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Breastfeeding: Federal Legislation

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October 12, 2006

Abstract. In the 109th Congress, several bills have been introduced concerning breastfeeding. At this time all of the bills are in committee. H.R. 2122, the proposed Pregnancy Discrimination Act Amendments of 2005, was introduced on May 5, 2005. The bill contains provisions which if enacted, would amend title VII of the Civil Rights Act of 1964 (equal employment opportunity) to protect breastfeeding by new mothers; provide tax incentives to employers to encourage breastfeeding by employees; and provide a performance standard for breast pumps. S. 1074, the proposed Healthy Lifestyles and Prevention America Act (or the HeLP America Act), was introduced on May 18, 2005 and contains various provisions dealing with the encouragement of breastfeeding. H.R. 4222, the proposed Child Health Investment for Long-term Development (CHILD and Newborn) Act of 2005, would authorize the President to furnish assistance to improve the health of newborns, children, and mothers in developing countries. The bill was introduced on November 3, 2005. S. 2765, the companion bill to H.R. 4222, was introduced on May 9, 2006. S.Res. 403, introduced on March 16, 2006, would recognize the health, economic, and social benefits of breastfeeding and urge the states to protect a mother's right to breastfeed and to remove the legal barriers faced by women who breastfeed.

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Updated October 12, 2006

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Breastfeeding: Federal Legislation

Summary

There has been significant growth in the practice of breastfeeding in recent years. As a result, Congress and numerous state legislatures have considered various proposals concerning different aspects of breastfeeding.

Congress has authorized and funded the Breastfeeding Promotion Program (“Program”) as part of the Child Nutrition Programs administered by the Secretary of Agriculture (“Secretary”). Under this Program, the Secretary is directed to establish a breastfeeding promotion program to encourage breastfeeding. Through appropriations legislation, Congress has repeatedly affirmed a mother’s right to breastfeed on federal property or in a federal building, if the mother and child are authorized to be in that location. This practice was most recently affirmed in the Consolidated Appropriations Act, 2005 and the practice has been promulgated into federal regulations.

In the 109th Congress, several bills have been introduced concerning breastfeeding. At this time all of the bills are in committee. H.R. 2122, the proposed Pregnancy Discrimination Act Amendments of 2005, was introduced on May 5, 2005. The bill contains provisions which if enacted, would amend title VII of the Civil Rights Act of 1964 (equal employment opportunity) to protect breastfeeding by new mothers; provide tax incentives to employers to encourage breastfeeding by employees; and provide a performance standard for breast pumps. S. 1074, the proposed Healthy Lifestyles and Prevention America Act (or the HeLP America Act), was introduced on May 18, 2005 and contains various provisions dealing with the encouragement of breastfeeding. H.R. 4222, the proposed Child Health Investment for Long-term Development (CHILD and Newborn) Act of 2005, would authorize the President to furnish assistance to improve the health of newborns, children, and mothers in developing countries. The bill was introduced on November 3, 2005. S. 2765, the companion bill to H.R. 4222, was introduced on May 9, 2006. S.Res. 403, introduced on March 16, 2006, would recognize the health, economic, and social benefits of breastfeeding and urge the states to protect a mother’s right to breastfeed and to remove the legal barriers faced by women who breastfeed.

This report will be updated as needed. It is expected that legislation concerning breastfeeding may be introduced in the 110th Congress.

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Breastfeeding: Federal Legislation

Introduction

The practice of breastfeeding has gained significant popularity in recent years.¹ A stated objective of the U.S. Public Health Service, set out in its report *Healthy People 2010*, is to increase the proportion of mothers who breastfeed their children.² The national objective set out in this report is to achieve a 75% participation rate of nursing mothers in the early postpartum period, a 50% participation rate of nursing mothers in the period after the infant reaches six months of age, and a 25% participation rate of nursing mothers at the age of one year. Numerous health care professionals encourage breastfeeding as the optimal type of nutrition for infants for at least the first six months of life.³ It has been reported that in 2000, more than 68 percent of mothers were breastfeeding their infants immediately after delivery, and it has been observed that the number of nursing mothers is significantly increasing.⁴ Breastfeeding rates have increased steadily from 1992-2004.⁵ Breastfeeding is considered to be beneficial to both mother and child,⁶ and breastfeeding is believed to reduce the incidence of various childhood illnesses and chronic diseases.⁷

Along with the growing popularity of breastfeeding and the growing incidence of women in the workforce, certain concerns have arisen. It may be necessary for a working mother to express⁸ milk during her working hours, and/or to breastfeed her child during working hours. Related issues concern nursing and/or the expression

¹ See CRS Report RL32002, *Breast-feeding: Impact on Health, Employment and Society* by Donna V. Porter (July 18, 2003).

