

CRS Report for Congress

Received through the CRS Web

Breastfeeding: Federal Legislation

May 5, 2005

Douglas Reid Weimer
Legislative Attorney
American Law Division

Breastfeeding: Federal Legislation

Summary

There has been significant growth in the practice of breastfeeding in recent years. As a result, Congress and numerous state legislatures have considered various proposals concerning different aspects of breastfeeding.

Congress has authorized and funded the Breastfeeding Promotion Program (“Program”) as part of the Child Nutrition Programs administered by the Secretary of Agriculture (“Secretary”). Under this Program, the Secretary is directed to establish a breastfeeding promotion program to encourage breastfeeding. Through appropriations legislation, Congress has repeatedly affirmed a mother’s right to breastfeed on federal property or in a federal building, if the mother and child are authorized to be in that location. This practice was most recently affirmed in the Consolidated Appropriations Act, 2005.

In the 109th Congress, H.R. 2122, the proposed Pregnancy Discrimination Act Amendments of 2005, was introduced on May 5, 2005. The bill contains provisions which if enacted, would amend title VII of the Civil Rights Act of 1964 (equal employment opportunity) to protect breastfeeding by new mothers; provide tax incentives to employers to encourage breastfeeding by employees; and provide a performance standard for breast pumps. At the current time the bill is in committee.

It is possible that additional legislation concerning breastfeeding may be introduced in the 109th Congress. This report will be updated as needed.

Contents

Introduction	1
Enacted Federal Legislation Relating to Breastfeeding	3
The Breastfeeding Promotion Program	3
Breastfeeding in Federal Buildings and on Federal Property	4
Federal Breastfeeding Legislation	4
108 th Congress	4
109 th Congress	5

Breastfeeding: Federal Legislation

Introduction

The practice of breastfeeding has gained significant popularity in recent years.¹ A stated objective of the U.S. Public Health Service, set out in its report *Healthy People 2010*, is to increase the proportion of mothers who breastfeed their children.² The national objective set out in this report is to achieve a 75% participation rate of nursing mothers in the early postpartum period, a 50% participation rate of nursing mothers in the period after the infant reaches six months of age, and a 25% participation rate of nursing mothers at the age of one year. Numerous health care professionals encourage breastfeeding as the optimal type of nutrition for infants for at least the first six months of life.³ It has been reported that in 2000, more than 68 percent of mothers were breastfeeding their infants immediately after delivery, and it has been observed that the number of nursing mothers is significantly increasing.⁴ Breastfeeding rates have increased steadily from 1992-2004.⁵ Breastfeeding is considered to be beneficial to both mother and child,⁶ and breastfeeding is believed to reduce the incidence of various childhood illnesses and chronic diseases.⁷

Along with the growing popularity of breastfeeding and the growing incidence of women in the workforce, certain concerns have arisen. It may be necessary for a working mother to express⁸ milk during her working hours, and/or to breastfeed her child during working hours. Related issues concern nursing and/or the expression of milk in public or semi-public places such as restaurants, stores, public transportation facilities, and other locations where the public is present. Numerous

¹ See CRS Report RL32002, *Breast-feeding: Impact on Health, Employment and Society* by Donna V. Porter (July 18, 2003).

² *Healthy People 2010*, Washington, DC: U.S. Department of Health and Human Services, Public Health Service (2000).

³ Leah Oliver and Hy G.A. Park, Maternal and Child Health, A Snapshot for State Legislatures 19 (2004) (cited afterward as “Oliver and Park”). See also Marilyn Elias, *New breast-feeding policy* USA TODAY 9D (Feb. 7, 2005)(cited to afterward as “Elias”).

⁴ Oliver and Park.

⁵ Elias (citing to statistics from the Centers for Disease Control and Prevention).

⁶ See generally the websites for the Centers for Disease Control and Prevention: [<http://www.cdc.gov/breastfeeding>] and the National Women’s Health Information Center’s Resources on Breastfeeding: [<http://www.4woman.gov/breastfeeding>].

⁷ See American Academy of Pediatrics homepage at [<http://www.aap.org/topics.html>].

