

Protection for Breastfeeding Mothers and Sex-based Discrimination under the DC Human Rights Act

- OHR Enforcement Guidance 19-001 -



Date: September 27, 2019

SUBJECT

Discussion of protections for breastfeeding mothers and right to express breastmilk under the DC Human Rights Act (DCHRA or HRA) at D.C. Code §§ 2-1401.05 and 2-1402.81-83, and the implementing regulations at 4 DCMR § 518.

PURPOSE

This enforcement guidance highlights protections for breastfeeding mothers afforded by the Child's Right to Nurse Human Rights Amendment Act of 2007. The 2007 law amended the DCHRA to add, among other things, breastfeeding as part of the definition of sex discrimination. It also discusses a mother's right to breastfeed in public or private space, and employers' duty to provide accommodation for expressing breast milk. The guidance contains examples to illustrate certain points, but the examples are for educational purposes only and shall not constitute legal advice.

GENERAL BACKGROUND

In 2007, the Council of the District of Columbia passed the Child's Right to Nurse Human Rights Amendment Act of 2007 (CRNHRA or the Act), which amended the DC Human Rights Act of 1977. The amendments include: (1) making breastfeeding a part of the definition of sex discrimination under the HRA; (2) explicitly providing that a woman has a right to breastfeed her child in both public and private spaces; and (3) requiring employers to make certain provisions in the workplace to assist breastfeeding women.¹ In 2009, the Office of Human Rights ("OHR") adopted regulations fully implement the CNHRA's amendments.²

OHR has the authority to accept, investigate, and issue determinations regarding complaints alleging violations of the Human Rights Act, including the provisions added by the CRNHRA. OHR issues this general guidance to provide assistance in understanding the application of the protections afforded by the Act and its implementing regulations.

A complaint regarding violation of the breastfeeding provisions of the DCHRA may be filed either with OHR or D.C. Superior Court within one year of the violation.

Please see detailed examples of breastfeeding provisions on the following pages.

¹ See Child's Right to Nurse Human Rights Amendment Act of 2007, 2007 District of Columbia Laws 17-58 (Act 17-132) at 1 (describing the Law's intent).

² See 4 DCMR § 518.

How was the Human Rights Act's definition of sex discrimination broadened by the right to breastfeed because of CRNHRA?

1. *It is unlawful for any covered entity under the HRA to discriminate against a woman who is breastfeeding.*

The CRNHRA makes clear that discrimination based on sex includes discrimination based on breastfeeding. The HRA now states:

*Discrimination on the basis of sex shall include, but not be limited to, discrimination on the basis of pregnancy, childbirth, related medical conditions, **breastfeeding**, or reproductive health decisions.³*

Thus, it is unlawful for the following covered entities to engage in an unlawful discriminatory practice based on breastfeeding, or other sex-based conditions such as pregnancy, childbirth and related medical conditions, and reproductive health decisions.⁴

- Places of public accommodations,
- Housing providers and commercial spaces,
- Educational institutions,
- Governmental agencies, and
- Employers.

2. *Examples⁵*

EXAMPLE A (PUBLIC ACCOMMODATIONS): A hotel cannot deny services or a hotel room because the customer is breastfeeding. A childcare facility cannot decline to enroll a child because the child's mother breastfeeds the child.

EXAMPLE B (HOUSING): A covered housing provider cannot refuse to rent to a potential tenant because she is breastfeeding.

EXAMPLE C (EDUCATION): A school cannot expel a student because she has chosen to breastfeed her child.

EXAMPLE D (GOVERNMENT SERVICES): A government agency cannot deny benefits or services to a customer because she is breastfeeding.

EXAMPLE E (EMPLOYERS): An employer cannot discriminate, harass, refuse to hire or otherwise take an adverse action because the applicant or employee is breastfeeding or expresses milk in the workplace.

³ See D.C. Code § 2-1401.05(a).

⁴ See D.C. Code § 2-1402.01-83.

⁵ These examples are based on breastfeeding only, but as discussed earlier, other sex-based conditions listed in DC Code § 2-1401.05(a) would apply as well.

How was the Human Rights Act expanded to include the right to breastfeed in a public or private space?

A woman has the right to breastfeed her child in any location, public or private, where she has a right to be with her child, without respect to whether the mother's breast or any part of it is uncovered during or incidental to the breastfeeding of her child.⁶ Thus, it is unlawful for the following covered entities to engage in an unlawful discriminatory practice based on breastfeeding, or other sex-based conditions such as pregnancy, childbirth and related medical conditions, and reproductive health decisions.

Therefore, under the HRA, it is unlawful discriminatory practice to deny a breastfeeding woman the right to breastfeed her child in a **public or private space** where she has a right to be with her child. An entity may not deny a woman this right even if her breast becomes exposed during or incidental to breastfeeding. It is important to note that if a breastfeeding woman exposes her breast during or incidental to breastfeeding, the woman does not violate any law regarding indecent exposure.⁷

EXAMPLE: A mother is at a restaurant with her family and is breastfeeding her infant at the table. A patron at the next table, who is dining with her five-year-old son, asks the mother to stop breastfeeding because the patron is upset that her five-year-old son can see the mother's exposed nipple. The mother ignores the patron and continues breastfeeding her child. The patron escalates the issue by notifying the restaurant manager about the mother's refusal.