² *Healthy People 2010*, Washington, DC: U.S. Department of Health and Human Services, Public Health Service (2000).

³ Leah Oliver and Hy G.A. Park, Maternal and Child Health, A Snapshot for State Legislatures 19 (2004) (cited afterward as "Oliver and Park"). See also Marilyn Elias, *New breast-feeding policy* USA TODAY 9D (Feb. 7, 2005)(cited to afterward as "Elias").

⁴ Oliver and Park.

⁵ Elias (citing to statistics from the Centers for Disease Control and Prevention).

⁶ See generally the websites for the Centers for Disease Control and Prevention: [<http://www.cdc.gov/breastfeeding>] and the National Women's Health Information Center's Resources on Breastfeeding: [<http://www.4woman.gov/breastfeeding>].

⁷ See American Academy of Pediatrics homepage at [<http://www.aap.org/topics.html>] and specifically the section on breastfeeding at [<http://www.aap.org/healthtopics/breastfeeding.cfm>].

⁸ A nursing mother "expresses" or extracts breast milk through a vacuum device for later feeding to her child.

of milk in public or semi-public places such as restaurants, stores, public transportation facilities, and other locations where the public is present. Numerous legal issues and controversies have developed concerning where a mother may breastfeed her child.⁹

Concurrent with the growing popularity of breastfeeding, state and federal legislation relating to breastfeeding has been proposed and enacted. There has been significant legislation at the state level.¹⁰ Some of the legal issues which state legislation has addressed include exemption of nursing mothers from public nudity, lewdness, and indecent exposure laws; affirmation that breastfeeding is to be permitted in public places where the mother and child are lawfully present; and exemption (or postponement) of nursing mothers from jury service. Other states have enacted laws dealing with breastfeeding in the workplace; breastfeeding awareness education campaigns; and various breastfeeding support programs. At the current time, thirty-eight states and Puerto Rico have some type of legislation dealing with the protection of nursing mothers and/or the promotion of breastfeeding.¹¹

Another legal issue that has arisen at the state level involves various issues concerning breastfeeding mothers and jury duty. Various states have enacted legislation to excuse or postpone the jury duty of a breastfeeding mother.¹²

At the federal level, Congress has established various federal programs to encourage the practice of breastfeeding and to improve child nutrition, especially infant nutrition.¹³ Congress has also enacted legislation, in appropriations measures, to affirm the right of a mother to breastfeed her child at any location in a federal building or on federal property, if the mother and child are otherwise authorized to be present at that location. This legislation is examined below. This practice has been promulgated into federal regulations.

Legislation to significantly broaden federal fostering of the practice of breastfeeding has been introduced in the 109th Congress. This proposal, contained in the Pregnancy Discrimination Act Amendments of 2005 (H.R. 2122), follows proposals introduced in the 108th Congress to encourage and protect breastfeeding through amendments to the Civil Rights Act of 1964 and the Internal Revenue Code. Other bills introduced in the 108th Congress made indirect references to breastfeeding within the context of the use of mercury in dental fillings, the

⁹ See CRS Report RL31633, *Summary of State Breastfeeding Laws and Related Issues at 2*, by Douglas Reid Weimer (May 19, 2005).

¹⁰ *Id.*

¹¹ However, the absence of a state law authorizing and/or promoting breastfeeding does not necessarily indicate that breastfeeding in public is prohibited within the state. Local customs or practices may condone public breastfeeding and other breastfeeding-related activities in the absence of specific authorizing legislation.

¹² See CRS Report RL32928, *Breastfeeding and Jury Duty: State Laws, Court Rules, and Related Issues* by Douglas Reid Weimer (May 17, 2005).