⁸ A nursing mother “expresses” or extracts breast milk through a vacuum device for later feeding to her child.

legal issues and controversies have developed concerning where a mother may breastfeed her child.⁹

Concurrent with the growing popularity of breastfeeding, state and federal legislation relating to breastfeeding has been proposed and enacted. There has been significant legislation at the state level.¹⁰ Some of the legal issues which state legislation has addressed include exemption of nursing mothers from public nudity, lewdness, and indecent exposure laws; affirmation that breastfeeding is to be permitted in public places where the mother and child are lawfully present; and exemption (or postponement) of nursing mothers from jury service. Other states have enacted laws dealing with breastfeeding in the workplace; breastfeeding awareness education campaigns; and various breastfeeding support programs. At the current time, thirty-eight states and Puerto Rico have some type of legislation dealing with the protection of nursing mothers and/or the promotion of breastfeeding.¹¹

At the federal level, Congress has established various federal programs to encourage the practice of breastfeeding and to improve child nutrition, especially infant nutrition. Congress has also enacted legislation, in appropriations measures, to affirm the right of a mother to breastfeed her child at any location in a federal building or on federal property, if the mother and child are otherwise authorized to be present at that location. This legislation is examined below.

Legislation to significantly broaden federal fostering of the practice of breastfeeding has been introduced in the 109th Congress. This proposal, contained in the Pregnancy Discrimination Act Amendments of 2005 (H.R. 2122), follows proposals introduced in the 108th Congress to encourage and protect breastfeeding through amendments to the Civil Rights Act of 1964 and the Internal Revenue Code. Other bills introduced in the 108th Congress made indirect references to breastfeeding within the context of the use of mercury in dental fillings, the prevention of HIV transmission, and mercury ingestion through seafood consumption. Similar legislation may be introduced in the 109th Congress.

⁹ See CRS Report RL31633, *Summary of State Breastfeeding Laws and Related Issues* at 2, by Douglas Reid Weimer.

¹⁰ *Id.*

¹¹ However, the absence of a state law authorizing and/or promoting breastfeeding does not necessarily indicate that breastfeeding in public is prohibited within the state. Local customs or practices may condone public breastfeeding and other breastfeeding-related activities in the absence of specific authorizing legislation.

Enacted Federal Legislation Relating to Breastfeeding

The Breastfeeding Promotion Program.

The Breastfeeding Promotion Program (“Program”)¹² is a part of the Child Nutrition Programs administered by the Secretary of Agriculture (“Secretary”). The Program was created by the Child Nutrition Amendments of 1992 to the Child Nutrition Act of 1966.¹³ Under the Program, the Secretary is directed to promote breastfeeding as the best method of infant nutrition, to foster wider public acceptance of breastfeeding in the United States, and to assist in the distribution of breastfeeding equipment to breastfeeding women.¹⁴ The Program maintains a comprehensive website dealing with such issues as the benefits of breastfeeding, program funding, and other related issues.¹⁵

Current authorization¹⁶ for the Program is provided by the Child Nutrition and WIC Reauthorization Act of 2004 (“Act”).¹⁷ The act provides that there is to be cooperation between the federal government and “communities, State and local agencies, employers, health care professionals, and other entities in the private sector to build a supportive breastfeeding environment for women participating in the program under this section to support the breastfeeding goals of the Healthy People 2010 initiative.”¹⁸ The act also provides the authority for “special projects to promote breastfeeding, including projects to assess the effectiveness of particular breastfeeding promotion strategies. . . .”¹⁹

The current funding for federal breastfeeding support is contained in the Consolidated Appropriations Act, 2005,²⁰ under the Special Supplemental Nutrition

¹² 42 U.S.C. § 1790.

¹³ Pub. L. 89-642, as added Pub. L. 102-342, title II, § 201, 106 Stat. 912 (Aug. 14, 1992). For a comprehensive legislative history of the breastfeeding promotion requirements in WIC, see [<http://www.fns.usda.gov/wic/Breastfeeding/bflegishistory.HTM>].

¹⁴ 42 U.S.C. § 1790(a).

¹⁵ See [<http://www.fns.usda.gov/wic/Breastfeeding/breastfeedingmainpage.HTM>].

¹⁶ For historical background on program organization and funding, see CRS Report RL31577, *Child Nutrition and WIC Programs: Background and Funding* by Joe Richardson (Updated Aug. 3, 2004).

