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The Fair Labor Standards Act has been amended to require covered employers to provide rest breaks and space for employees who are nursing mothers to express breast milk.

FLSA Amended to Require Breaks and Space to Express Breast Milk for Nursing Mothers

By Julie A. Dunne and Mendy Mattingly

In a largely unnoticed section of the Patient Protection and Affordable Care Act recently signed by President Obama, the Fair Labor Standards Act (FLSA) (29 U.S.C. § 207) was amended to require employers to provide rest breaks and space for employees who are nursing mothers to express breast milk.

Until this amendment, rest break requirements had been the subject of state regulation. The FLSA does not require employers to provide breaks or meal periods to workers. Unless rest breaks are required by state law, when and how they are provided has traditionally been a matter of agreement between the employer and employee.

The amendment to the FLSA, 29 U.S.C. section 207(r)(1), changes that. The amendment will require some employers subject to the FLSA to provide rest breaks to mothers who wish to express breast milk. In addition, it will require employers to provide an appropriate space, other than a bathroom, for mothers to express milk.

When is the Amendment Effective?

While some sections of the Patient Protection and Affordable Care Act have prospective effective dates, the section amending the FLSA did not have any stated specific effective date. Absent an expressly stated effective date in federal legislation, a law or amendment to law takes effect immediately. Thus, the provision took effect upon President Obama's signature on March 23, 2010.

Are There State Laws That Already Require Lactation Accommodation?

Many states in the last decade have passed laws requiring employers to provide nursing mothers with reasonable break time and space to express breast milk. This amendment to the FLSA will not substantially affect employers operating in those states. And, as often is the case, employers must satisfy the requirements of both federal and state law.

Where there may be conflict between federal and state law on a particular issue, the amendment specifically provides that the federal law does not preempt a state law providing greater protections.

To Which Employers Does the Amendment Apply?

Generally, all employers that are covered by the FLSA and employ 50 or more employees are required to comply with the amendment. The amendment states that employers covered by the FLSA that employ fewer than 50 employees are not required to provide the breaks “if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer’s business.” As has been seen in litigation regarding similar language in other statutes, proving that providing a rest break or space would create a “significant difficulty or expense” may be burdensome. Consequently, employers covered by the FLSA that employ fewer than 50 employees should consult with counsel and assess whether compliance would create significant difficulty or expense before deciding they need not comply with the new law.

The amendment does not address how employers should count the 50 employees for purposes of relying on the “undue hardship” justification. For example, the statute does not indicate whether the 50 employees must be full-time, part-time, within a geographical region, or employed for a minimum amount of time. While there are no parameters to the employee threshold within the statute itself, the Department of Labor may issue regulations that further explain how to interpret this provision.

To Which Employees Does the Amendment Apply?

This amendment to the FLSA was added at the end of Section 7 (29 U.S.C. § 207), which does not apply to white-collar exempt employees (29 U.S.C. §213(a)) or certain employees within particular industries or that hold specific positions (29 U.S.C. § 213(b)). To the extent employers choose, nonetheless, to provide these rest breaks to salaried exempt employees (as it is expected most employers will do), they should not seek to make deductions from salaries for lactation breaks. Salaried exempt employees generally must receive their full salary for any week in which they perform work, regardless of the quantity of work they provide.

How Many Breaks Are Permitted?

The amendment requires employers to provide employees “reasonable break time” to express breast milk “each time” that an employee has the need to do so. Reasonable break time is yet to be defined. The length and frequency of each employee’s lactation breaks could vary based on the needs of each individual employee and the location and logistics of the space provided.

For How Long Do Employers Need to Provide Rest Breaks for Employees to Express Milk?

The law requires employers to provide these breaks for up to one year after a child’s birth, which is consistent with the American Academy of Pediatrics’ recommendations on breastfeeding. Employers may obviously choose to provide such rest breaks for a longer period of time.

Must These Rest Breaks be Paid?

The amendment states that employers need not pay employees for “reasonable break time” for lactation provided under the amendment. Employers should be aware, however, that there are federal regulations regarding rest breaks that indicate “rest periods of short duration, running from 5 minutes to about 20 minutes are common in the industry...[and] must be counted as hours worked.” (29 C.F.R. Section 785.18) Employers should consult employment counsel for further advice on how to address a particular employee’s situation.

What Type of Space Must Employers Provide?

Like many of the state laws that require accommodations for expressing breast milk, the amendments require “a place, **other than a**

bathroom, that is shielded from view and free from intrusion from coworkers and the public.” (emphasis added) Because there are a variety of solutions in providing a private location for mothers to express breast milk, employers are not necessarily required to construct a new room. In states that already have these requirements, many larger employers have chosen to convert an unused office to a permanent and designated “Mother’s Room.” Often, however, an unused private office with a lock may be the next best solution. For example, the U.S. Department of Health and Human Services, in its 2008 *Easy Steps to Supporting Breastfeeding Employees*¹ resource guide for employers, notes that the size of a designated breastfeeding area can be as small as four feet by five feet to accommodate a comfortable chair and a small table or shelf for a breast pump. Various employers have been successful in using an area that can be shielded off in a conference room with a private moveable screen or sectioning off a less traveled area of a store or office. DOL regulations may provide employers with other possible compliance solutions.

Penalties

Because the law requires that only unpaid time and space be provided, it is unclear what remedies would be available for employees whose employers do not comply with the new requirements. This amendment was originally part of the Breastfeeding Promotion Act of 2009, which is currently in committee, so the Department of Labor may look to that act in identifying remedies. The only remedy available in the Breastfeeding Promotion Act for this portion is equitable relief. State laws that require such time and space, however, may provide additional civil penalties.

What should employers do now?

- Identify and designate a private space in the work location, other than a bathroom, which can be used for employees needing to express breast milk.
- Develop a written lactation accommodation policy that can be included in the employee handbook and provided with leave of absence paperwork for mothers, indicating how to request such accommodation and where the space will be provided. Distribute the policy now, so that currently breastfeeding mothers can request an accommodation as necessary.
- Communicate how the designated space can be accessed and whether other mothers will be using it. If multiple women will be using the space, consider implementing a reservation system, so that all mothers can be accommodated.
- Analyze work schedules to ensure that appropriate breaks can be provided when necessary.
- Train managers and supervisors about new policies and procedures for nursing mothers and ensure that they are aware of the need for accommodation and space.

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¹ Available at www.womenshealth.gov/breastfeeding/programs/business-case.