¹³ See CRS Report RL33307, *Child Nutrition and WIC Programs: Background and Recent Funding* at 13-15, by Joe Richardson (updated July 12, 2006).

prevention of HIV transmission, and mercury ingestion through seafood consumption.

To date, four other measures have been introduced in the 109th Congress that deal with issues relating to breastfeeding. At the present time, all of these measures are in committee. The proposed Healthy Lifestyles and Prevention America Act (HeLP America Act) (S. 1074) contains various provisions to encourage breastfeeding. The proposed Child Health Investment for Long-term Development (CHILD and Newborn) Act of 2005 (H.R. 4222) and the companion Senate bill (S. 2765) would authorize the President to provide assistance to improve the health of newborns, children, and mothers in developing countries. S.Res. 403 would recognize the health, economic, and social benefits of breastfeeding and urge the states to protect a mother's right to breastfeed and to remove legal barriers faced by women who breastfeed.

Enacted Federal Legislation Relating to Breastfeeding

The Breastfeeding Promotion Program

The Breastfeeding Promotion Program (“Program”)¹⁴ is a part of the Child Nutrition Programs administered by the Secretary of Agriculture (“Secretary”). The Program was created by the Child Nutrition Amendments of 1992 to the Child Nutrition Act of 1966.¹⁵ Under the Program, the Secretary is directed to promote breastfeeding as the best method of infant nutrition, to foster wider public acceptance of breastfeeding in the United States, and to assist in the distribution of breastfeeding equipment to breastfeeding women.¹⁶ The Program maintains a comprehensive website dealing with such issues as the benefits of breastfeeding, program funding, and other related issues.¹⁷

Current authorization¹⁸ for the Program is provided by the Child Nutrition and WIC Reauthorization Act of 2004 (“Act”).¹⁹ The act provides that there is to be cooperation between the federal government and “communities, State and local agencies, employers, health care professionals, and other entities in the private sector to build a supportive breastfeeding environment for women participating in the program under this section to support the breastfeeding goals of the Healthy People

¹⁴ 42 U.S.C. § 1790.

¹⁵ P.L. 89-642, as added P.L. 102-342, title II, § 201, 106 Stat. 912 (Aug. 14, 1992). For a comprehensive legislative history of the breastfeeding promotion requirements in WIC, see [<http://www.fns.usda.gov/wic/Breastfeeding/bflegishistory.HTM>].

¹⁶ 42 U.S.C. § 1790(a).

¹⁷ See [<http://www.fns.usda.gov/wic/Breastfeeding/breastfeedingmainpage.HTM>].

¹⁸ For historical background on program organization and funding, see CRS Report RL33307.

¹⁹ P.L. 108-265, 118 Stat. 729 (June 20, 2004).

2010 initiative.”²⁰ The act also provides the authority for “special projects to promote breastfeeding, including projects to assess the effectiveness of particular breastfeeding promotion strategies...”²¹

The current funding for federal breastfeeding support is contained in the FY2006 Department of Agriculture appropriations bill,²² as extended by continuing resolution.²³ Funding for federal breastfeeding support was appropriated for not less than \$15,000,000 for a breastfeeding support initiative and for other breastfeeding activities.²⁴ FY2007 funding would be maintained at the same level in the proposed Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2007.²⁵

Breastfeeding in Federal Buildings and on Federal Property

Federal appropriations legislation has affirmed the right to breastfeed on federal property or in federal buildings.²⁶ The most recent affirmation of this practice was contained in the Consolidated Appropriations Act, 2005:²⁷

Sec. 629. Notwithstanding any other provision of law, a woman may breastfeed her child at any location in a Federal building or on Federal property, if the woman and her child are otherwise authorized to be present at the location.

This provision has been promulgated into the Code of Federal Regulations.²⁸

²⁰ *Id.* § 203(e)(2)(C). See 42 U.S.C. § 1786(h)(4)(F).

²¹ *Id.* § 203(e)(9). See 42 U.S.C. § 1786(h)(10)(B)(II).

²² P.L. 109-97, Title IV, “Supplemental Nutrition Program for Women, Infants and Children (WIC), 119 Stat. 2144 (Nov. 10, 2005). See CRS Report RL33307 at 18 for appropriations information.

