

CSBA Sample Board Policy

All Personnel

BP 4033(a)

LACTATION ACCOMMODATION

Note: The following **optional** policy may be revised to reflect district practice. Both federal and state law require that employees be provided reasonable break time and an appropriate location to accommodate their desire to express milk for their infant children. The Patient Protection and Affordable Care Act (P.L. 111-148, 2010) amended 29 USC 207 of the Fair Labor Standards Act (FLSA) to require employers to provide reasonable break time for nursing mothers, but applies only to employees who are not exempt from the overtime pay requirements of the FLSA (i.e., classified employees). State law (Labor Code 1030-1033) applies to all district employees. Where provisions of the two laws conflict, the statute providing greater protections for employees supersedes. The district should consult legal counsel if questions arise about the application of these laws to a particular employee.

The Fair Employment and Housing Commission has determined that, because breastfeeding is an activity intrinsic to females, termination of an employee because she was still breastfeeding after returning to work from pregnancy disability leave was sexual discrimination in violation of Government Code 12940 and 12945 (Chavez v. Acosta Tacos). Furthermore, pursuant to Labor Code 1033, violation of Labor Code 1030-1033 may result in a citation from the Labor Commissioner and/or a civil penalty.

The district should ensure consistency of this policy with provisions in the district's collective bargaining agreement, if any, related to break times or other employment issues.

The Governing Board recognizes the immediate and long-term health advantages of breastfeeding for infants and mothers and desires to provide a supportive environment for any district employee to express milk for her infant child upon her return to work following the birth of the child. The Board prohibits discrimination, harassment, and/or retaliation against any district employee who chooses to express breast milk for her infant child while at work.

(cf. 4030 - Nondiscrimination in Employment)

(cf. 4031 - Complaints Concerning Discrimination in Employment)

Note: Although 29 USC 207 limits the length of time that a classified employee is entitled to lactation accommodation to one year after the birth of the child, Labor Code 1030-1033 does not set a specific limit on the infant child's age and therefore provides greater benefits to employees.

The district shall provide a reasonable amount of break time to accommodate an employee each time she has a need to express breast milk for her infant child. (Labor Code 1030)

Note: Labor Code 1030 and 29 USC 207 do not require the district to compensate non-exempt employees for breaks taken for the purpose of expressing milk. However, an employee who uses break time already provided by the district as paid time must be compensated for that break time in the same manner as any other employee. Any additional time beyond the authorized paid break time could be uncompensated, provided the employee is completely relieved from duty during that time. If the district chooses to provide compensation during extended break time, it should modify the following paragraph accordingly. The district also may provide flexible scheduling for those employees who choose to make up for any unpaid break time.

LACTATION ACCOMMODATION (continued)

To the extent possible, such break time shall run concurrently with the break time already provided to the employee. Any additional break time used by a non-exempt employee for this purpose shall be unpaid. (Labor Code 1030; 29 USC 207)

Note: Labor Code 1031 requires the district to make reasonable efforts to provide an employee with the use of a private room or other location, except a toilet stall, in close proximity to the employee's work area, which may include the place where the employee normally works if the location otherwise meets legal requirements. 20 USC 207, applicable to classified employees, specifies that the location must be shielded from view and free from intrusion from coworkers and the public. A fact sheet issued by the U.S. Department of Labor's (DOL) Wage and Hour Division, Break Time for Nursing Mothers under the FLSA, clarifies that the location provided by the district could be a space temporarily created or converted into a space for expressing milk as long as it is functional and meets all requirements of law.

The DOL has preliminarily interpreted an employee's right to express milk for her infant child to include the ability to safely store the milk (75 Fed. Reg. 244, page 80076). According to the DOL, this might include providing access to a refrigerator or ice chest or allowing the employee to bring an insulated food container to work.

A fact sheet issued by the California Department of Public Health, Minimum Requirements of the California Lactation Accommodation Law, recommends that the location should have the following items: a comfortable chair, small table, electrical outlet, a sink with a safe water source, disinfectant dish soap, and paper towels.

