

Articles on Reasonable Break Time for Nursing Mothers

A provision of the PPACA, amending FLSA

Morgan, Lewis & Bockius LLP

http://www.morganlewis.com/pubs/WashGRPP_NursingMothers_LF_07apr10.pdf

Alston & Bird

<http://www.alston.com/files/Publication/b0595c41-0829-42bd-b0b8-32de5f3b4f39/Presentation/PublicationAttachment/02378fba-aafb-43c6-8d57-38028436c03b/FLSA%20Amendment.pdf>

"While it will likely be several months before the Department of Labor issues regulations regarding these new requirements, this amendment to the FLSA became effective when the health care reform bill was signed on March 23, 2010. To avoid potential claims, employers should be aware of the break requirements and consider what private locations they may be able to offer nursing mothers to express breast milk. Employers who receive a request from nursing mothers should not be rigid regarding the frequency and duration of the breaks and should communicate with the employee to resolve any problems. Employers with less than 50 employees are cautioned not to assume exemption from the requirements, but should consult with counsel regarding the undue hardship standard set forth in the law."

- The U.S. Department of Labor has been given the authority to draft regulations offering guidance in this area, but until it does so, employers may wish to interpret this provision generously in order to avoid litigation risk under the FLSA.

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Health Care Reform Includes FLSA Amendment Requiring Break Time for Nursing Mothers

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By Michael J. Killeen and Modessa Jacobs

As of March 23, 2010, federal law requires employers to provide nursing mothers "reasonable break time" to express breast milk for up to one year after the birth of their child. An amendment to the Fair Labor Standards Act containing this requirement was inconspicuously buried in Section 4207 of the Patient Protection and Affordable Care Act, better known as the federal Health Care Reform law.¹ Seventeen states and the District of Columbia already have statutes that speak to an employer's obligation to provide rest breaks for the purpose of expressing milk.²

The new federal law does not pre-empt a state law that provides greater protections. Thus, employers will need to review both federal and state statutes to determine how

to comply. Aside from potential conflicts with state legislation directly dealing with break time for expressing milk, there will be numerous questions regarding the interplay between the new requirement and other state and federal laws regarding rest and meal breaks generally, as well as the patchwork of laws regarding breastfeeding (a related, but separate, issue) that exist in nearly all states.

Defining “reasonable” break time: The U.S. Department of Labor (DOL) has not yet defined how many breaks and how much break time is “reasonable” or how to penalize violators. It is possible that the DOL will look to existing state statutes for guidance. For example, Oregon’s statute, which many believe served as a model for the federal amendment, requires that employers provide employees 30 minutes to express milk for every four-hour work period.³ Other statutes have been interpreted to require breaks of “no less than twenty minutes ... at least once every three hours.”⁴ Regardless of what the DOL decides, employers must comply with state law if state law is more protective. But, in the meantime, it is unclear whether complying with state law will satisfy the federal reasonableness standards.

Concurrent breaks vs. stacking breaks: Several state statutes give employees discretion to combine or overlap breaks to express milk with paid rest breaks or meal breaks. Most of the state statutes mandate that, if possible, such breaks run concurrently with any break time already scheduled.⁵ Some, however, require an employer to “permit an employee to use paid break time or meal time, or both [unpaid break time and paid break time].”⁶ The question employers will be asking is whether, under their state law, they can require employees to combine breaks under the federal statute with breaks already mandated or allowed by state law, or whether employees have the right to stack their federally mandated break on top of breaks already required or allowed by the state.

Harmonizing the federal statute with other federal and state regulations on paid breaks: The amendment provides that breaks for nursing mothers need not be “compensated,” creating the assumption, contrary to the general rule on breaks of less than 20 minutes, that the break time will not be considered “hours worked.” It is unclear how states will treat this under their minimum wage and rest/meal break laws when it comes to compensation, or categorization as “hours worked,” particularly if the mandatory federal break time is handled concurrently with state law break time.

Exemption for undue hardship: Under the federal statute, employers of less than 50 employees may be exempt if they can show that the requirement would pose an “undue hardship,” which is generally defined in antidiscrimination law as significant difficulty or expense when considered in relation to factors such as the size of the business, the financial resources of the business or the nature and structure of its operation. It is unclear how many employers would actually be able to prove undue hardship. According to Sen. Jeff Merkley, D-Ore., who sponsored the federal amendment and helped pass Oregon’s statute, no company in Oregon has prevailed in arguing that they could not accommodate employees under Oregon’s statute.⁷ *Note:* Some state statutes provide an exemption if breaks to express milk would “disrupt” the

employer's operations. Employers in such states should not assume that an exemption under the state statute would exempt them from an applicable federal statute or vice-versa.⁸

Greater protections under state statutes: Employers in states with similar legislation should not assume that compliance with the federal statute will equal compliance with their obligations under the state statute. For example, several statutes require that the rest break accommodation be made for two or three years instead of one. And, although the federal statute requires employers to provide a place, other than a bathroom, shielded from view and free from intrusion, for employees to use for expressing milk, many state statutes additionally require that this place be "in close proximity to the workplace."⁹

FOOTNOTES

1 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §4207 (2010).