¹⁷ Pub. L. 108-265, 118 Stat. 729 (June 20, 2004).

¹⁸ *Id.* § 203(e)(2)(C).

¹⁹ *Id.* § 203(e)(9).

²⁰ Pub. L. 108-447, 118 Stat. 2809 (Dec. 8, 2004).

Program for Women, Infants, and Children.²¹ Funding was authorized for not less than \$15,000,000 for a special breastfeeding support initiative.²²

Breastfeeding in Federal Buildings and on Federal Property.

Federal appropriations legislation has affirmed the right to breastfeed on federal property or in federal buildings.²³ The most recent affirmation of this practice was contained in the Consolidated Appropriations Act, 2005:²⁴

Sec. 629. Notwithstanding any other provision of law, a woman may breastfeed her child at any location in a Federal building or on Federal property, if the woman and her child are otherwise authorized to be present at the location.

Federal Breastfeeding Legislation

108th Congress.

In the 108th Congress two bills were introduced which dealt with breastfeeding support. These bills are briefly summarized.

S. 418,²⁵ the proposed “Pregnancy Discrimination Act Amendments of 2003,” was introduced by Senator Olympia J. Snowe on February 14, 2003.²⁶ Through an amendment to section 701(k) of the Civil Rights Act of 1964 (“Act”),²⁷ breastfeeding would have been added as a protected activity within prohibitions against sex discrimination in employment. The bill defined “breastfeeding” for this purpose as “the feeding of a child directly from the breast or the expression of milk from the breast by a lactating woman.”

²¹ Popularly known as the “WIC” program.

²² Pub. L. 108-447, 118 Stat. 2809, Title IV Domestic Food Programs, Special Supplemental Nutrition for Women, Infants, and Children (WIC) (Dec. 8, 2004). See H. Conf. Rep. on H.R. 4818, Consolidated Appropriations Act, 2005, (2004) *printed in* 150 Cong. Rec. H10241 (daily ed. Nov. 19, 2004).

²³ See Pub.L. 108-199, 108th Cong., 2nd Sess. (2004); Pub. L. 108-7, 108th Cong., 1st Sess. § 630 (2003); Pub. L. 106-58, 106th Cong., 1st Sess. § 647 (1999). (Provision is apparently not codified).

²⁴ See note 22.

²⁵ 108th Cong., 1st Sess. (2003). The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions. It did not emerge from Committee consideration.

²⁶ The provision of S. 418 are substantially similar to the provisions of S. 256, 107th Cong., 1st Sess. (2001).

²⁷ 42 U.S.C. § 2000e(k).

H.R. 2790,²⁸ the proposed “Breastfeeding Promotion Act,” was introduced by Representative Carolyn B. Maloney on July 18, 2003.²⁹ Similar to S. 418, *H.R. 2790* would have amended the employment discrimination provisions of the Civil Rights Act of 1964 (“Act”) to protect lactation (including the expression of milk) under the prohibition against sex discrimination. The bill also proposed to amend the Internal Revenue Code (“Code”) to allow a limited tax credit to employers for expenses incurred in enabling mothers to breastfeed at their places of employment. The Code definition of medical care would have been expanded to include qualified breastfeeding equipment and services. Other provisions would have directed the Secretary of Health and Human Services to (1) put into effect a performance standard for breast pumps and (2) issue a compliance policy to assure that women who want to breastfeed a child are given full and complete information respecting breast pumps.

Additional bills in the 108th Congress made reference — in a somewhat indirect way — to breastfeeding. These bills dealt with mercury in dental filling disclosure,³⁰ prevention of HIV transmission,³¹ and mercury exposure through seafood consumption.³²

109th Congress.

H.R. 2122 was introduced by Representative Carolyn B. Maloney, on May 5, 2005.³³ The bill is based upon some of the provisions of *H.R. 2790*, discussed above. The provisions of the bill are summarized below.

The bill has three main provisions: to amend the employment discrimination provisions of the Civil Rights Act of 1964 to protect breastfeeding by new mothers; to provide tax incentives to encourage breastfeeding; and to provide for a performance standard for breast pumps.

