



# HR INSIGHTS

A MORETON & COMPANY HR ADVISORY SERVICES NEWSLETTER

## DOL Publishes Enforcement Guidance for Compliance With the PUMP Act

On May 17, 2023, the U.S. Department of Labor (DOL) published [Field Assistance Bulletin \(FAB\) 2023-02](#)<sup>1</sup> to provide guidance to agency officials on how to interpret and enforce compliance with the Providing Urgent Maternal Protections for Nursing Mothers (PUMP)<sup>2</sup> Act.

### The PUMP Act

On Dec. 29, 2022, the PUMP Act was signed into law. The act amended the Fair Labor Standards Act (FLSA) to expand the requirement that employers provide break time and a private place, other than a bathroom, for employees to express breast milk. The FLSA mandate on nursing breaks now applies to almost all employees, including those who are exempt from FLSA overtime rules.

The PUMP Act also clarifies that these breaks must be paid when employees are not completely relieved of all work duties. A hardship exemption to the act is available for employers with fewer than 50 employees

Nearly all employees covered by the FLSA are also covered by PUMP Act protections. Among other protections, employers may not “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”.

### Break Time Requirements

Employers cannot deny pumping breaks for covered employees. FAB 2023-02 clarifies that employers are required to provide employees who are nursing with a reasonable break time each time these employees have a need to pump breast milk at work. This requirement is valid for up to one year after the birth of a child.

The frequency, duration and timing of these breaks may be tailored to the specific needs of employees and their children. However, employers cannot require employees to adhere to fixed schedules. Schedules may need to be adjusted over time as employees' pumping needs change.

Break time requirements also apply to employees who telework as if they were working at their employer's premises.

### Compensation

FAB 2023-02 clarifies that pumping breaks are not compensable unless otherwise required by federal, state or municipal law. For this reason, employers should review federal, state and local requirements that may establish an obligation to compensate employees for some or all of the pumping breaks they may take.

Whether to compensate employees for pumping breaks may depend on the employee's classification as either exempt or nonexempt. The DOL has provided the following examples to illustrate this important distinction:





- **Nonexempt employee:** Julia is on a pump break when she receives a call on her work cell phone from a co-worker who provides her with instructions regarding a work project. After she finishes the work call, Julia completes her pump break. Because Julia was not relieved from duty, the time she spent on the call must be counted as hours worked.
- **Exempt employee:** Cameron is a salaried exempt administrative employee at an assisted living center who has a 4-month-old child. Cameron takes three pump breaks a day. Cameron's employer cannot deduct the time used for pump breaks from their salary.

## Important Dates:

- **Dec. 29, 2022:** PUMP Act signed into law.
- **April 2023:** DOL published updated FLSA minimum wage, overtime and PUMP Act notice requirements.
- **May 17, 2023:** DOL published FAB 2023-02.

## Space Requirements

Employers must provide employees who are nursing with a space other than a bathroom where they can pump. This space must be shielded from view, free from co-worker or public intrusion, and available each time employees must use it. Employers may set up temporary spaces as long as all the criteria are met.

FAB 2023-02 clarifies that pumping spaces must ensure employee privacy. For employees working at the employer's facility, this may be accomplished by displaying a sign when the space is in use or providing a locking mechanism when the space is in use. For teleworking employees, privacy may include providing break times when employees are "free from observation by employer-provided or required video systems, computer cameras, security cameras or web conferencing platforms when they are expressing milk, regardless of the location they are working from."

The space must also be functional. Under FAB 2023-02, "functional" means that the space must contain a place for employees to sit and a flat surface (other than the floor) for placing the pump. Employees must also be able to safely store milk while at work. The guidance gives the examples of an insulated food container, personal cooler or refrigerator for this requirement. Ideally, the space would also provide access to an outlet to plug in an electric pump and a sink nearby so employees may wash their hands and clean breast pump attachments after use.

## Small Employer Exception

Employers with 49 or fewer employees may be exempt from the pump time requirements of the FLSA and the PUMP Act if they can demonstrate that compliance would require undue hardship. Employers must count every employee to verify whether they have 49 or fewer employees.

To demonstrate undue hardship, employees carry the burden of proving that accommodating a specific employee's pumping needs presents significant difficulty or expense in light of the employer's size, financial resources, nature and business structure. FAB 2023-02 instructs DOL officers to allow for this exemption only in limited circumstances, given that employers are required to provide this accommodation only for one year after the child's birth.

## Additional Exemptions

FAB 2023-02 also provides clarification on the following additional exemptions:

- **Air carrier crew members:** Crew members of air carriers are exempt from FLSA pump-at-work protections. "Crew member" means a person assigned to perform duty in an aircraft during flight time and includes pilots and flight attendants. The break time and space protections for pumping at work apply as normal to other employees of air carriers.





- **Rail carriers:** The PUMP Act delays coverage for certain employees of rail carriers. The delay applies to members of a train crew involved in the movement of a locomotive or rolling stock or employees who maintain the right of way of a rail carrier employer. Beginning Dec. 29, 2025, the break time and space requirements are applicable to these employees unless compliance:
  - Requires the employer to incur significant expense, such as through the addition of a member of a train crew in response to providing FLSA break time to pump, removal or retrofitting of seats, or the modification or retrofitting of a locomotive or rolling stock; or
  - Results in unsafe conditions for an individual who is an employee who maintains the right of way.
- **Motorcoach service operators:** Similar to the PUMP Act's provisions affecting rail carriers, a three-year delay in coverage applies to employees of motorcoach services operators involved in the movement of a motorcoach. Beginning Dec. 29, 2025, the pump-at-work protections will apply to these motorcoach services employees unless compliance:
  - Requires the employer to incur significant expense, such as through the removal or retrofitting of seats, the modification or retrofitting of the motorcoach, or unscheduled stops; or
  - Results in unsafe conditions for an employee or passenger.

## Enforcement

Employers that violate FLSA and PUMP Act requirements may be liable for appropriate legal or equitable remedies under the FLSA, including employment reinstatement, promotion, and the payment of lost wages and an additional equal amount as liquidated damages, compensatory damages and make-whole relief. These remedies are available regardless of whether the employee has also experienced retaliation.

Aggrieved employees may file a complaint with the DOL or a private cause of action seeking appropriate remedies. Special procedures may apply to filing a private action where an employer has failed to provide an employee with an appropriate space to pump. Special procedures do not apply before an employee or other party can file a complaint with the DOL or when an employee brings a private suit to enforce the reasonable break time requirement.

1. <https://www.dol.gov/sites/dolgov/files/WHD/fab/2023-2.pdf>

2. <https://www.dol.gov/agencies/whd/fact-sheets/73-flsa-break-time-nursing-mothers>

For more information about Moreton & Company's HR Advisory Services please contact Kevin Mansfield at [kmansfield@moreton.com](mailto:kmansfield@moreton.com).

© 2023 Moreton & Company. This newsletter is intended to inform recipients about industry developments and best practices. It does not constitute the rendering of legal advice or recommendations and is provided for your general information only. If you need legal advice upon which you can rely, you must seek an opinion from your attorney.

To view more of Moreton & Company's newsletters, visit [www.moreton.com/news-events/](http://www.moreton.com/news-events/)