ANALYSIS: What can the restaurant manager do? The restaurant manager can inform the patron that the D.C. Human Rights Act affords the mother the right to breastfeed her child at the table. The manager can also direct the patron to this Guidance or to the Office of Human Rights.

What about employers and their employees? Can an employee breastfeed or express breastmilk in the workplace?

1. **Employers are required to:** (a) provide reasonable daily breaks to breastfeeding employees so that they can express breast milk; (b) make reasonable efforts to provide a sanitary room where an employee can express breast milk; and (c) provide other accommodations to breastfeeding women.

(a) Daily Breaks

An employer **MUST** provide reasonable daily break periods so that the employee who is breastfeeding may express breast milk, unless providing such break periods would create an undue hardship on the operations of the employer.⁸ Note, however, that the break does not have to be paid and the break period shall run concurrently with the paid breaks or unpaid breaks which are already provided to the employee.⁹ An undue hardship is defined as "any action that requires significant difficulty or expense when considered in relation to factors such as the size of an employer's business, its financial resources, and the nature and structure of its operation."¹⁰

⁶ See D.C. Code §§ 2-1402.82 (b), (c)(1).

⁷ See D.C. Code § 2-1402.82 (c)(2).

⁸ See D.C. Code §§ 2-1402.82 (b), (d)(1).

⁹ *Id.*

¹⁰ See D.C. Code § 2-1402.82(a)(2).

EXAMPLE: Each employee is provided with two paid 15-minute breaks during an eight-hour work day. Martha, who is breastfeeding, arrives at work at 9:00 am. At 10:30 am, Martha takes a 15-minute break to pump. Around 12:00 pm, Martha takes another 15-minute break, this time to eat lunch. At 2:00 pm, Martha takes an additional 25-minute break to express milk. Martha leaves work at 5:55 pm. Martha’s employer found that she took an unexcused leave at 2:00 pm because she had exhausted her allowable 30-minute break total, and charged her with AWOL (absence without leave) for the 25 minutes. Martha who has read the DC Human Rights Act informs her employer that it was unlawful to charge her AWOL and that she should be paid for the break at 2:00 pm. Is Martha correct?

ANALYSIS: Yes and No. The law provides that employers must provide reasonable daily breaks to employees who need to express breast milk and that such breaks “shall” run concurrently with already provided breaks. Thus, Martha is correct that she likely should not have been charged with AWOL because the employer should have provided her with the reasonable 25-minute break at 2:00 pm in addition to her earlier break in the morning at 10:30 am. However, the law does NOT require that the breaks be paid. Therefore, Martha is incorrect that she should have been paid for the additional 25-minute she took at 2:00 pm to express milk.

(b) Sanitary Rooms

An employer **MUST** make reasonable efforts to provide a sanitary room or other location in close proximity to the work area where an employee can express her breast milk in privacy and security, unless doing so would create an undue hardship on the operations of the employer.¹¹

The sanitary room or location provided **CANNOT** be a bathroom or toilet stall, but may include access to/space within a childcare facility that is in close proximity to the work area.¹² If the room is located at the work location, the room must have the following.¹³

- Adequate lighting,
- Ventilation, and
- An electrical outlet (if necessary for a pumping device).

Additionally, it is recommended, but not required, that the room have a lock for privacy, a sink with a safe water source, a comfortable chair, a small table, and a clock.¹⁴

EXAMPLE A: Tina is breastfeeding her six-month-old. Tina’s office contains a desk, a chair, a lamp, electrical outlets and a door with a lock. Tina asks her supervisor if she can take breaks to express breast milk in her office and he agrees. Has Tina’s employer met its requirement to provide her with a sanitary room where she can express milk?

ANALYSIS: Yes, so long as Tina’s office has a proper ventilation—i.e. a window, an HVAC system, or some other system which exchanges indoor and outdoor air.

¹¹ See See D.C. Code § 2-1402.82(d)(2).

¹² *Id.*

¹³ See 4 DCMR § 518(c)(2).

¹⁴ *Id.*

EXAMPLE B: Mary is also breastfeeding her six-month-old. Mary does not have an office, but works in a cubicle work station. She asks her employer if she could have a sanitary room to express breast milk. Her manager tells her she could use the office’s “supply closet” since it has lighting, ventilation, and an electrical outlook. Has Mary’s employer complied with the law?

ANALYSIS: Likely no, because a supply closet likely could neither constitute a “room” nor a sanitary room.

(c) Other Accommodations

Finally, OHR regulations require that an employer reasonably accommodate a breastfeeding woman by allowing her to bring a small refrigerator or freezer to the workplace so that she can store her breastmilk, affording her a flexible schedule, job sharing, or telecommuting arrangement, and providing her with other workplace accommodations – unless doing so would create an undue hardship on the operations of the employer.¹⁵

EXAMPLE: Sarai is breastfeeding and asks her supervisor if she can set up a small refrigerator in her personal office to store her breastmilk. Her supervisor says no, and tells Sarai to store her breastmilk in the communal refrigerator in the breakroom used by all employees, because he is concerned that the electrical circuit in Sarai’s personal office is not equipped to support the office equipment and a small refrigerator. There are other locations in the office, for example in the break room, where the electrical circuits would be able to support a small refrigerator. Has Sarai’s supervisor failed to comply with the Law?

