

DOL Issues Preliminary Interpretation of Nursing Mothers Amendment to FLSA

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On December 21, the U.S. Department of Labor (DOL) published a Request for Information that contains its preliminary interpretations of the 2010 Nursing Mothers Amendment to the Fair Labor Standards Act (FLSA) enacted as part of the Healthcare Reform Law.

The DOL does not plan to issue regulations implementing the Nursing Mothers Amendment at this time, as it believes that regulations may not be the most useful or effective means for providing initial guidance to employers because of the wide variety of workplace environments and workforces. However, if its experience enforcing the break-time requirement and the public comments solicited by the DOL suggest that regulations are ultimately necessary, the DOL will initiate rulemaking.

Requirements of the Nursing Mothers Amendment

The Nursing Mothers Amendment, which became effective on March 23, 2010, requires employers to provide unpaid “reasonable break time for an employee to express breast milk for her nursing child for one year after the child’s birth each time such employee has need to express milk.” The law also requires employers to 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.” Since the amendment’s passage, employers have sought guidance on a variety of compliance issues, including the length of a “reasonable” break, the penalties for noncompliance, the margins of the hardship exception, and how to identify adequately private space at the worksite.

Employee Coverage

The law does not apply to employees who qualify as exempt under 29 U.S.C. § 213. Thus, employees who qualify under the FLSA’s exemptions for executive, administrative, professional, computer, and outside sales employees are not entitled to breaks under the new law. Nonetheless, the DOL is encouraging employers to provide break time for *all* nursing mothers. Moreover, employers may be obligated to provide such breaks under state law, as the amendment does not preempt a state law that provides for greater protections such as paid break time or a longer period of time following the child’s birth.

Employer Coverage

Employers with 50 or more employees must comply with the law without exception. Contrary to how some employers have been interpreting the amendment and unlike the Family and Medical Leave Act (FMLA), which excuses compliance for employers with fewer than 50 employees within a 75-mile radius of a particular worksite, the Nursing Mothers Amendment requires employers to count *all* employees (including part-time workers) at all worksites to determine whether they could qualify for a hardship exception.

Even those employers with fewer than 50 employees are still subject to the requirements of the amendment, unless they can demonstrate that compliance will cause “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.” The DOL’s preliminary guidance cautions that this rigorous showing will operate like an affirmative defense that employers will be permitted to avail themselves of only in extremely limited circumstances.

Reasonable Break Time

The new law requires employers to determine what constitutes a “reasonable” amount of time to express milk, and defines the frequency of required breaks subjectively, based on the employee’s need to express milk. The DOL expects that nursing mothers typically will need two to three breaks during an eight-hour shift. It explains that, while the length of time necessary to express milk varies from woman to woman, it typically takes from 15 to 20 minutes every two to four hours to express milk. However, in determining whether the length of break time provided to an employee is “reasonable,” the DOL has indicated that it will consider factors in addition to the amount of time necessary to express milk.

These factors include the time it takes the employee to walk to the lactation space, whether the employee must retrieve her pump and other supplies from a separate location such as a locker, whether the employee will need to unpack and set up her own pump or whether a pump is provided for her, the efficiency of the employee’s pump, whether there is a sink and running water nearby for the employee to use to wash her hands before pumping and to clean the pump and its attachments when she is finished, and the time it takes for the employee to store the milk in either a refrigerator or a personal cooler. Therefore, employers need to consider these additional factors when determining the length of break that will be considered “reasonable” under the statute.

Identifying or Creating Private Space for the Breaks

The DOL’s preliminary interpretation of the requirement that the designated lactation space be “shielded from view and free from intrusion” is that employers are required, where practicable, to make a room (either private or with partitions for use by multiple nursing mothers) available for use by covered employees. In those circumstances where it is not practicable for an employer to provide a designated room, the DOL explains that the requirement can be met by providing a private space with curtains or partitions and a sign or a lock that indicates when the space is in use. Although a bathroom cannot meet the statutory requirements, the preliminary interpretation clarifies that an anteroom or lounge area connected to a bathroom may meet the requirements if there is a wall or door separating the lounge area from the bathroom and the area is shielded from view and free from intrusion.

The DOL encourages employers with sizeable workforces, or with a significant number of nursing mothers, to create a nursing mother room or other spaces that would accommodate more than one

individual nursing at a time because the DOL has specified that employers will not be considered to be in compliance with the law in instances where the number of nursing mothers exceeds the designated space so that an employee is either prevented from taking a nursing break or experiences a prolonged wait time.

The DOL is seeking comments addressing the conditions under which managers' offices, utility closets, and other spaces normally dedicated to other purposes can be considered adequate space under the statute. It is also seeking comments on how best to provide adequate breaks and space for employees who are not in a fixed place during a work shift (e.g., bus drivers, mail or parcel delivery workers, law enforcement officers, emergency medical technicians). However, the DOL's preliminary interpretation makes it clear that an employer's obligation to provide the private space exists even in those situations where an employee is located off-site, such as at a client's worksite. In this situation, the DOL recommends that the employer work with the client to ensure that adequate space exists or is created at the client's facility for the employee to use while there.

Enforcement

Until it issued its preliminary interpretation, the DOL had not indicated how it intended to enforce the amendment or what penalties would be imposed for noncompliance. Because Section 7(r) of the FLSA does not enumerate penalties for employers that are found to violate the break-time requirement of the Nursing Mothers Amendment, there was much speculation. Claims under Section 7(r) of the FLSA only permit an employee to bring an action for the recovery of unpaid minimum wages or unpaid overtime compensation and an additional equal amount in liquidated damages. 29 U.S.C. § 216(b). Because the Nursing Mothers Amendment does not require employees to be compensated for break time used to express milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks.

The DOL's Wage and Hour Division will investigate complaints about an employer failing to provide break time or space to express milk on a priority basis. When an employer has refused to comply with its obligations, the DOL may seek injunctive relief in federal district court, and may obtain reinstatement and lost wages for the employee, where applicable. If an employer terminates or disciplines a nursing mother because she takes breaks to express milk or because she has announced that she intends to take such breaks, the employee would be entitled to file a claim in federal court for lost wages and reinstatement, according to the DOL. Moreover, if an employer treats an employee who takes breaks to express breast milk differently than employees who take breaks for other personal reasons, the DOL has cautioned that a nursing employee may have a claim for discrimination under Title VII of the Civil Rights Act of 1964.

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