § 2(b)(2).

¹⁶ *Federal Wage and Hour Policies in the Twenty-First Century Economy: Hearing before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 117th Cong. 49 (2017) (statement of Christine Walters, Sole Proprietor, FIVEL Co.).

¹⁷ H.R. 3110, 117th Cong. § 2(a)(4).

tially unintended consequences the PUMP Act could have in the treatment of the compensability of lactation breaks:

The inclusion of the word “Federal” . . . would arguably convert all “short” lactation breaks (including those less than 20 minutes) into compensable hours worked. See 29 C.F.R. 785.18 (“Rest periods of short duration, running from 5 minutes to about 20 minutes . . . must be counted as hours worked.”). It may be that many employers already treat all lactation breaks as compensable hours worked; however, for employers that require employees to “clock out” for lactation breaks (or that only permit a certain number of paid lactation breaks per day), this could be a significant change.¹⁸

Committee Republicans support paying employees whenever they engage in work. However, H.R. 3110 creates unnecessary and confusing compensatory requirements that are incompatible with the modern workplace.

REPUBLICAN SUBSTITUTE

Consistent with Committee Republicans’ support for working women and flexible workplace policies that empower them, Republican Leader Virginia Foxx offered a substitute amendment at the Committee markup to make workable and commonsense alterations to existing FLSA nursing-accommodation requirements. The amendment embodies a responsible approach to address the needs of working mothers.

The Foxx substitute amendment modifies current-law coverage of nursing-mother accommodations by including white collar executive, administrative, and professional employees, including academic personnel and teachers in elementary and secondary schools, while also maintaining current-law coverage of nonexempt (hourly) employees. This balanced and targeted approach would ensure appropriate access to breastfeeding accommodations while maintaining the FLSA’s exemptions for certain unique jobs and industry sectors.

The left-leaning Economic Policy Institute found in 2018 that this framework would ensure access to workplace breastfeeding accommodations for more than 83 percent of women of childbearing age who are not currently covered.¹⁹ Moreover, Rep. Carolyn Maloney (D–NY), the sponsor of H.R. 3110, introduced a bill in 2017 that included coverage of nursing-accommodation requirements for white collar employees but did not impose the sweeping and overly punitive structure found in H.R. 3110.²⁰ By choosing to advance H.R. 3110, House Democrats have abandoned their workable and responsible approach in the 115th Congress in favor of a politicized

¹⁸ *Fighting for Fairness: Examining Legislation to Confront Workplace Discrimination: Hearing Before the Subcomm. on Civ. Rights & Hum. Serv. & Subcomm. on Workforce Protections of the H. Comm. on Educ. & Lab.*, 117th Cong. (2021) (letter from James A. Paretti, Jr., Shareholder, Littler Mendelson, P.C. Workplace Pol’y Inst., to Reps. Suzanne Bonamici et al.).

¹⁹ HEIDI SHIERHOLZ, ECON. POL’Y INST., MILLIONS OF WORKING WOMEN OF CHILDBEARING AGE ARE NOT INCLUDED IN PROTECTIONS FOR NURSING MOTHERS (Dec. 10, 2018).

²⁰ See H.R. 3255, *Supporting Working Moms Act of 2017*, 115th Cong. (2017).

scheme which is crafted to reward trial lawyers at the expense of sound public policy.

Among several provisions prioritizing the improvement of working conditions for mothers over the interests of trial lawyers, the Foxx substitute amendment removes the excessive penalties included in H.R. 3110. The amendment preserves the authority of the Secretary of Labor to enforce compliance with the FLSA's breastfeeding accommodation requirements through injunctive relief, while also allowing for the assessment of civil monetary penalties for repeat and willful violators. Significantly, the amendment also protects small businesses from the threat of litigation and excessive costs by maintaining the 50-employee threshold for the undue hardship exemption under current law.

In addition, the Foxx substitute amendment clarifies that individuals engaging actively in work during a nursing break are owed compensation for the time spent on such work. This approach ensures that nursing mothers receive the desired privacy while accounting for the nature of work in a modern office. Finally, the substitute amendment requires the Government Accountability Office (GAO) to issue a report to Congress evaluating the bill's implementation, the number of working mothers with access to accommodations, and the actions taken by the Secretary of Labor to enforce the bill's requirements.

Unfortunately, Committee Democrats unanimously opposed Republican Leader Foxx's commonsense and workable approach to providing breastfeeding accommodations to working mothers, which was defeated on a party-line vote.

CONCLUSION

Committee Republicans are strong advocates of flexible workplace policies that empower working mothers. Unfortunately, H.R. 3110 takes an overly broad and punitive approach which imposes unnecessary and confusing mandates on certain employers which, coupled with inflated penalties for alleged violations, will provide incentives for trial lawyers to file lawsuits against unsuspecting smaller businesses with the promise of big payouts. For these reasons, and those outlined above, Committee Republicans oppose the enactment of H.R. 3110 as reported by the Committee on Education and Labor.

VIRGINIA FOXX, *Ranking
Member.*
JOE WILSON.
GLENN "GT" THOMPSON.
TIM WALBERG.
GLENN GROTHMAN.
ELISE M. STEFANIK.
RICK W. ALLEN.
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JAMES COMER.
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