²³ P.L. 109-289, Division B (September 29, 2006). See CRS Report RL33412, *Agriculture and Related Agencies: FY2007 Appropriations* by Jim Monke.

²⁴ *Id.* For information on 2007 funding, see CRS Report RS22382, *The FY2007 Budget Request for the U.S. Department of Agriculture (USDA)* by Jim Monke at 6.

²⁵ H.R. 5384, Title IV, “Special Supplemental Nutrition Program for Women, Infants, and Children,” 109th Cong., 2nd Sess. (2006).

²⁶ See P.L. 108-199, 108th Cong., 2nd Sess. (2004); P.L. 108-7, 108th Cong., 1st Sess. § 630 (2003); P.L. 106-58, 106th Cong., 1st Sess. § 647 (1999). (Provision is apparently not codified).

²⁷ P.L. 108-447, 118 Stat. 2809, Title IV Domestic Food Programs, Special Supplemental Nutrition for Women, Infants, and Children (WIC)(Dec. 8, 2004). See H. Conf. Rep. on H.R. 4818, Consolidated Appropriations Act, 2005 (2004) printed in 150 Cong. Rec. H10241 (daily ed. Nov. 19, 2004).

²⁸ 41 C.F.R. § 102-74.426.

Federal Breastfeeding Legislation

108th Congress

In the 108th Congress two bills were introduced which dealt with breastfeeding support. These bills are briefly summarized.

S. 418,²⁹ the proposed “Pregnancy Discrimination Act Amendments of 2003,” was introduced by Senator Olympia J. Snowe on February 14, 2003.³⁰ Through an amendment to section 701(k) of the Civil Rights Act of 1964 (“Act”),³¹ breastfeeding would have been added as a protected activity within prohibitions against sex discrimination in employment. The bill defined “breastfeeding” for this purpose as “the feeding of a child directly from the breast or the expression of milk from the breast by a lactating woman.”

H.R. 2790,³² the proposed “Breastfeeding Promotion Act,” was introduced by Representative Carolyn B. Maloney on July 18, 2003.³³ Similar to S. 418, H.R. 2790 would have amended the employment discrimination provisions of the Civil Rights Act of 1964 (“Act”) to protect lactation (including the expression of milk) under the prohibition against sex discrimination. The bill also proposed to amend the Internal Revenue Code (“Code”) to allow a limited tax credit to employers for expenses incurred in enabling mothers to breastfeed at their places of employment. The Code definition of medical care would have been expanded to include qualified breastfeeding equipment and services. Other provisions would have directed the Secretary of Health and Human Services to (1) put into effect a performance standard for breast pumps and (2) issue a compliance policy to assure that women who want to breastfeed a child are given full and complete information respecting breast pumps.

²⁹ 108th Cong., 1st Sess. (2003). The bill was referred to the Senate Committee on Health, Education, Labor, and Pensions. It did not emerge from Committee consideration.

³⁰ The provision of S. 418 are substantially similar to the provisions of S. 256, 107th Cong., 1st Sess. (2001).

³¹ 42 U.S.C. § 2000e(k).

³² 108th Cong., 1st Sess. (2003). The bill was referred to the House Ways and Means Committee, the House Education and Workforce Committee, and the House Energy and Commerce Committee. On July 23, 2003, it was referred to the Subcommittee on Health of the House Energy and Commerce Committee and on Aug. 13, 2003, it was referred to the Subcommittee on Employer-Employee Relations of the House Education and Workforce Committee.

³³ The provisions of the bill are similar to those of H.R. 285, 107th Cong., 1st Sess. (2001), which was introduced by Representative Maloney on January 30, 2001. The bill did not emerge from Committee consideration.

Additional bills in the 108th Congress made reference — in a somewhat indirect way — to breastfeeding. These bills dealt with mercury in dental filling disclosure,³⁴ prevention of HIV transmission,³⁵ and mercury exposure through seafood consumption.³⁶

109th Congress

Several bills and one resolution have been introduced in the 109th Congress to deal with certain aspects of breastfeeding. None of them has been reported out of committee. The provisions of the bills and the resolution are summarized below.

H.R. 2122³⁷ was introduced by Representative Carolyn Maloney and is based upon some of the provisions of H.R. 2790 of the 108th Congress, discussed above. The provisions of the bill are summarized below.

