Legal Protections for Nursing Mothers in Wisconsin

Breastfeeding mothers have legal protections in the workplace and in public

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In Wisconsin, 83.5 percent of women breastfed their newborn infants at least once and 54.9 percent continue to breastfeed six months after giving birth. These rates are higher than the national average where 79.2 percent of women have ever breastfed and 49.4 percent continue to breastfeed at six months. Both federal and state laws provide protections and benefits for nursing mothers.

The Fair Labor Standards Act is a federal law that requires some employers to accommodate their employees’ breastfeeding needs. The Federal Family Medical Leave Act and the Wisconsin Family Medical Leave Act are federal and state laws that require some employers to provide unpaid vacation time for employees after the birth of a child. In addition to workplace protections, nursing mothers in Wisconsin have legal protections that allow them to breastfeed in public locations like parks, restaurants, and stores.

Eligible mothers also have access to the Women Infant and Children (WIC) program and protections under the Affordable Care Act. WIC provides breastfeeding education and peer counseling for new mothers. The Affordable Care Act also requires most health insurance plans to provide lactation equipment and counseling for pregnant and nursing women. This fact sheet provides an overview of federal, state, county, and city laws that protect nursing mothers in the workplace and in public throughout Madison and Dane County.

The Fair Labor Standards Act

Q: What is the Fair Labor Standards Act?
A: The Fair Labor Standards Act (FLSA) is the federal law that regulates employment matters such as overtime and minimum wage rates. Under the Affordable Care Act, the FLSA was amended to require some employers to accommodate their employee’s breastfeeding needs.

Q: What sort of time and space must my employer provide me to express milk?
A: The FLSA requires employers to provide a space, other than a bathroom, that allows employees to express breast milk that is free from intrusion from coworkers and the public. Employers are required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. If a nursing mother uses what would otherwise be a paid break to express milk, the employer must compensate the mother as normal. If a nursing mother takes more frequent breaks than are allowed for all employees, the employer is not required to pay the mother for the extra break time.

Q: Which employers are covered by the FLSA?
A: All employers with 50 or more employees are required to comply with the FLSA’s break time requirements. Employers with fewer than 50 employees must comply unless they receive an exemption for demonstrating that compliance with the requirements would impose an undue hardship. An undue hardship is determined by looking at the difficulty or expense of compliance for the employer when considered in relation to the size, financial resources, nature, or structure of the employer’s business.

Q: Which employees are covered by the FLSA?
A: The FLSA applies to employees who are covered by the overtime pay requirements of the FLSA and that work for a covered employer. This means that an employee is generally covered by the FLSA if the employer is covered by the FLSA and the employee receives overtime pay at least one and a half times the employee’s regular wage when working over 40 hours per workweek.
The requirements under the FLSA apply regardless of the mother’s immigration or citizenship status.\(^{17,18}\) Although the FLSA protects undocumented workers, these workers should consult an attorney for additional information on their specific situations.\(^{19}\) The Immigrant Justice Clinic (http://law.wisc.edu/eji/ijc/) and the Community Immigration Law Center (http://cpcmadison.org/internationals/immigration-counseling/) may be helpful in answering questions related to the FLSA for undocumented workers.

A list of attorneys specializing in immigration law and are located in and around Dane County can be found at https://lawyers.law.cornell.edu/lawyers/immigration-naturalization/wisconsin/dane-county.

**Q:** Do I need to notify my employer in advance that I will need to take breaks during work to express milk?

**A:** No.\(^{20}\) Even though women are not required by law to notify their employer about breaks, it may be a good idea for women to give the employer advance notice of their intent to take breaks to express milk. By providing notice, the employer can take the necessary steps to plan for absences during break times.

**Q:** What if I encounter difficulties in obtaining break time or space to express milk in the workplace?

**A:** Employees can file complaints against employers or report violations through the U.S. Department of Labor’s Wage and Hour Division (WHD) website at http://www.dol.gov/wecanhelp/howtofilecomplaint.htm or by contacting the Milwaukee Area Office of WHD at (414)-297-1590. There are no charges to file a complaint or for the WHD to conduct an investigation. To find an attorney that works in employment law, you can search the following sites: http://www.wisbar.org/Pages/BasicLawyerSearch.aspx or https://www.dcba.net/lawyer-search.