Title I of the bill would amend title VII (equal employment opportunity) of the Civil Rights Act of 1964 (“Act”) and is cited to as the “Pregnancy Discrimination

²⁸ 108th Cong., 1st Sess. (2003). The bill was referred to the House Ways and Means Committee, the House Education and Workforce Committee, and the House Energy and Commerce Committee. On July 23, 2003, it was referred to the Subcommittee on Health of the House Energy and Commerce Committee and on Aug. 13, 2003, it was referred to the Subcommittee on Employer-Employee Relations of the House Education and Workforce Committee.

²⁹ The provisions of the bill are similar to those of *H.R. 285*, 107th Cong., 1st Sess. (2001), which was introduced by Representative Maloney on January 30, 2001. The bill did not emerge from Committee consideration.

³⁰ *H.R. 1680*, 108th Cong., 1st Sess. (2003).

³¹ *S. 859*, 108th Cong., 1st Sess. (2003).

³² *S. 1939*, 108th Cong., 1st Sess. (2003).

³³ 109th Cong., 1st Sess. (2005). On May 5, 2005, the bill was referred to the House Committee on Energy and Commerce; the House Committee on Ways and Means; and House Committee on Education and the Workforce.

Act Amendments of 2005.”³⁴ Section 102 deals with various findings and purposes. This section recognizes that women with infants are a significant part of the labor force; cites to studies that indicate the benefits of breastfeeding for both mother and child; and observes that some courts have not applied the protection of title VII to mothers who are breastfeeding and expressing milk in the workplace. The stated purpose of the proposed amendment to Title VII is to promote the health and well-being of infants whose mothers return to the workplace after childbirth and clarify that breastfeeding and expressing breast milk in the workplace are protected conduct under the amendment made by the Pregnancy Discrimination Act of 1978 to Title VII of the act. Section 103 of Title 1 would amend section 701(k) of the Civil Rights Act of 1964,³⁵ which defines sex discrimination for employment purposes, to insert the phrase “including lactation” after the term “childbirth,” and by adding at the end, the following: “For the purposes of this subsection, the term ‘lactation’ means a condition that may result in the feeding of a child directly from the breast or the expression of milk from the breast.”

Title II of the bill would provide a tax credit under the Internal Revenue Code for an employer’s expenses in providing an appropriate environment on business premises for employed mothers to breastfeed or express milk. The credit for a taxable year would equal 50 percent of qualified expenditures, up to a credit limit of \$10,000. “Qualified breastfeeding promotion and support expenditure” is to include breast pumps and related “exclusive use property,” if such materials meet prescribed standards, and consultation services related to breastfeeding. The term “other exclusive use property” is defined to mean any amount paid or incurred for the acquisition or lease of tangible personal property used by mothers who are employees of the taxpayer to breastfeed or to express milk for their children, unless the property is located in any residence of the taxpayer or any employee of the taxpayer. The amendments made by this section would be applicable to taxable years beginning after December 31, 2004.

Title III of the bill deals with safe and effective breast pumps and is entitled the “Safe and Effective Breast Pumps Act.”³⁶ Section 302 would require the Secretary of Health and Human Services (“Secretary”) to establish a performance standard for breast pumps. The Secretary is to identify those pumps appropriate for use on a regular basis in a place of employment based on the efficiency and effectiveness of the pump and on sanitation factors related to communal use. Section 302 also requires that the Secretary, acting through the Commissioner of Food and Drugs, issue a compliance policy guide to assure that women who want to breastfeed a child are given full and complete information concerning breast pumps.

Title IV of the bill would amend the definition of “medical care” in the Internal Revenue Code to include breastfeeding equipment and services. Section 401 would include as medical expenses the cost of:

³⁴ H.R. 2122, § 101.

³⁵ 42 U.S.C. § 2000e(k),

³⁶ H.R. 2122, § 301.

(A) breast pumps and other equipment specially designed to assist a mother to breastfeed or express milk for her child but only if such pumps and equipment meet such standards (if any) prescribed by the Secretary of health and Human Services, and

(B) consultation services related to breastfeeding.³⁷

The amendments made by this section are to apply to taxable years beginning after December 31, 2004.

It is possible that other legislation concerning breastfeeding may be introduced in the 109th Congress. This report will be updated as is needed

³⁷ *Id.*, § 401(b).