



## Guide to the Rights of Breastfeeding Employees in Hawaii

**Purpose:** This guide was developed to provide an overview of the laws that protect the rights of breastfeeding employees in Hawaii to express breast milk during the workday. The factors that are addressed and the level of protection provided vary widely from one law to another. The chart below details the Hawaii and federal laws that impact breastfeeding employees, and the protections those laws provide for each listed component. Components that are not addressed by the law are shaded in gray.

**How to Use This Guide:** To identify your rights as a breastfeeding employee or obligations as an employer, you must first determine which of the laws apply to you. Then compare each part of the applicable laws. If an employee is covered by more than one law, and those laws address the same component, the employee is entitled to the strongest protection available. If an employer does not provide the required accommodations, a complaint can be filed with the regulatory agency. The agency responsible for enforcement of each law and information on how to file a complaint is included in the chart.

The template was developed to address every component considered in existing state and federal workplace lactation accommodation laws. Some components may not apply to your state.

**Where to Go for Help:** Many breastfeeding coalitions provide support for employees and employers. See the [Breastfeeding Hawaii'i website](#) or visit the U.S. Breastfeeding Committee [Coalitions Directory](#) for a list of all breastfeeding coalitions.

**Important Note:** The information provided in this guide is not legal advice. Legal advice is dependent upon the specific circumstances of each situation. Check with a lawyer or the regulatory agency if you believe your rights have been violated.

### Hawaii Laws:

#### [Hawaii Rev. Stat. § 378-2\(7\)](#). Discriminatory practices made unlawful; offenses defined.

(a) It shall be an unlawful discriminatory practice:

(7) For any employer or labor organization to refuse to hire or employ, bar or discharge from employment, withhold pay from, demote, or penalize a lactating employee because the employee breastfeeds or expresses milk at the workplace. For purposes of this paragraph, the term "breastfeeds" means the feeding of a child directly from the breast;

Resources:

- [Hawaii State Legislature](#):
  - [Statutory language](#): full text of Hawaii Rev. Stat. § 378-2(7)

#### [Hawaii Rev. Stat. § 378-91, 378-92, 378-93 Related to Breastfeeding in the Workplace](#)

(a) An employer shall provide:

(1) Reasonable break time for an employee to express milk for the employee's nursing child for one year after the child's birth each time the employee has a need to express breast milk; and

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

(b) Every employer covered by this section shall post a notice in a conspicuous place accessible to employees and use other appropriate means to keep the employer's employees informed of the protections and obligations under this part.

(c) Subsection (a) shall not apply to any employer who has fewer than twenty employees if the employer can show that the requirements under subsection (a) would impose an undue hardship by causing the employer significant difficulty or expense in relation to the size, financial resources, nature, or structure of the employer's business.

Civil actions for injunctive relief or damages.

(a) An employee who alleges a violation of this part may bring a civil action for appropriate injunctive relief, actual damages, or both within two years after the occurrence of the alleged violation.

(b) A cause of action pursuant to subsection (a) may be brought in the appropriate court in the circuit where the alleged violation occurred, where the plaintiff resides, or where the defendant resides or has a principal place of business.

(c) A defendant who violates this part shall be fined \$500 for each violation. A civil fine that is ordered pursuant to this section shall be deposited with the director of finance to the credit of the state general fund.

Resources:

- [Hawaii State Legislature](#):
  - [Statutory language](#): full text of Hawaii Rev. Stat. §§ 378-91, 378-92
- [Hawaii Department of Labor and Industrial Relations](#):
  - [Notice to Employees](#): general background information on Hawaii Employment Practices Law

## Federal Laws:

### **Section 7(r) of the Fair Labor Standards Act – Break Time for Nursing Mothers Provision:**

(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.

Resources:

- [United States Department of Labor Wage and Hour Division](#) (WHD):
  - [Statutory language](#): full text of the "Break Time for Nursing Mothers" law.
  - [Fact Sheet #73](#): includes information on general requirements, time and location of breaks, and coverage and compensation requirements under the "Break Time for Nursing Mothers" law.
  - [FAQs](#): answers many questions about the law.

