

Nursing Mothers in the Workplace: New Federal Law Creates New Obligations for Employers

Holly R. Rogers and Katharine V. Hartman, Dilworth Paxson LLP

A new federal law creates new obligations for employers of mothers who return to work after giving birth and want to continue breastfeeding. As of March 23, 2010, the day President Obama signed the Patient Protection and Affordable Care Act into law, employers are required to provide an appropriate space and reasonable break time for nursing mothers to express breast milk while they are at work.

Overview of the Law

The Patient Protection and Affordable Care Act amended Section 7 of the Fair Labor Standards Act (the “FLSA”) to require employers to make accommodations for nursing mothers. Referred to as the “Nursing Mothers Amendment,” the legislation mandates that employers provide employees with reasonable break time in a private place, other than a bathroom, to express breast milk for one year following the birth of their child.

Employers are not required to compensate employees for their breaks. Additionally, employers with fewer than fifty employees are excused from the new requirements if they are able to show that compliance would cause them undue hardship.

The legislation provides only the base requirements for accommodating nursing mothers. Where state

law provides greater protection to employees, it is not preempted by the federal law.

Implementing a Program

1. Reasonable Time to Express Breast Milk

The legislation requires that an employer provide “reasonable break time” each time an employee has “the need to express milk.”¹ However, it does not address what frequency or duration is reasonable for the breaks. In its July 2010 guidance on the new regulation, the Department of Labor also left the question open, stating “the frequency of the breaks needed to express milk as well as the duration of each break will likely vary.”²

Oregon law on rest periods for the expression of breast milk provides some guidance on what accommodations may be suitable, as the federal legislation, which was proposed by Oregon Senator Jeff Merkley, was largely modeled on Oregon law.³ The Oregon Bureau of Labor and Industries requires that employees receive a thirty minute break for every four hours worked and advises that the break be taken approximately in the middle of the work period.⁴

Additionally, the U.S. Department of Health and Human Services (“HHS”) gives some insight into the appropriate frequency and duration of the breaks.

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In its 2008 publication on creating a breastfeeding-friendly workplace, HHS recommends that women be given a fifteen minute break (plus time to go to and from the lactation room) every three hours, or two to three times during a typical workday.⁵

Ultimately, employers should take into consideration the unique characteristic of their workforce and worksite when creating their policy. Nursing mothers should have adequate time to get to the room, set up the breast pump, express milk, clean the equipment, store the milk, and return to their workstation during their break. Practical considerations such as the distance to the lactation room and to an area with running water where the breast pump can be cleaned should factor into the amount of time granted to employees for their breaks.

2. *Private Place to Express Breast Milk*

In addition to providing reasonable break time, the legislation requires employers to provide a “place other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public.”⁶ The Department of Labor has explained that the space simply must be “functional as a space for expressing breast milk.”⁷ It does not have to be dedicated to nursing mothers at all times, provided that it is available to them when they need it, and is a private space when it is in use.⁸

Oregon law and HHS guidance again offer insight on this requirement, providing suggestions on the types of spaces that are appropriate to accommodate nursing employees. Like the new federal regulation, Oregon’s law requires that the space be located in a place other than a bathroom and that it be both concealed from view and free from intrusion.⁹ It suggests that the space could be “the employee’s work area; a room connected to a public restroom (such as a lounge); a child care facility; [or] an empty, unused office, conference room or storage space.”¹⁰ HHS suggests that the room could be as small as four feet by five feet

provided that it can accommodate a chair and a small table or shelf for the breast pump.¹¹ It describes an ideal room as one that is equipped with an electrical outlet, lockable from the inside, and near a source of hot and cold water for washing the breast pump and other equipment.¹²

Given the wide variety of work environments in which these regulations will be applied, there is a great deal of flexibility in the arrangement and location of the designated room for expressing milk. As long as the room is clean, comfortable, private, functional for a nursing mother to express milk and either equipped with a sink or close to a room with a sink so that the mother can wash her breast pump and other equipment, it should be adequate to meet the new requirements.

3. *Breaks to Express Breast Milk May be Unpaid*

The legislation does not require employers to compensate employees for breaks taken to express breast milk.¹³ The Department of Labor has clarified this requirement, however, explaining that if an employer already provides compensated break time and an employee uses that break time to express milk, they must be compensated in the same way they would be for using their regular breaks.¹⁴ Additionally, if the employee is not completely relieved from duty during the break period, the time must be compensated as work time.¹⁵

Thus, it is only time taken in excess of normal compensated break time given to an employee that is not compensable. If a nursing mother uses only her previously allotted breaks to express milk, she should be compensated for that time.