The bill has three main provisions: to amend the employment discrimination provisions of the Civil Rights Act of 1964 to protect breastfeeding by new mothers; to provide tax incentives to encourage breastfeeding; and to provide for a performance standard for breast pumps.

Title I of the bill would amend title VII (equal employment opportunity) of the Civil Rights Act of 1964 (“Act”) and is cited to as the “Pregnancy Discrimination Act Amendments of 2005.”³⁸ Section 102 deals with various findings and purposes. This section recognizes that women with infants are a significant part of the labor force; cites to studies that indicate the benefits of breastfeeding for both mother and child; and observes that some courts have not applied the protection of title VII to mothers who are breastfeeding and expressing milk in the workplace. The stated purpose of the proposed amendment to Title VII is to promote the health and well-being of infants whose mothers return to the workplace after childbirth and clarify that breastfeeding and expressing breast milk in the workplace are protected conduct under the amendment made by the Pregnancy Discrimination Act of 1978 to Title VII of the act. Section 103 of Title 1 would amend section 701(k) of the Civil Rights Act of 1964,³⁹ which defines sex discrimination for employment purposes, to insert the phrase “including lactation” after the term “childbirth,” and by adding at the end, the following: “For the purposes of this subsection, the term ‘lactation’ means a condition that may result in the feeding of a child directly from the breast or the expression of milk from the breast.”

³⁴ H.R. 1680, 108th Cong., 1st Sess. (2003).

³⁵ S. 859, 108th Cong., 1st Sess. (2003).

³⁶ S. 1939, 108th Cong., 1st Sess. (2003).

³⁷ 109th Cong., 1st Sess. (2005). The bill was introduced and was referred to the House Committee on Energy and Commerce; the House Committee on Ways and Means; and House Committee on Education and the Workforce on May 5, 2005.

³⁸ H.R. 2122, § 101.

³⁹ 42 U.S.C. § 2000e(k),

Title II of the bill would provide a tax credit under the Internal Revenue Code for an employer's expenses in providing an appropriate environment on business premises for employed mothers to breastfeed or express milk. The credit for a taxable year would equal 50 percent of qualified expenditures, up to a credit limit of \$10,000. "Qualified breastfeeding promotion and support expenditure" is to include breast pumps and related "exclusive use property," if such materials meet prescribed standards, and consultation services related to breastfeeding. The term "other exclusive use property" is defined to mean any amount paid or incurred for the acquisition or lease of tangible personal property used by mothers who are employees of the taxpayer to breastfeed or to express milk for their children, unless the property is located in any residence of the taxpayer or any employee of the taxpayer. The amendments made by this section would be applicable to taxable years beginning after December 31, 2004.

Title III of the bill deals with safe and effective breast pumps and is entitled the "Safe and Effective Breast Pumps Act."⁴⁰ Section 302 would require the Secretary of Health and Human Services ("Secretary") to establish a performance standard for breast pumps. The Secretary is to identify those pumps appropriate for use on a regular basis in a place of employment based on the efficiency and effectiveness of the pump and on sanitation factors related to communal use. Section 302 also requires that the Secretary, acting through the Commissioner of Food and Drugs, issue a compliance policy guide to assure that women who want to breastfeed a child are given full and complete information concerning breast pumps.

Title IV of the bill would amend the definition of "medical care" in the Internal Revenue Code to include breastfeeding equipment and services. Section 401 would include as medical expenses the cost of:

(A) breast pumps and other equipment specially designed to assist a mother to breastfeed or express milk for her child but only if such pumps and equipment meet such standards (if any) prescribed by the Secretary of health and Human Services, and

(B) consultation services related to breastfeeding.⁴¹

The amendments made by this section are to apply to taxable years beginning after December 31, 2004.

S. 1074, the Healthy Lifestyles and Prevention Act America (or the HeLP America Act), was introduced by Senator Tom Harkin on May 18, 2005.⁴² The bill sets forth provisions for the establishment of, and incentives for, wellness programs. Certain provisions of the bill relate to breastfeeding and are summarized below.

⁴⁰ H.R. 2122, § 301.

⁴¹ *Id.*, § 401(b).

⁴² 109th Cong., 1st Sess. (2005). On May 18, 2005, the bill was referred to the Senate Committee on Finance.