**Title VII of the Civil Rights Act:** The Pregnancy Discrimination Act, passed in 1978, amended Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy, childbirth, and related medical conditions. In 2013, the United States Court of Appeals for the Fifth Circuit held that firing a woman because she is lactating or expressing milk is unlawful sex discrimination under Title VII of the Civil Rights Act.

Title VII states:

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(k) The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for

abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

Resources:

- [U.S. Equal Employment Opportunity Commission:](#)
  - [The Pregnancy Discrimination Act of 1978](#): statutory language of amendment to Title VII of the Civil Rights Act.
  - [Pregnancy Discrimination](#): webpage detailing prohibited treatment of employees impacted by pregnancy, childbirth, or related medical conditions.
  - [Enforcement Guidance: Pregnancy Discrimination and Related Issues](#): guidance regarding the Pregnancy Discrimination Act and the Americans with Disabilities Act as they apply to pregnant workers. The Enforcement Guidance states that there are various circumstances in which discrimination against a female employee who is lactating or breastfeeding can implicate Title VII. Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination. An employee must have the same freedom to address lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions.

	<a href="#">State: Hawaii Rev. Stat. § 378-2</a>	<a href="#">State: Hawaii Rev. Stat. § 378-91, 378-92, 378-93</a>	<a href="#">Federal: Break Time for Nursing Mothers Law</a>	<a href="#">Federal: Title VII of the Civil Rights Act</a>
<b>Eligible Employees</b>	All employees who breastfeed or express breast milk at the workplace.	All employees who need to express breast milk at the workplace.	Nursing mothers who are <a href="#">employees covered by the Fair Labor Standards Act (FLSA)</a> and not exempt from FLSA overtime pay requirements. Important note: if an employer is not covered by the FLSA, its employees may still be covered if the employee's own duties meet certain interstate commerce requirements.	Title VII protects employees of private and state and local government employers with 15 or more employees, labor organizations, employment agencies, and apprenticeship and training programs. Title VII also applies to employees in the federal sector.
<b>Are Employers Required to Have a Policy on Breastfeeding Employees?</b>				No policy is required under Title VII. However, if an employer allows employees to take breaks, change their schedules, or use sick leave for routine doctor appointments and to address non-incapacitating medical conditions, then it must allow female employees to change their schedules or use sick leave for lactation-related needs under similar circumstances. Or, if

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				an employer freely permits employees to use break time for personal reasons, it would violate Title VII to deny break time for expressing breast milk.
<b>Frequency of Milk Expression Breaks</b>		Each time the employee has a need to express breast milk.	As frequently as needed by the nursing mother. The frequency of breaks needed to express breast milk will likely vary.	
<b>Length of Time for Milk Expression Breaks</b>		Reasonable.	Reasonable. The duration of each break will likely vary.	
<b>Duration of Milk Expression Breaks</b>		1 year after the child's birth.	1 year after the child's birth.	
<b>Space Requirements</b>		Location, other than a restroom, that is shielded from view and free from intrusion from coworkers and the public that may be used by an employee to express breast milk.	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. The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mothers' use, it must be available when needed in order to meet the statutory requirement. Of course, employers may choose to create permanent, dedicated space if they determine that is the best way to meet their obligations under the law.	
<b>Pay Requirement</b>			<a href="#">Unpaid</a> , unless concurrent with <a href="#">paid breaks</a> . 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.	

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<b>Are Employers Required to Notify Employees of Their Rights?</b>		Employers are required to post a <a href="#">notice</a> in a conspicuous place accessible to employees and use other appropriate means to keep employees informed of the protections and obligations under this part.		Employers are required to post the <a href="#">"EEO is the Law" English poster</a> . <i>Note: This notice does not specifically address the rights of breastfeeding employees.</i>
<b>Requirements for Employees Seeking Accommodation</b>				
<b>Exemption</b>		These requirements shall not apply to employers with fewer than 20 employees if the employer can show that the requirements would impose an undue hardship by causing the employer significant difficulty or expense in relation to the size, financial resources, nature, or structure of the employer's business.	All <a href="#">employers covered by the FLSA</a> , regardless of the size of their business, are required to comply with this provision. However, employers with fewer than 50 employees are not subject to the FLSA break time requirement if the employer can demonstrate that compliance with the provision would impose an undue hardship. Whether compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, or structure of the employer's business.	
<b>Milk Storage</b>				
<b>Does Unpaid Break Time Impact Full Time Status and/or Eligibility for Health Insurance?</b>				
<b>Is Unpaid Break Time Expressly Separated from Paid Leave or Paid Time Off?</b>				

