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Nursing mother claims on the rise

The case of Autumn Lampkins should serve as a warning to employers to be mindful of the needs of nursing mothers.

Lampkins, an assistant manager of a KFC in Delaware, gave birth to a son and needed to pump breast milk.

At first, her employer told her to use the restaurant's single-stall bathroom. After a while, the employer became fed up with the bathroom being occupied, so Lampkins allegedly was made to express milk in the manager's office, which was accessible to coworkers who would enter while Lampkins was pumping.

Lampkins needed to pump every two hours, but her employer allowed her to pump only once each 10-hour shift.

After coworkers griped about Lampkins' pumping breaks, she was demoted and transferred to a different store, where she had to pump in an office with a window.

Her new boss cut her hours, supposedly to give her more time to pump. She quit when she heard she was about to be fired.

Lampkins sued KFC for sex discrimination, for maintaining a "hostile work environment" under Title VII of the federal Civil Rights Act and for failing to follow its obligation under the federal Fair Labor Standards Act (FLSA) to reasonably accommodate a nursing mother's need to express breast milk.

A jury awarded her $25,000 to compensate her for the harm she suffered and a whopping $1.5 million in punitive damages.

The case is only one example of an explosion of lactation-related lawsuits brought by working mothers in recent years.

A study by the University of California Hastings College of the Law found that between 2006 and 2016, the number of such suits increased 800 percent over the prior decade. Given the landscape, employers need to know the state and federal laws on the issue and how best to comply.

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The most important law for all employers to be aware of is FLSA, which applies everywhere. Though most employers probably know FLSA in the context of wage, hour and overtime requirements, fewer are familiar with its breast-pumping provisions, which were enacted in 2010 as part of the Affordable Care Act.

Under FLSA, employers must provide nonexempt employees (gen-

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ALLRED, BACON, HALFHILL & YOUNG, PC

11350 Random Hills Road, Suite 700 | Fairfax, VA 22030
(703) 352-1300 | admin@abhylaw.com | www.abhylaw.com

Noncompetes for low-paid workers? Not so fast …

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Loss of a good worker means the hassle of hiring a replacement, training the new person and getting other workers to pick up the slack in the meantime.

It's even worse if the departing employee had specialized skills, intimate knowledge of your operations and information such as customer lists or trade secrets that you want to keep confidential.

That's why many employers have workers sign noncompetition (or "noncompete") and nondisclosure agreements, contracts under which workers promise that, should they leave, they will not work for competitors for a particular period of time and will not share or use any confidential information they acquired on the job.

But if your workforce is made up of low-paid, low-skilled workers, you should think twice.

Courts across the country are becoming increasingly unwilling to enforce noncompete agreements, especially those that appear to be more about limiting worker mobility than legitimately protecting secrets from competitors.

For example, the New Hampshire Supreme Court has refused to enforce noncompetition agreements for light-industrial laborers who had no access to confidential information and could not possibly undermine goodwill the employer had generated in the field.

Similarly, the Maryland Court of Appeals refused to enforce a noncompete against workers who simply delivered packages and did not use specialized skills that the court felt noncompetition agreements are designed to protect.

Meanwhile, courts in Michigan and Delaware have refused to enforce noncompete agreements against swim instructors and janitors, calling such agreements "overbroad" and finding that they unfairly limited the right of workers to continue to ply their trades.

The Rhode Island Supreme Court even refused to enforce a noncompetition agreement against a relatively low-level employee who had learned how the employer made special paper to cover books and packages. Because the employee was a low-paid worker who held a low position in the company, the court decided the noncompete agreement was designed to control workers rather than protect the company's secrets.

Some states now have passed laws that flat-out prohibit noncompetition agreements for low-level employees.

In 2017, Illinois passed such a law; it bans noncompetes for workers making less than the greater of $13 per hour or the federal minimum wage.

New Hampshire has a similar bill pending, but it sets the noncompete floor at $15 per hour, or the federal minimum wage, whichever is more. New Jersey has a bill pending as well. Maryland's new law bans noncompete agreements for employees making less than $15 per hour, or $31,200 per year, and in Washington and Oregon noncompetes are limited to high-wage earners making $100,000 per year and $95,000 per year, respectively.

Has your state passed such a law? Talk to a lawyer to find out.

U.S. Supreme Court to discrimination defendants: Don't delay

Under Title VII of the Civil Rights Act, employees can take employers to court for discrimination based on race, color, religion, sex or national origin. But the law requires that an employee first file a charge with the federal Equal Employment Opportunity Commission within 180 days of the supposed violation (300 days if a state or local agency is investigating under state or local law).

Only after receiving EEOC clearance can an employee sue the employer in federal court. If an employee sues without EEOC clearance, the employer can get the lawsuit dismissed. But as the U.S. Supreme Court decided this spring you must do that quickly or you forfeit that right forever.

In the case, the plaintiff had already filed a sexual harassment charge with the EEOC when she was fired for refusing to work on Sundays for religious reasons. She tried to add religious discrimination to her charge by handwriting it on an intake questionnaire, but she made no formal change to her charge. She then sued the employer in federal court after getting clearance from the EEOC.