Section 105 of Title I, Healthier Kids and Schools, provides for the establishment, by the Director of the Office on Women's Health of the Department of Health and Human Services ("Director"), of the "Baby-Friendly Hospital Initiative," through which a hospital could be certified as a "baby friendly hospital/center for breastfeeding excellence." The Director would establish a certification process. The certification process would be based upon the international guidelines of the Baby-Friendly Hospital Initiative established by the World Health Organization and the United Nations Children's Fund. In order to be certified, a hospital would have to meet various requirements concerning breastfeeding policy, treatment of mothers and newly born infants, and other issues related to breastfeeding. The Director would be required to make an on-site assessment to determine hospital compliance with criteria guidelines and would have follow-up visits to assure continued compliance. The bill provides for a one-time award of up to \$20,000 per hospital to offset the cost of being certified as a baby friendly hospital/center of breastfeeding excellence.

Title II, Healthier Communities and Workplaces, Subtitle B, Healthy Communities contains two provisions relating to breastfeeding.

Section 216 would establish a task force for the promotion of breastfeeding in the workplace. Under the bill, the Secretary of Health and Human Services and the Secretary of Labor would convene and chair a task force for the purpose of promoting breastfeeding by working mothers. Guidelines are established for the composition of the task force, periods of appointment, and vacancies. The task force would be required to issue a public report concerning various aspects of breastfeeding, copies of which would be sent to Congress. The bill would authorize the task force to hold hearings, gather information, and to elicit information from federal agencies. Funding is to come from the general operating expense funds of the Secretary of Health and Human Services and the Secretary of Labor.

Section 217 deals with lactation accommodation and breastfeeding promotion at work. The section would amend the Family and Medical Leave Act of 1993 (29 U.S.C. § 2611 et seq.) to include provision for lactation periods and facilities. The bill further requires employers to provide lactation periods during each work day. However, a limitation is made that the employer would not be required to provide such period if it would impose "an undue hardship" on the employer. The bill also would require an employer to provide an "appropriate lactation facility," unless such provision would pose an "undue hardship" for the employer. Provision is made for enforcement of the provision and for remedies. Specific language is provided for breastfeeding at work for federal/civil service employees, which includes provision for lactation periods, lactation facilities, and enforcement and remedies.

The companion bills, H.R. 4222 introduced by Representative Betty McCollum⁴³ and S. 2765 introduced by Senator Christopher Dodd,⁴⁴ provide for the

⁴³ 109th Cong., 1st Sess. (2005); introduced and referred to the House Committee on International Relations on November 3, 2005.

⁴⁴ 109th Cong., 2nd Sess. (2005); introduced and referred to the Senate Committee on Foreign (continued...)

Child Health Investment for Long-term Development (CHILD and Newborn) Act of 2006. The bill(s) would amend the Foreign Assistance Act of 1961 to authorize the President to furnish assistance to improve the health of newborns, children, and mothers in developing countries. The President would be directed to develop a comprehensive strategy to this end. The bill(s) also would establish the Interagency Task Force on Child Survival and Maternal Health in Developing Countries.

Section 2(a) of the bill(s) deals with the findings of the legislation. Subsection 13 states that “[e]xclusive breastfeeding — giving only breast milk for the first six months of life — could prevent an estimated 1.3 million newborn and infant deaths each year, primarily by protecting against diarrhea and pneumonia.”

S.Res. 403,⁴⁵ introduced by Senator Richard Durbin, would recognize the benefits of breastfeeding. The resolution sets forth many of the benefits of breastfeeding, such as lower infant mortality, nutritional benefits, protection against childhood illnesses, protection against chronic diseases, health benefits to the mother, economic benefits, and other positive aspects of breastfeeding. The resolution would call upon the states to take steps to protect a mother’s right to breastfeed and to remove the barriers faced by women who breastfeed.

It is possible that other legislation concerning breastfeeding may be introduced in the 109th Congress. It is expected that such legislation may be introduced in the 110th Congress.

⁴⁴ (...continued)
Relations on May 9, 2006.

⁴⁵ S.Res. 403, 109th Cong., 2d Sess. (2006); introduced and referred to Senate Committee on Health, Education, Labor, and Pensions on March 16, 2006.