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<b>Are Employers Required to Consider Providing Additional Accommodations for Breastfeeding Employees?</b>				
<b>Discrimination/Retaliation</b>	It is an unlawful discriminatory practice for any employer or labor organization to refuse to hire or employ, bar or discharge from employment, withhold pay from, demote, or penalize a lactating employee because the employee breastfeeds or expresses milk at the workplace. For purposes of this paragraph, the term "breastfeeds" means the feeding of a child directly from the breast.		It is a violation for any person to <a href="#">discharge or in any other manner discriminate against</a> an employee who files a complaint or cooperates with the investigation of a complaint.	Firing a woman or taking other adverse employment action against her because she is lactating or expressing milk is unlawful sex discrimination. An employer may not discriminate against an employee because of her breastfeeding schedule. Women breastfeeding and lactating must be able to take breaks as other employees who take breaks for other medical or personal reasons. Employers are prohibited from firing, demoting, harassing or otherwise retaliating against an employee because she has complained of discrimination or participated in an employment discrimination proceeding.
<b>Protection from Harassment</b>				Employers are required to provide a <a href="#">work environment free of harassment</a> based on pregnancy, childbirth, or related medical conditions, including breastfeeding.
<b>Agency Responsible for Enforcement</b>	<a href="#">Hawaii Civil Rights Commission</a> (HCRC).	<a href="#">Hawaii Department of Labor and Industrial Relations</a> (DLIR).	U.S. Department of Labor, <a href="#">Wage and Hour Division</a> .	<a href="#">U.S. Equal Employment Opportunity Commission</a> .

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<b>How to File a Complaint</b>	For violations of HRS 378-2, file a complaint with the HCRC. Contact the HCRC at (808) 586-8636 or visit the <a href="#">HCRC website</a> .	HRS chapter 378, part VII provides enforcement through direct court action, not DLIR administrative enforcement process.	File a complaint by calling the WHD toll-free at 1-800-487-9243 or visiting <a href="http://www.dol.gov/whd">www.dol.gov/whd</a> . You will then be directed to your nearest WHD office for assistance.	You may file a charge of employment discrimination at the EEOC office closest to where you live, or at any one of the <a href="#">EEOC's 53 field offices</a> . You may call 1-800-669-4000 or <a href="#">visit the EEOC website</a> for more information on filing a charge and filing deadlines. Important Note: <a href="#">Federal sector employees have a different complaint process</a> .
<b>Is the Agency Required to Monitor and Compile Enforcement Reports?</b>				Yes.
<b>Sanctions for Non-Compliance</b>	Remedies ordered by the Commission or courts in discrimination may include: hiring, reinstatement, or upgrading of employees; back pay; compensatory and punitive damages; equitable and injunctive relief; and reasonable attorney's fees and costs.	Employers found to be in violation shall be fined \$500 for each violation. A civil fine that is ordered pursuant to this section shall be deposited with the director of finance to the credit of the state general fund.	An employee whose rights are denied can file a complaint with the Wage and Hour Division, which can go to court to obtain an order requiring the employer to comply. In addition, any employee who is "discharged or in any other manner discriminated against" because, for instance, he or she has filed a complaint or cooperated in an investigation, may file a retaliation complaint with the Wage and Hour Division or may file a private cause of action seeking appropriate remedies including, but not limited to, employment, reinstatement, lost wages and an additional equal amount as liquidated damages.	<a href="#">Remedies may include</a> reinstatement, compensatory damages, punitive damages, back pay for lost wages where someone has been terminated, and requiring an employer to take certain actions to prevent future discrimination.
<b>Do Employees Have Private Action Rights?</b>	Complainant is required to exhaust administrative remedy	Yes. An employee who alleges a violation of this part may bring a civil	Yes.	Yes, but employees are first required to