ANALYSIS: Likely yes. Sarai’s supervisor cannot prohibit her from bringing in a small refrigerator to store her milk unless doing so would create an undue hardship. If a building electrician (not the manager) determines that the circuit in Sarai’s office cannot support the small refrigerator, Sarai’s supervisor could have allowed her to store the small refrigerator in the break room, where it is capable of supporting an additional electrical device.

(d) Additional Rights under the Protecting Pregnant Workers Fairness Act

In addition to the above, the **Protecting Pregnant Workers Fairness Act (PPWFA)** requires employers to provide reasonable accommodation to a worker whose ability to perform the functions of her job is limited by breastfeeding, as well as childbirth, a related medical condition, or breastfeeding.¹⁶ Thus, in addition to the daily breaks and sanitary room requirements under the DCHRA, an employer must also provide other reasonable accommodations for known limitations related to breastfeeding, so long as there is no undue hardship for the employer. For more information on other protections under the PPWFA, consult OHR’s factsheet [here](#), or OHR’s Enforcement Guidance 17-02: “What the PPWFA Requires of Employers”, [here](#).

2. Employers are required to maintain a breastfeeding policy.

OHR’s regulations require employers to create a breastfeeding policy.¹⁷ The policy must be posted in a conspicuous place and may not dictate whether a women’s breast be uncovered during or incidental to breastfeeding or expressing milk.¹⁸ OHR has appended an example of a Breastfeeding Policy to this Guidance.

¹⁵ See 4 DCMR §§ 518.4 (e); 518.5 (b), (d).

¹⁶ See D.C. Code § 32-1231, as amended.

¹⁷ See 4 DCMR § 518.3. D.C. Code § 32-1231, as amended.

¹⁸ *Id.*

EXAMPLE BREASTFEEDING POLICY¹⁹

It is _____ **[name of employer]** policy to provide reasonable break time for an employee who is breastfeeding to express breast milk/pump. Any break taken to express breast milk will run concurrently with any breaks already provided to all employees. If an employee uses all provided paid breaks and requires additional time to pump, an employee must notify her supervisor before taking an unpaid break to express breast milk and provide her supervisor with notice as to when she shall return from said break.

_____ **[name of employer]** has made reasonable efforts to provide a sanitary room or other location in close proximity to the work area, other than a bathroom or toilet stall, where an employee can express her breast milk in privacy. _____ **[name of employer]** will make efforts to ensure that designated room has a working electrical outlet, proper lighting and ventilation, a sink, a chair, and a clock. In this facility, _____ **[name of employer]** has designated _____ **[identify room by name or number]**, located _____ **[provide location]**, as a private space which can be used by an employee to breastfeed or to express breast milk. The room may only be accessed by employees who wish to breastfeed or express milk and will not be accessible to other employees. To gain access to the room, please contact _____ **[insert contact name, phone number, and email]**.

If the designated room is not close in proximity to the employee's work location, the employee may consult with Human Resources or _____ **[insert other preferred contact]** at _____ **[phone and email address]** to determine whether there are other rooms within the facility, which comport with conditions outlined by the DC Human Rights Act. For example, _____ **[name of employer]** may allow an employee to use a private office, whether it is the employee's personal office or an empty private office, which is not shared with another employee, to express breast milk.

An employee who is breastfeeding and needs to express milk is permitted to bring a small refrigerator or freezer to store breast milk. The employee must contact Human Resources or _____ **[insert other preferred contact]** at _____ **[phone and email address]** to determine the appropriate place to store the refrigerator or freezer.

If requested, the _____ **[name of employer]** will also provide a flexible schedule, job-sharing, or telecommuting arrangements, and if necessary, other reasonable accommodations to a breastfeeding employee unless doing so would create an undue hardship. If an employee requires a flexible schedule, job-sharing, telecommuting arrangement, or any other reasonable accommodation in the work place while breastfeeding or expressing milk, the employee must contact Human Resources or _____ **[insert other preferred contact]** at _____ **[phone and email address]**.

All employees are prohibited from harassing an employee, taking any disciplinary action, or otherwise discriminating against an employee because the employee breastfeeds or expresses breast milk in the workplace. If an employee believes she is being harassed or discriminated against because she is breastfeeding or expresses milk in the workplace, please contact Human Resources or _____ **[insert other preferred contact]** at _____ **[phone and email address]**. The employee may also file a formal complaint with the DC Office of Human Rights, located at 441, 4th Street NW, Suite 570N, Washington DC 20001, 202-727-4559, [online](#),

¹⁹ This policy is provided as a sample for educational purposes only and should not be construed as legal advice. Employers should seek legal advice for a licensed attorney in order to ensure compliance with the Human Rights Act in creating this policy or any other policy related to the HRA.