

## **Healthcare Reform Law Requires Reasonable Break Times and Locations for Nursing Mothers**

**April 7, 2010**

The Patient Protection and Affordable Care Act of 2010, as amended by the Health Care and Education Reconciliation Act of 2010 (the Healthcare Reform Law), includes a provision that requires employers to provide covered employees with the ability to take unpaid breaks to express milk for their nursing infants.

The Healthcare Reform Law amends the Fair Labor Standards Act (FLSA) to require that employers provide nursing mothers with an unpaid “reasonable” break time “each time an employee has need” to express breast milk for the first year following the birth of a child. Employers are also required to offer a workplace location for the purpose of expressing breast milk. This location must not be a bathroom and must be shielded from view and free from intrusion by coworkers and the public.

The new provision does not apply to any employee who qualifies as exempt under Section 213 of the FLSA. Thus, employees who qualify under the executive, administrative, professional, outside sales, or computer professional exemptions are not entitled to breaks under the amendment. The law also offers a safe harbor for employers with fewer than 50 employees. These employers are only excluded from the law’s requirements, however, if complying with them 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.” This standard is highly fact-specific, and each employer will have to make an individualized determination as to whether the exception is likely to apply. The language closely tracks the undue hardship exception to the reasonable accommodation requirement under the Americans with Disabilities Act, so case law and regulations specific to that exception may provide some guidance until the Department of Labor issues regulations in this area.

The Healthcare Reform Law requires employers to determine what constitutes a “reasonable” amount of time to express milk, and defines the frequency of required breaks based on a subjective standard based on the employee’s need to express milk. 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.

Research has shown that the ability to express sufficient milk to meet an infant’s nutritional needs can vary greatly from woman to woman, and that a schedule that allows for successful expression of milk

may evolve over time as the infant grows.<sup>1</sup> Employers should expect that the average employee will need between 15 and 20 minutes of break time every two to four hours to express milk. This is not an insignificant burden on employers. However, a well-designed lactation program could be a key factor in creating private places for expression that allow employees to continue working while pumping or in minimizing incidental time lost due to setting up, cleaning pump parts, and storing expressed milk.

## Relationship to State Laws

Twenty-four states, the District of Columbia, and Puerto Rico already have laws in place related to expressing milk in the workplace, specifically Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Indiana, Maine, Minnesota, Mississippi, Montana, New Mexico, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, and Wyoming. The amendment specifies that it will not preempt any state law that provides greater protection to employees. It is important to note that these state laws often apply to employers with fewer than 50 employees as well as to exempt employees. Due to these variations, employers may wish to consider crafting a comprehensive policy, applicable to all employees.

The amendment does not include an effective date, and is therefore presumed to be effective as of March 23, 2010. If you have any questions or would like more information about how to implement a program that will most effectively allow you to comply with this amendment, please contact the authors of this LawFlash, Sarah Andrews (412.560.7788; [sarah.andrews@morganlewis.com](mailto:sarah.andrews@morganlewis.com)) and Mike Ossip (215.963.5761; [mossip@morganlewis.com](mailto:mossip@morganlewis.com)), or a [member of our Labor and Employment Practice versed in this matter in your region](#).

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<sup>1</sup> Corporate Voice for Working Families has published a Workforce Lactation Toolkit at [www.cvworkingfamilies.org/lactation](http://www.cvworkingfamilies.org/lactation) that provides educational materials and outlines a number of workplace solutions.

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