**Family and Medical Leave Act**

**Q:** What is the Family Medical Leave Act?

**A:** The Family and Medical Leave Act (FMLA) is a federal law that requires covered employers to provide employees with job-protected and unpaid leave for qualified medical and family reasons.\(^{21}\) The birth or placement of a child is a qualified medical reason for FMLA.\(^{22}\) New mothers can use unpaid leave to initiate and continue breastfeeding without having to balance work and child care. In addition to the federal FLMA, the Wisconsin FLMA provides new mothers with similar rights.\(^{23}\)

**Q:** Which employers are covered by the federal FMLA and the Wisconsin FMLA?

**A:** The federal FMLA applies to most private-sector employers with 50 or more employees, all public agencies regardless of the number of employees, and all public or private elementary or secondary schools regardless of the number of employees.\(^{24}\) The coverage criteria for the Wisconsin FMLA are similar to the criteria of the federal FMLA. The Wisconsin FMLA applies to all employers who had 50 or more permanent employees during at least 6 months of the preceding 12 calendar months.\(^{25}\)

**Q:** Which employees are covered by the federal FMLA and the Wisconsin FMLA?

**A:** While the federal FMLA and the Wisconsin FMLA are similar, they have slightly different requirements to be considered a covered employee. The federal FMLA applies to employees who work for employers that are covered by the federal FMLA. Additionally, the covered employee must have worked for the employer for at least 12 months, have worked at least 1,250 hours for the employer during the 12-month period immediately preceding the leave, and must work at a location where the employer has at least 50 employees within 75 miles.\(^{26}\) The 12 months of employment do not have to be consecutive. That means any time previously worked for the same employer (including seasonal work) could, in most cases, be used to meet the 12-month requirement.\(^{27}\)
The Wisconsin FMLA applies to an employee who has been employed by the same covered employer for more than 52 consecutive weeks and who worked for the employer for at least 1,000 hours during the 52-week period preceding the leave.  

**Q: What events qualify me for unpaid, job-protected leave?**  
**A:** Both the federal and Wisconsin FMLA allow an employee to take unpaid leave following the birth of a child or placement of a child with the employee for adoption or foster care.  

**Q: How much unpaid leave am I allowed to take?**  
**A:** The federal FLSA entitles eligible employees to 12 workweeks of unpaid leave in a 12-month period that can be used for the birth of a child and to care for a newborn child in the first year of birth. The Wisconsin FMLA only allows employees to take 6 weeks of unpaid leave in a 12-month period for the birth or placement of a child. The 6 weeks of unpaid leave granted under the Wisconsin FMLA must commence within 16 weeks of the birth or placement of a child.  

**Q: What if I am eligible for unpaid leave under both the federal and Wisconsin FMLA?**  
**A:** Employees aren’t obligated to designate whether the leave they are taking is federal or state leave, but for an employee who qualifies for leave under both laws, the leave used counts against the employee’s entitlement under both laws. For more information regarding both the federal and the Wisconsin FMLA read the *Comparison of Federal and Wisconsin Family Medical Leave Laws* fact sheet that can be found at [http://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd_9680_p.pdf](http://dwd.wisconsin.gov/dwd/publications/erd/pdf/erd_9680_p.pdf).  

**Q: Do I need to notify my employer in advance that I will be taking time off following the birth of my child?**  
**A:** Yes. Both the federal and Wisconsin FMLA require employees to notify their employer that they will be taking a leave of absence under the law. The federal FMLA requires employees to notify their employer 30 days in advance or as soon as practicable, and the Wisconsin FMLA requires that notification be made in advance in a reasonable and practicable manner. What is reasonable and practicable notice depends on the circumstances surrounding the birth. For instance, in an emergency situation, an employee will not be expected to provide advanced notice.  

**Breastfeeding in Public**  

**Q: Does federal or state law protect a woman’s ability to breastfeeding in public?**  
**A:** Yes. Wisconsin law allows a mother to breastfeed her child in any public or private location where the mother and child are otherwise allowed. Further, no person may prohibit a mother from breastfeeding her child, direct her to move to a different location to breastfeed her child, direct her to cover her child or breast while breast-feeding, or otherwise restrict a mother from breastfeeding. This means women are allowed to breastfeed in restaurants, stores, parks, malls, and other public locations. Breastfeeding in public is not a violation of Wisconsin’s sexual gratification, indecent exposure, or obscenity laws.  

**Q: Are there local ordinances that protect a woman’s ability to breastfeed in public?**  
**A:** Madison and Dane County both have local ordinances that permit a woman to breastfeed in public, and Madison’s breastfeeding ordinance provides additional protections. Madison’s ordinance protects the “expression” of breast milk in any public or private location where a woman (mother or surrogate) is otherwise permitted. Expressing breast milk includes pumping as well as breastfeeding. The one exception to a woman’s ability to express breast milk under Madison’s ordinance is that the owner of a private residence may prohibit a woman from breastfeeding or pumping within that private residence.
The Woman, Infants, and Children program, and the Affordable Care Act

Q: What government programs are available to support breastfeeding mothers?
A: The Woman, Infants, and Children (WIC) program provides food, health care referrals, nutrition, and breastfeeding education to eligible pregnant women, new mothers, babies, and young children.

