

Employment, Labor and Benefits Alert: Health Care Reform Amendments to FLSA Require Break Time and Private Place for Nursing Mothers to Express Milk

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Health care reform impacts employers in many significant ways. While the effects of reform on insurance coverage and other requirements have been widely publicized, much less well-understood are various amendments to the Fair Labor Standards Act (FLSA). One such amendment requires employers to provide nursing mothers break time to express milk and, perhaps more significantly for employers, a private and secure place, other than a bathroom, in which to do so.

The New Law

Section 4207 of the Patient Protection and Affordable Care Act, which was signed into law by President Obama on March 23, 2010, amends Section 7 of the FLSA by adding the requirement that “an employer shall 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 need to express the milk.” The break time can be unpaid. The Act also requires that employers provide a private and secure place, other than a bathroom, that can be used by employees to express milk.

Employers with less than 50 employees are exempt from these requirements if they would impose “an undue hardship” by causing the employer significant difficulty or expense relative to the “size, financial resources, nature, or structure of the employer’s business.”

The statute expressly does not preempt state laws which provide greater protections for nursing mothers who need to express milk at work.

Action Items for Employers

All employers with 50 or more employees should immediately adopt changes to their employee policies that explicitly allow breaks during the work day for nursing mothers to express milk. In addition, such employers should identify one or more areas which may be used by the employee for that purpose. Importantly, the area must be private (“shielded from view,” in the words of the statute) and secure (“free from intrusion”), but it may not be a bathroom. Thus, generally, this will require designating a small office or other room with a lockable door for this purpose.

Employers who employ fewer than 50 employees may avoid these requirements only if they can demonstrate undue hardship. It is not clear whether undue hardship must be demonstrated separately for both the break time requirement and the private and secure place requirement. Accordingly, employers with fewer than 50 employees who elect not to provide nursing mothers **both** break time **and** a private and secure place in which to express milk should carefully consider their decision and document their undue hardship analysis. This will be particularly delicate for employers who hover just below the 50-employee threshold, because once they have 50 employees they will be required to provide both the break time and the private and secure place for expressing milk.

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For up-to-date information regarding health care reform, please visit our [Health Care Reform: Analysis & Perspectives](#) page.

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