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	by <a href="#">filing a discrimination complaint with HCRC</a> . After filing administrative complaint, the complainant can request a notice of right to sue and elect court action.	action for appropriate injunctive relief, actual damages, or both within two years after the occurrence of the alleged violation. A cause of action may be brought in the appropriate court in the circuit where the alleged violation occurred, where the plaintiff resides, or where the defendant resides or has a principle place of business.		file a charge with the EEOC.
<b>Worksite Designation Program</b>				
<b>Additional Resources</b>	<p><a href="#">Breastfeeding Hawaii</a></p> <p>U.S. Department of Labor Women’s Bureau: <a href="#">Employment Protections For Workers Who Are Pregnant or Nursing</a></p> <p>Haw. Code R. <a href="#">§12-46-106</a> provides female employees with a disability resulting from pregnancy, childbirth, or related medical conditions with the right to take a leave of absence; to the extent lactation/breastfeeding were interpreted to be a qualifying “disability” entitling an employee to time off under this rule, this statute could be implicated under circumstances involving discrimination against a female employee who is lactating or breastfeeding. Under HAR § 12-46-106, lactation (or pregnancy itself) is not considered to be a <i>per se disability</i> due to pregnancy, childbirth, or related medical condition. However, there are post-birth pregnancy-related disabilities (e.g., post-partum depression), and that could include disabilities related to lactation. *It is up to the pregnant worker’s physician to determine whether she cannot work due to a pregnancy-related disability, and when she is able to return to work; an employer may require a physician certification of release to return to work.</p> <p>State of Hawaii, Department of Health: <a href="#">WIC Breastfeeding</a></p> <p>Hawaii Wage Standards blog: "<a href="#">Lactation breaks and posting requirements went into effect July 1, 2013</a>"</p>	<p>Office on Women’s Health:</p> <ul style="list-style-type: none"> <li>- <a href="#">Supporting Nursing Moms at Work: Employer Solutions</a></li> <li>- <a href="#">Business Case for Breastfeeding</a></li> </ul> <p>U.S. Breastfeeding Committee:</p> <ul style="list-style-type: none"> <li>- <a href="#">Resource and Referral Guide for Breastfeeding Employees and their Employers</a></li> <li>- <a href="#">Online Guide: “What You Need to Know About the “Break Time for Nursing Mothers” Law</a></li> </ul> <p>Especially see Online Guide sections:</p> <ul style="list-style-type: none"> <li>- <a href="#">How should you store your breast milk?</a></li> <li>- <a href="#">What are the space requirements?</a></li> </ul>	<p>Equal Employment Opportunity Commission:</p> <ul style="list-style-type: none"> <li>- Guidance: <a href="#">Questions and Answers about the EEOC’s Enforcement Guidance on Pregnancy Discrimination and Related Issues</a></li> <li>- Press release: <a href="#">Fifth Circuit Holds Lactation Discrimination is Unlawful Sex Discrimination</a></li> </ul> <p>National Women’s Law Center: <a href="#">Fact Sheet: The Pregnancy Discrimination Act and the Amended Americans with Disabilities Act: Working Together to Protect Pregnant Workers</a></p> <p>American Civil Liberties Union: <a href="#">Federal Law and Pregnant, Post-Partum and</a></p>	



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			Wage and Hour Division: <a href="#">Family and Medical Leave Act</a>  Center for WorkLife Law:  - <a href="#">Pregnant @ Work</a>  - <a href="#">Guide for doctors on writing work notes for nursing mothers</a>	<a href="#">Breastfeeding Workers</a>  A Better Balance: <a href="#">Babygate</a>

This document was developed in partnership with Breastfeeding Hawaii. Hawaii Rev. Stat. § 378-2 was reviewed by the Hawaii Civil Rights Commission and Hawaii Rev. Stat. § 378-91, 378-92, 378-93 content was reviewed by the Hawaii Department of Labor and Industrial Relations in September 2016. Title VII of the Civil Rights Act content is based on Equal Employment Opportunity Commission publications. Break Time for Nursing Mothers law content was reviewed by the U.S. Department of Labor, Wage and Hour Division in May 2016.