4. *Employers Covered*

Generally all employers of fifty or more persons who are covered by the FLSA are required to comply with the new regulations. All employees who work for the employer should be counted

towards the fifty employee limit, even if employees work in different locations.¹⁶

Employers of less than fifty persons are not required to comply with the regulations if they can show that meeting the requirements would cause undue hardship.¹⁷ Undue hardship is determined by looking at the difficulty or expense of compliance for the employer, taking into account the employer's business size, financial resources, nature and structure.¹⁸

Given the flexibility of the time and space requirements under the regulations, it may be difficult for employers to show that compliance with the new legislation would cause them undue hardship. Employers should thoroughly investigate whether compliance would truly create significant difficulty or expense before making the decision not to comply with the regulations.¹⁹

5. *Employees Covered*

Only employees who are not exempt from overtime pay requirements under the FLSA are covered by the new requirements.²⁰ Exempt workers are not legally entitled to the breaks, as they are not covered under the law; however, they may still have rights under state law.

6. *State Law Requiring Lactation Accommodation*

The new regulations do not preempt any state laws that provide greater protection to breastfeeding employees.²¹ Currently twenty-four states, Puerto Rico, and the District of Columbia have legislation addressing rest periods for the expression of breast milk.²²

Neither Pennsylvania nor New Jersey are among the twenty-four with legislation on rest periods; however, employers with offices in states that do have regulations should research the requirements for accommodating nursing mothers under their state law, as the law that is most favorable to

employees will be controlling. Federal law does not preempt where state law offers more generous coverage.

Top Three Next Steps for Employers

The following are the top three next steps for employers covered by the Nursing Mothers Amendment to take to be in compliance with the new regulations:

1. Designate a private area which can be used by nursing mothers to express breast milk.
 - o Absent extenuating circumstances, the room should be: (1) no smaller than four feet by five feet; (2) equipped with a table, chair and electrical outlet; (3) lockable from the inside or marked clearly from the outside as a private area; (4) equipped with a sink for cleaning the breast pump and other equipment or close to a water source where the equipment can be cleaned; (5) equipped with or close to a small refrigerator for storing breast milk (alternatively, employers may allow employees to bring small personal coolers for breast milk storage).
2. Create a nursing mothers' accommodation policy that can be incorporated into leave of absence information for pregnant employees, distributed to currently nursing employees, and communicated immediately to managers and supervisors.
 - o The policy should include information on how employees may request accommodation under the policy and provide details on using the lactation room.²³
3. Create internal protocols for tracking usage of the lactation room. These protocols are important for accounting for employee time spent on break and for scheduling room usage

where there are multiple mothers who need to use the room.

Holly R. Rogers (hrogers@dilworthlaw.com) (B.A. Harvard University; J.D., Duke University) and Katharine V. Hartman (khartman@dilworthlaw.com) (B.A., University of Florida; J.D., Duke University) practice labor and employment law at Dilworth Paxson LLP. For more information visit www.dilworthlaw.com

¹ Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 4207 (2010) amending Fair Labor Standards Act, 29 U.S.C. § 207.

² United States Department of Labor, Wage and Hour Division, *Fact Sheet #73: Break Time for Nursing Mothers under the FLSA*, (July 2010), www.dol.gov/whd/regs/compliance/whdfs73.htm.

³ Tamara Jankovic and Anthony Hall, *Health Care Reform Requires Break Time for Nursing Mothers*, 15 No. 9 Nev. Emp. L. Letter 2 (June 2010).

⁴ Oregon Bureau of Labor and Industries, *Technical Assistance for Employers, Breaks: Rest Periods for Expression of Breast Milk*, (2010), http://www.oregon.gov/BOLI/TA/T_FAQ_Expression_of_Breast_Milk2.pdf?ga=t.

⁵ United States Department of Health and Human Services, *The Business Case for Breastfeeding, Steps for Creating a Breastfeeding Friendly Worksite, Easy Steps to Supporting Breastfeeding Employees*, (2008), <http://www.womenshealth.gov/breastfeeding/programs/business-case/easysteps-breastfeeding.cfm>.

⁶ H.R. 3590 § 4207 (2010).

⁷ United States Department of Labor, Wage and Hour Division, *supra*.

⁸ *Id.*

⁹ Oregon Bureau of Labor and Industries, *supra*.

¹⁰ *Id.*

¹¹ United States Department of Health and Human Services, *supra*.

¹² *Id.*

¹³ H.R. 3590 § 4207 (2010).

¹⁴ United States Department of Labor, Wage and Hour Division, *supra*.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ H.R. 3590 § 4207 (2010).

¹⁸ *Id.*

¹⁹ Julie Dunne and Mendy Mattingly, Littler Mendelson P.C., *United States: FLSA Amended to Require Breaks and Space to Express Breast Milk for Nursing Mothers*, (April 23, 2010), www.mondaq.com/unitedstates/article.asp?articleid=99004&print=1.

²⁰ United States Department of Labor, Wage and Hour Division, *supra*.

²¹ H.R. 3590 § 4207 (2010).

²² United States Breastfeeding Committee, *Health Care Reform Boosts Support for Employed Breastfeeding Mothers*, (July 8, 2010), <http://www.usbreastfeeding.org/Workplace/WorkplaceSupport/WorkplaceSupportinHealthCareReform/tabid/175/Default.aspx>.

²³ Julie Dunne and Mendy Mattingly, Littler Mendelson P.C., *supra*.