

Insights, News & Events

“NURSING MOTHER” BREAK REQUIREMENT SPURS INVESTIGATIONS, LAWSUITS

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A little-known section of the Patient Protection and Affordable Care Act requires employers covered by the federal Fair Labor Standards Act (FLSA) to allow a worker to take unpaid break time to express breastmilk for her nursing child. The requirement extends for a year after the child is born. Under the law you must:

- make available a suitable location (other than a bathroom) that is shielded from view and is free from intrusion by coworkers or the public;
- permit a “reasonable” break time under the circumstances; and
- let the worker take such a break each time she “has need” to express milk.

SOUNDS SIMPLE, BUT IT’S NOT

This all seems straightforward until one begins to ponder such things as how many daily breaks are required, how much time is “reasonable,” and so on. Many of the answers necessitate individualized evaluations based upon a particular employee’s (and child’s) circumstances.

For example, the number and frequency of breaks can depend upon a variety of things, such as the number of feedings in a baby’s normal daily schedule, the impact of a baby’s age upon feeding needs, and whether the baby is eating solid food. The U.S. Labor Department suggests that the number of breaks called for in an eight-hour shift would “typically” be two or three. However, more might be required during longer shifts.

The duration of a “reasonable” break is also subject to situation-specific factors. Relevant considerations would include, for instance, how long it takes the worker to walk to and from the break location, how much time she must spend expressing the milk (the Labor Department thinks that this would normally be around 15 to 20 minutes), and the amount of time she must devote to setting-up for, cleaning-up after, and adequately storing the milk produced.

There are also many other areas of uncertainty. As illustrations, what must an employer do with respect to employees who do not work at any fixed location, or as to those who work at a client’s or a customer’s premises? The DOL has asked for public comment on these questions, but to date it has offered little guidance.

Although the law plainly says that “[a]n employer shall not be required to compensate an employee” for the reasonable break time taken, even here matters are less than clear. The DOL has said that the break could nevertheless count as compensable worktime in some situations, including when the employee has not been “completely relieved from duty” during the break. Labor Department interpretations also take the view that an employer must pay the employee the same way it does others if she takes paid break time to express breastmilk.

The requirement does not apply to employees who are excluded from the FLSA’s overtime provision, including those who fall within that law’s executive, administrative, professional, or “outside salesman” exemption. There is also an exception for an employer of fewer than a total of 50 workers if “undue hardship” will result from providing the breaks, but this is a high standard that will likely be difficult to prove.

LET THE CLAIMS BEGIN

So far, enforcement efforts appear mainly to have involved the Labor Department. The most-recent statistics released reveal that the agency found one or more violations of the break requirement in two-thirds of the 54 investigations it conducted.

About 80% of the compliance problems grew out of the obligation to provide an adequate space, while a smaller percentage apparently arose from not providing break time. Employers found to be in violation reportedly agreed to observe the requirement in the future and to make employees whole for any losses resulting from unlawful conduct.

There have also already been at least some employee lawsuits. In one of them, a lower federal court found that only the Labor Department could enforce the requirement to provide a suitable break location. However, the court allowed the

former employee to move forward with her allegation that management retaliated against her when she asserted her rights.

The potential remedies for such a claim could include more than just lost wages; the FLSA allows for “such legal or equitable relief as may be appropriate,” which might encompass additional things like compensatory damages and reinstatement to one’s job.

OUR ADVICE? COMPLIANCE

Management should develop a policy for dealing with the break obligation *before* a worker comes forward with her request. Planning points will include, among others, who will take the lead in evaluating each worker’s request, what location(s) will be provided, how management will go about arriving at the appropriate length and number of breaks, and whether there are any unusual or atypical factors to be evaluated ahead of time.

And be aware that a number of state laws require these kinds of breaks. Some of those laws provide more rights to a covered employee than the federal one does. When different break requirements apply to a particular worker, generally you must comply with whichever is more favorable to the individual. Take this possibility into account as you formulate a policy.

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