

## Lawyer Insights

### Making Room(s) for Moms: Restaurants Face Suits From Nursing Mothers

By Amber Rogers and Scott Burton  
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Workers at retail fast-food chains McDonald's and Wendy's are taking advantage of the new protections granted them by the 2022 Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) by filing class actions in both Ohio and Illinois. The PUMP Act requires employers to provide "reasonable break time" to nearly all exempt and nonexempt employees to allow them to express breast milk in a private space that is not a bathroom."

The law also requires these spaces to be "shielded from view," "free from intrusion of coworkers and the public," and for it to be "available each time" that an employee needs to pump. In the lawsuits, the plaintiffs claim that their respective franchisees, failed to provide adequate breaks and appropriate spaces to express breast milk, as required by the Act. The cases highlight potential liability for retail fast-food operators lurking in stores that might not be prepared to comply with the new law.

#### Key Nuggets

On February 1, named-Plaintiff Amanda Bazzett filed a complaint on behalf of Wendy's employees who were denied break time and an appropriate space to express breast milk, dating back to the PUMP Act's effective date in December 2022. Bazzett claims she was forced to pump in an open-spaced "crew room" at the back of the restaurant typically used for employee's to take rest and meal breaks and to store their personal items. Bazzett further alleges that while she was pumping in this room, other employees frequently came in and out, and that she was therefore not afforded a secure, private space as required by the Act. Just recently, on June 12, Bazzett agreed to dismiss her individual claims, but the agreement left the door open for other class members to pursue similar claims against Wendy's and its franchisees.

On February 14, represented by the same firm as Bazzett, Plaintiffs Kathleen R. Faber and Lexis Mays filed suit on behalf of McDonald's employees who they claim were similarly denied appropriate break time and private spaces to pump. In particular, Faber claimed that the general manager at her Kansas McDonald's required her to pump in a stock room during some shifts, and, when male employees worked with her, in the bathroom of the restaurant. She also claimed that she did not have sufficient time to pump and had "no break at all" for half her shifts. Mays claims she was forced to pump in a back office of her New York store, with no door, which employees frequented during Mays' pumping breaks. Both Faber and Mays further claimed that there were shifts during which they were denied break time for pumping entirely. McDonald's has moved to dismiss the case, but the court is unlikely to issue a ruling until later this year.

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In both suits, the complaints allege that defendants could have easily provided private spaces through the use of temporary pod-like units for relatively low cost—which appears to be an attempt to head off an “undue burden” argument potentially available to the franchisees under the Act. The complaints seek injunctive relief, equitable and punitive damages, as well as attorneys’ fees against the fast-food chains and their franchisees.

### **Takeaways**

Although these two class actions have not been entirely successful to date, the facts alleged in the twin complaints demonstrate the challenges faced by restaurant operators to adapt the physical spaces in their stores to the Act. Compliance need not be a headache though, as it generally only requires two types of accommodations for breastfeeding employees: time and space.

First, the Act requires employers to provide “reasonable break time” each time an employee needs to pump. What is reasonable will depend on each pumping employees’ needs, and managers should be wary of enforcing a strict “nursing schedule”—even if agreed to by the employee—as needs can vary throughout the nursing period. The Act does not require this break time to be paid, but PUMP Act breaks should be compensated in the same manner as other short breaks provided to non-nursing employees.

Second, the Act requires that employers provide a private space, that isn’t a bathroom, is shielded from view, and is free from intrusion. A private space can take many forms, and can be an office, storage room, or even a partitioned area, as long as it affords privacy to the pumping employee. A room capable of being locked, or an area that has a sign displayed warning other employees not to enter, can suffice. The space must also be “functional,” which according to Department of Labor guidance, means that there must be a place for the nursing employee to sit, and a flat surface, other than the floor, to place a pump. And, while it need not be located in the same room, employees must be provided with a way to store pumped milk while at work, such as an insulated cooler or an employee refrigerator.

Another unique facet presented by these cases are allegations that the franchisors and franchisees are jointly liable due to requirements in Wendy’s and McDonald’s franchisee agreements and guidelines. The complaints assert that because the corporate franchisors may dictate the layout of the restaurants, they are therefore dictating the terms and conditions of employment for nursing employees who are deprived of pumping spaces. In the Faber/Mays case, McDonald’s leads off their dismissal pleading with the argument that the corporation is not a “direct employer,” an argument that is unavailable to the franchisees. Similar theories have failed because courts found an insufficient level of control by the corporate franchisor, but the recent push by federal agencies expand the definition of “joint employers” looms in the background.

For now, franchise operators should ensure that store managers are aware of the PUMP Act requirements. Before even receiving a request, store operators should also assess whether their stores can accommodate the private space requirements of the Act, or if modification of the space will be necessary. In the longer term, franchisors and their franchisees should review their franchise agreements for elements of control over their stores’ physical spaces. At the very least, provisions in each agreement should permit modification of spaces, temporary or otherwise, to accommodate nursing employees.

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***Amber M. Rogers** is a partner in the firm's Labor & Employment group and the hiring partner for the firm's Dallas office. Her national practice assists clients with traditional labor relations and litigation, employment advice and counseling and complex employment litigation. She can be reached at +1 (214) 468-3308 or [arogers@HuntonAK.com](mailto:arogers@HuntonAK.com).*

***Scott W. Burton** is an associate in the firm's Labor & Employment group in the firm's Washington D.C. office. Scott counsels and represents employers facing complex employment and labor-management issues. He can be reached at +1 (202) 955-1664 or [burtons@HuntonAK.com](mailto:burtons@HuntonAK.com).*

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