



Are You Ready To Accommodate Nursing Mothers?

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As the result of a little-noticed amendment contained in 2010's Patient Protection and Affordable Care Act, the federal Fair Labor Standards Act's Section 7(r) now requires covered employers to give unpaid break time to a worker for the purpose of expressing breast milk for her nursing child. This obligation extends for a year after the child's birth, and under it the employer must:

- Provide a suitable location for the break (other than a bathroom) that is shielded from view and is free from intrusion by co-workers or the public,
- Allow a break that is long enough to be "reasonable" under the circumstances, and
- Permit a break each time the employee "has need" to express milk.

What Does It All Really Mean?

To some extent, meeting these requirements as to a particular employee calls for individualized evaluation. For instance, a "reasonable" break's duration will depend on factors such as how much time it takes the employee to express the milk (the Labor Department anticipates 15 to 20 minutes), how long it takes her to walk to and from the break location, the amount of time she must devote to setting up for and expressing the milk and the time necessary for cleaning-up and for storing the milk.

Where the number and frequency of breaks are concerned, the employer should take into account a variety of considerations such as the baby's age as this relates to the child's feeding needs, the number of feedings/nursings in the baby's normal daily schedule and whether the baby is eating solid food. The Labor Department opines that the number of breaks would "typically" be two or three during an eight-hour shift and possibly more for a longer shift.

How Is The Requirement Enforced?

Section 7(r) itself says nothing about enforcement. Even so, employee complaints could provoke an investigation by the Labor Department, to a Labor Department lawsuit for court-ordered compliance, and to Labor Department-imposed civil penalties of up to \$1,100 for each willful or repeated violation.

And the Labor Department has been active. Earlier this year, officials disclosed that there have been at least 54 Section 7(r) investigations, and that the government found one or more violations in

36 of them. The Labor Department said that 29 of the violations involved a failure to provide space, while several others arose from not providing break time. In all cases in which there were violations, the Labor Department required the employers to agree to future compliance and to provide appropriate remedies for any employee losses resulting from unlawful conduct.

The Time To Plan Is *Now*

Prudent employers will consider right away how they plan to respond when Section 7(r)'s requirements come into play. Among other things, who will be responsible for handling the situation, and how will that person learn of the need for the breaks? What suitable location(s) will be made available? What information will management need to evaluate the break's appropriate parameters, and how and by whom will this information be gathered? What unusual or unique circumstances should be evaluated in advance, rather than under the time-pressure of an employee's request?

Many states also require these kinds of breaks. Section 7(r) does not override those laws to the extent that they are more favorable to the employee than the FLSA is. Any nursing-mother policy must also take the applicable requirements of these other jurisdictions into account.

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