Several years later, the religious discrimination claim was the only one that had not been resolved. At that point the employer tried to get it thrown out by pointing out that the employee had never formally raised the charge with the EEOC.

A U.S. District Court judge agreed, but the Supreme Court reversed the decision and ordered the claim reinstated, ruling that the charge-filing requirement is just a processing requirement and did not strip the federal court of the ability to hear the claim after the employer failed to act quickly.

Breastfeeding at work: what employers should know

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erally, employees in nonexecutive, nonadministrative or nonprofessional roles who are entitled to overtime pay) reasonable break time to express milk for at least a year after their child's birth. The break time is unpaid, unless the employer gives workers paid breaks for other reasons.

Employers must provide a private place, out of the view of coworkers and the public, that is free from intrusion, and the place *cannot* be a bathroom.

Employers with fewer than 50 employees are exempt, but only if FLSA's requirements would pose an undue hardship on the employer. (This would need to be a lot more than just an inconvenience. After all, a private space doesn't need to be that big, and it's possible to share lactation space with a nearby business.)

FLSA violations can bring heavy fines and, in extreme cases, criminal prosecution.

Meanwhile, many states and even some cities have their own protections for mothers who need to pump at work, and many of them offer more protection than FLSA. For instance, the District of Columbia's law covers all breastfeeding women, not just nonexempt employees, and an employee's rights don't expire a year after a child's birth. Illinois's law similarly applies to all workers. New York City recently passed a law requiring employers to provide "lactation rooms" with helpful amenities like refrigerators (for storing breast milk) and running water. It also mandates written lactation policies and processes for employees to request nursing accommodations.

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This is a complicated area. Talk to an employment attorney where you live to review your compliance.

Court recognizes 'hostile work environment' claims under ADA

A "hostile work environment" claim is one in which an employee claims an employer maintained a workplace so unbearable due to discriminatory actions of coworkers or supervisors that it was impossible for the employee to do his job.

Courts have long held that under Title VII of the Civil Rights Act, employers can be held accountable for harassment and discrimination based on race, color, religion, sex and national origin that create a hostile work environment.

A recent decision by the 2nd U.S. Circuit Court of Appeals suggests that employers who allow hostile work environments for employees with disabilities to fester may face liability under the Americans with Disabilities Act.

In the case, Costco employee Christopher Fox suffered from the neurological condition Tourette's syndrome, which is characterized by facial, muscular and verbal tics. He started receiving reprimands over alleged performance issues.

Fox was accused of leaving shopping carts in the wrong place and of making comments to customers that made them feel uncomfortable, but that he couldn't control due to his condition. He apparently was suspended for three days and moved to a less customer-facing position.

At that point, coworkers allegedly started mimicking and mocking his physical and verbal tics.

Managers apparently witnessed the harassment and allowed it to persist. The ridicule ultimately resulted in a workplace panic attack that required EMTs to escort Fox from the building.

When Fox tried to bring a disability discrimination claim under the ADA based on a hostile work environment, a federal district judge ruled that no such action exists under that law.

But the 2nd Circuit reversed the decision and reinstated his suit.

Specifically, the court pointed to language in the ADA which prohibits disability discrimination in the workplace regarding "terms, conditions, and privileges of employment." Because Title VII, which has very similar language, allows employees to bring hostile work environment claims based on other forms of discrimination, the 2nd Circuit couldn't see why the ADA should work any differently for disabled workers.

This is just one federal circuit — others may view the issue differently. But it's still a very good idea to review your own workplace policies with an attorney.

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ALLRED, BACON,
HALFHILL & YOUNG, PC
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(703) 352-1300 | admin@abhylaw.com | www.abhylaw.com

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Parental leave discrimination can cost you

A recent class-action suit highlights the importance of ensuring that your parental leave policies do not discriminate against fathers.


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In the case, a male bank employee asked for 16 weeks of parental leave after his child was born. The bank's parental leave policy allotted that amount to "primary caregivers," but allowed only two weeks for "nonprimary caregivers."

The bank allegedly told the employee that, under the policy, birth mothers were considered the primary caregivers unless he could prove his wife either had returned to work or was not "medically capable" of caring for the child.

The wife, a teacher, was off for the summer and was not medically incapable of caring for the child, so the employee was given only the two weeks.

He filed suit on behalf of himself and other bank employees who had been treated the same way, arguing that the bank discriminated based on sex by wrongly using gender stereotypes in presuming men could not be primary caregivers.

As the father pointed out, Title VII of the Civil Rights Act forbids employers from treating men and women differently based on such stereotypes.

Apparently concerned about what could happen in court, the bank agreed to pay the class $5 million in exchange for the employees dropping the case. The bank also revised its policy to clarify that either a mother or a father is eligible for primary caregiver leave, and it is training its managers accordingly.

Does your parental leave policy leave you vulnerable to a discrimination suit? Talk to a lawyer to find out.