2 Ark. Stat. Ann. § 11-5-116 (2009); Cal. Labor Code § 1030 et seq. (2001); Colo. Rev. Stat. § 8-13.5-101 et seq. (2008); Conn. Gen. Stat. § 31-40w (2001); D.C. Code Ann. § 2-1402.81 et seq. (2007); O.G.G.A § 34-1-6 (1999); 820 ILCS 260/10 (2001); Ind. Code 5-10-6-2, 22-2-14-2 (2008) (public sector); 26 Me. Rev. Stat. Ann. § 604 (2001); Minn. Stat. § 181.939 (1998); Mont. Code. Ann. § 39-2-217 (2007) (public sector); N.M. Stat Ann. § 28-20-2 (2007); N.Y. Labor Law § 206-c (2007); 40 Okla. Stat. § 435 (2006); Or. Rev. Stat. § 653.077 (2007); R.I. Gen. Laws § 23-13.2-1 (2003); Tenn. Code Ann. § 50-1-305 (1999); 21 Vt. Stat. Ann. § 305 (2008).

3 Or. Rev. Stat. § 653.077(c) (2007).

4 N.Y. State Dept. of Labor, Division of Labor Standards, Guidelines Regarding the Rights of Nursing Mothers to Express Breast Milk in the Work Place, available at <http://www.labor.ny.gov/formsdocs/wp/LS702.pdf>.

5 See, e.g., Cal. Labor Code § 1030 (2001); 820 ILCS 260/10 (2001).

6 See, e.g., Colo. Rev. Stat. § 8-13.5-101 et seq. (2008).

7 Emily Holden, "Provision in Health Care Bill Protects Nursing Mothers," USA TODAY, March 27, 2010, available at <http://www.statesmanjournal.com/article/20100327/NEWS/3270326/Provision-in-health-care-bill-protects-nursing-mothers>.

8 See, e.g., Cal. Labor Code § 1030 (2001) (providing an exemption if breaks would "seriously disrupt the operations of the employer"); 820 ILCS 260/10 (2001) (providing an exemption if breaks would "unduly disrupt the employer's operations").

9 See, e.g., D.C. Code Ann. § 2-1401.81 et seq. (2007).

U.S. Breastfeeding Council

<http://www.usbreastfeeding.org/Workplace/WorkplaceSupport/WorkplaceSupportinHealthCareReform/tabid/175/Default.aspx>

What do the time and space requirements in the new law mean?

- The Department of Labor will define terms used in the law, such as “reasonable break time” and “significant difficulty or expense.”
- An example of how the Department of Labor *might* interpret the law can be found in Oregon’s *Rest Breaks for Breast Milk Expression* law, which served as the model for the federal law. In Oregon, the Bureau of Labor and Industry Administrative Rules defined the time and space provisions as follows:

In Oregon, “reasonable” time for milk expression is defined as: “a 30-minute rest period to express milk during each four-hour work period, or the major part of a four-hour work period, to be taken by the employee approximately in the middle of the work period.” This matches wage and hour law, and also covers exempt and part-time employees.

The effort is to match the biological rhythm of a breastfeeding mother and child to the structured rhythm of the workday as closely as possible. A breastfeeding employee needs to express milk regularly to maintain her milk supply. Research and experience have shown that a 30-minute break in every four-hour work period is the minimum time needed for the employee to get to the designated space, set up the pump, express adequate milk, clean pump parts, get the milk to cold storage, and return to the work station.

The Oregon law’s definitions have provided great flexibility in designating space for milk expression, while still meeting the threshold of the law. Unlike the Americans with Disability Act, businesses in Oregon are *not* required to make major changes to the built environment. Examples of creative solutions include:

- Designated, permanent space, at least 4’ x 6’ with a chair, sink, and electrical outlet.
- Space designated with a sign or reserved on a calendar that rotates throughout the workspace between offices, conference rooms, clinic rooms, etc.
- Temporary use of manager office space in fast-food restaurants, police departments, or settings that lack other spaces with a locking door.
- A curtained-off area that is non-accessible to the public, and meets privacy threshold because of clear, well-communicated policy with co-workers. This can even mean a chair behind a curtain in an employee-only bathroom lounge, if there is truly no other space available.

- A designated space that serves employees from several employers, located in the employee-only areas of malls, airports, and retail strips.
- An agreement between worksites, where a breastfeeding employee can visit a neighboring business to access a designated space within.
- Privacy panels to block the windows of work vehicles such as patrol cars or construction vehicles on the road.
- Use of City or County buildings by public employees on route, such as police on patrol, bus drivers, or meter readers.

What about complaints, enforcements, penalties, and “undue hardship”?

These are some of the important questions the Department of Labor will be working to answer in the coming months. USBC and Senator Merkley’s office will be closely monitoring and supporting this process.