The employee shall be provided a private location, other than a restroom, which is in close proximity to her work area and meets the requirements of Labor Code 1031 and 29 USC 207, as applicable.

Employees are encouraged to notify their supervisor or other appropriate personnel in advance of their intent to make use of the accommodations offered for employees who are nursing mothers. As needed, the supervisor shall work with the employee to address arrangements and scheduling in order to ensure that the employees' essential job duties are covered during the break time.

Note: Labor Code 1032 provides exceptions to the requirement for lactation accommodation when providing such accommodation would "seriously disrupt" district operations. "Serious disruption" is not defined in the law. 29 USC 207 provides exceptions when lactation accommodation would result in "undue hardship" based on significant difficulty or expense in relation to the size, financial resources, nature, or structure of the district. In this case, the exception is limited to districts with fewer than 50 employees and applies to classified employees only.

Regardless of the size of the district, the determination of serious disruption or undue hardship should be made on a case-by-case basis and only in limited, stringent circumstances. The burden of demonstrating why accommodation could not be made, even if on a temporary basis or for less time than requested, would likely fall to the district.

Lactation accommodations may be denied only in limited circumstances in accordance with law. (Labor Code 1032; 29 USC 207)

LACTATION ACCOMMODATION (continued)

Before an employee's supervisor makes a determination to deny lactation accommodations, he/she shall consult the Superintendent or designee. In any case in which lactation accommodations are denied, the Superintendent or designee shall document the options that were considered and the reasons for denying the accommodations.

Legal Reference: (see next page)

LACTATION ACCOMMODATION (continued)

Legal Reference:

EDUCATION CODE

200-262.4 Prohibition of discrimination on the basis of sex

CIVIL CODE

43.3 Right of mothers to breastfeed in any public or private location

GOVERNMENT CODE

12940 Discriminatory employment practices

12945 Discrimination based on pregnancy, childbirth, or related medical conditions

LABOR CODE

1030-1033 Lactation accommodation

CODE OF REGULATIONS, TITLE 2

7291.2-7291.16 Sex discrimination; pregnancy and related medical conditions

UNITED STATES CODE, TITLE 29

207 Fair Labor Standards Act; lactation accommodation

FAIR EMPLOYMENT AND HOUSING COMMISSION DECISIONS

Department of Fair Employment and Housing v. Acosta Tacos (Chavez), FEHC Precedential Decision 09-03P, 2009

Management Resources:

CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS PUBLICATIONS

Rest Periods/Lactation Accommodation, Frequently Asked Questions

CALIFORNIA DEPARTMENT OF PUBLIC HEALTH PUBLICATIONS

Minimum Requirements of the California Lactation Accommodation Law

CENTERS FOR DISEASE CONTROL AND PREVENTION PUBLICATIONS

Lactation Support Program Toolkit

FEDERAL REGISTER

Reasonable Break Time for Nursing Mothers, December 21, 2010, Vol. 75, No. 244, pages 80073-80079

OFFICE OF THE SURGEON GENERAL PUBLICATIONS

The Surgeon General's Call to Action to Support Breastfeeding, 2011

HEALTH RESOURCES AND SERVICES ADMINISTRATION PUBLICATIONS

The Business Case for Breastfeeding: Steps for Creating a Breastfeeding Friendly Worksite, Toolkit, 2008

U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, PUBLICATIONS

Fact Sheet #3: Break Time for Nursing Mothers under the FLSA, rev. December 2010

WEB SITES

California Department of Industrial Relations, Division of Labor and Standards Enforcement:

<http://www.dir.ca.gov/dlse>

California Department of Public Health: <http://www.cdph.ca.gov>

California Women, Infants and Children: <http://www.wicworks.ca.gov>

Centers for Disease Control and Prevention: <http://www.cdc.gov>

Health Resources and Services Administration: <http://www.hrsa.gov>

Office of the Surgeon General: <http://www.surgeongeneral.gov>

U.S. Department of Labor, Wage and Hour Division, Break Time for Nursing Mothers:

<http://www.dol.gov/whd/nursingmothers>