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Employers Required to Provide Reasonable Break Time for Nursing Mothers

By Christopher B. Lunny and Angela D. Miles

The U.S. Department of Labor's Wage and Hour Division ("the Department") is requesting public comments on its preliminary interpretations of a new provision of the Fair Labor Standards Act ("FLSA"). The new provision requires employers to provide nursing mothers with reasonable break time and a private space for expressing breast milk while at work. The break time requirement is set forth in Section 4207 of the Patient Protection and Affordable Care Act ("Affordable Care Act") and became effective when the President signed the Affordable Care Act into law on March 23, 2010.



The law imposes at least two new requirements on employers:

1. Employers must provide a "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has a need to express the milk;" and
2. Employers must provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."

29 U.S.C. 207(r)(1). The law specifically provides, however, that employers are not required to compensate nursing mothers for breaks taken for the purpose of expressing milk.

The nursing mothers provision was added to section 7 of the FLSA, which sets forth overtime pay requirements for hourly employees. Consequently, the Department has taken the view that the nursing mothers provision does not apply to employees who are exempt from the overtime provisions of section 7 (i.e., "salaried employees").

Small employers with fewer than 50 employees should note that the statutory provision provides an undue hardship exemption. Whether compliance would impose an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's

This article is meant to provide a brief overview and points of discussion regarding employment and labor law topics. Should a particular issue arise or should you desire additional consultation to protect your firm, the advice of a competent counsel should be sought.

business. Simply having a small workforce, however, will not automatically establish that compliance will result in an undue hardship. Instead, small employers must prove the exemption when measured by their financial resources and other factors listed above.

The Department has issued a Request for Information ("RFI") that contains the Department's preliminary interpretations of the law's requirements and identifies key issues related to the new law. For instance, the Department expects that nursing mothers typically will need breaks to express milk two to three times during an eight hour shift. Although the act of expressing breast milk alone takes about 15 to 20 minutes, the Department's RFI indicates that many other factors will determine what constitutes a reasonable break time, such as the wait, if any, to use the space and whether there is a sink and running water nearby for the employee to use before and after she expresses milk.

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The Department is soliciting comments on a variety of issues associated with the application of this new law including whether, and under what circumstances, rooms that adjoin bathrooms can be considered adequate spaces for use by nursing mothers under the statute. The Department is likewise seeking comments that address the conditions under which spaces such as storage spaces, utility closets, and similar spaces normally used for other purposes could be compliant with the law.

The Department's RFI can be found on the Department's [web-site](#). The Department will continue to accept public comments regarding the new law through February 22, 2011. Accordingly, employers should act now if they are interested in participating in the development or regulatory application of this new law.

If you have any questions, please contact our office at (850) 425-6654.



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