Q: Who is eligible for WIC benefits?
A: To be eligible for WIC benefits in Wisconsin, a woman must be a Wisconsin resident who is pregnant, breastfeeding, or a new mother. Infants up to age one and children up to age 5 may also be eligible for WIC in Wisconsin. All applicants must meet income eligibility requirements to qualify for WIC benefits.

Q: What are the income eligibility requirements for WIC?
A: WIC income eligibility is based on 185 percent of the United States Department of Health and Human Services poverty guidelines. Eligible annual incomes based on family size can be found on the Wisconsin Department of Health Services website at https://www.dhs.wisconsin.gov/medicaid/fpl.htm. In addition to the income eligibility requirements, a person may automatically be eligible for WIC benefits if they are enrolled in:
- FoodShare
- Medicaid
- BadgerCare Plus
- Wisconsin Works Program (W-2)
- Temporary Assistance to Needy Families (TANF)
- Food Distribution Program on Indian Reservations

Q: What breastfeeding related benefits does WIC offer?
A: WIC provides mothers who choose to breastfeed numerous benefits including breastfeeding education materials, counseling, and follow-up support through peer counselors. Additionally, some breastfeeding mothers can receive breast pumps, breast shells, or nursing supplements to help with breastfeeding initiation and continuation. Breastfeeding mothers are also eligible to participate in WIC longer than non-breastfeeding mothers, and mothers who exclusively breastfeed their infants receive an enhanced food package.

Q: What else has the Affordable Care Act (ACA) done to support breastfeeding?
A: The ACA requires most health insurance plans to provide support to breastfeeding mothers including providing breastfeeding counseling and equipment for the duration of breastfeeding. These services may be provided before and after a woman has a baby. These rules apply to Health Insurance Marketplace plans and all other health insurance plans, except for grandfathered plans. Grandfathered plans are plans that were in existence on March 23, 2010 and haven’t been changed in ways that substantially cut benefits or increase costs for policy holders. There are 2 types of grandfathered plans: job-based plans provided by an employer and individual plans purchased directly by the policy holder. For more information about grandfathered plans see https://www.healthcare.gov/health-care-law-protections/grandfathered-plans/. If a health insurance plan is not grandfathered, it must also cover the cost of a breast pump. Covering the cost means either paying for a rental for a woman while she is breastfeeding or paying for a new pump for the woman to keep. Plans may have guidelines on whether the covered pump is manual or electric, how long the coverage of a rented pump lasts, and when the pump will be provided (before or after birth).
Q: What questions should I ask my insurance coverage when asking for a breast pump?

A: Every health insurance has different coverage, and most insurance companies have a toll-free customer service number people can call and ask questions. Some questions to consider are:

- What type of pump can I get?
- When can I get my breast pump?
- How do I get a breast pump?
- Can I receive lactation counseling services in the clinic? If so, can I schedule with a lactation counselor directly?
- Will I be able to see an International Board Certified Lactation Consultant (IBCLC) if I need one? If so, are they in the clinic or will I get a referral? Is there a limit on the number of visits with a lactation consultant?

1 The structure and format of this fact sheet was modeled after the “Legal Protections for Nursing Mothers in Minnesota: Breastfeeding mothers have legal protections in the workplace & in public” published by the Public Health Law Center at the William Mitchell College of Law.
3 Id.
4 29 U.S.C. § 207.
6 WIC is authorized by the Child Nutrition Act which expired on September 30, 2015. Despite the expiration, the program is continuing to operate under its current provisions. Women enrolled or hoping to enroll in WIC should be aware that changes may be coming to the program and the benefits it offers.
10 Id.; 29 U.S.C. § 207(r).
13 Id.
14 Id.
17 Trejos v. Edita’s Bar & Rest., Inc., No. CV-08-1477. (E.D.N.Y. Mar. 17, 2009) (“whether plaintiffs had green cards or working papers -- is not relevant to the question of whether plaintiffs are employees under the FLSA.”).
20 Reasonable Break Time for Nursing Mothers. 75 Fed. Reg. 244 (Dec. 21, 2010). (“In order to facilitate an employer’s ability to provide appropriate space for expressing milk, the Department encourages nursing employees to give employers


28 Wis. Stat. § 103.10(2)(c).


31 Wis. Stat. § 103.10(3)(a)(1).

32 Wis. Stat. § 103.10(3)(b).


34 Id.


36 Wis. Stat. § 253.165.

37 Id.

38 Wis. Stat. § 944.17(3), § 944.20(2) and § 948.10(2)(b).


41 Id.


51 Id.


53 Id.