



California Bills Seek To Expand Employer Obligations for Lactation Accommodation

Insights

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One of the more popular public policy issues of late has been an employer's obligation to accommodate employees who are lactating or expressing breast milk. The federal government, states, and local jurisdictions have been increasingly active on this front in recent years.

California has had a "lactation accommodation" law on the books since 2002, requiring employers to provide reasonable break time and a location for employees to express breast milk.

But the federal government has gotten in the game as well. The Fair Labor Standards Act (FLSA) provides that, for up to one year after a child's birth, a nursing mother must be provided a "reasonable break time" to express milk "each time such employee has need to express the milk." These breaks may be unpaid. You must also provide a private place for expressing milk, other than a bathroom, that is shielded from view and free from intrusion. Further, in 2015 the Equal Employment Opportunity Commission (EEOC) officially adopted the position that lactation is protected by the Pregnancy Discrimination Act (PDA). Accordingly, failure to allow for time to express breastmilk could result not only in FLSA violations, but also a discrimination lawsuit under the PDA.

Several local jurisdictions have also adopted their own workplace policies in this area. For example, late San Francisco Mayor Lee signed the Lactation in the Workplace Ordinance on June 30, 2017. That ordinance went into effect on January 1, 2018, and requires businesses to provide employees with breaks and a designated location for lactation. Additionally, employers must also implement policies that notify employees of their right to an accommodation for lactation. The ordinance also requires newly constructed or renovated buildings designated for certain uses to include lactation rooms, and amends the San Francisco building code to specify technical specifications of lactation rooms.

California employers' obligations in this area would expand under two proposed bills working their way through the California Legislature.

Assembly Bill 1976 (Limón) – Bathrooms Won't Cut It

Under current state law, employers are required to make reasonable efforts to provide employees with the use of a room or other location (other than a toilet stall) for purposes of expressing breast milk at work.

However, Assembly Bill 1976 by Assemblywoman Monique Limón, amends current law to specify that employers have to make a reasonable effort to provide a room “other than a bathroom” (not just other than a “toilet” stall) to accommodate such employees.

The California Chamber of Commerce and other employer groups have expressed concern that the bill does not contain a hardship exemption for small employers and does not contain a definition of the term “bathroom,” which may exclude spaces that may be appropriate for such activity.

Senate Bill 937 (Weiner) – What Happens in San Francisco *Doesn't* Stay in San Francisco

The other proposal is much more expansive and is largely based on the San Francisco ordinance. Senate Bill 937 by Senator Scott Weiner would require employers to provide a lactation room (other than a bathroom) that shall be “in proximity to the employee’s work area, shielded from view, and free from intrusion.” SB 937 also specifies that the lactation room must (1) be safe, clean, and free of toxic or hazardous materials, (2) contain a surface to place a breast pump and personal items, (3) contain a place to sit, and (4) have access to electricity. The bill also requires employers to provide access to a sink with running water and a refrigerator in close proximity to the employee’s workspace.

SB 937 permits an employer with fewer than five employees to petition the Labor Commissioner for an “undue hardship” exemption. The bill also specifies that an employer in a multitenant building may comply with the law by providing a shared space among multiple employers if the employer cannot provide a lactation location within its own workspace.

SB 937 also imposes new building standards by requiring the California Building Standards Commission to adopt new rules that require the installation of lactation space for new or remodeled construction in building with at least 15,000 square feet if the project costs more than \$5,000. The bill specifies that building standard shall provide that lactation spaces shall be at least 50 square feet, have at least one electrical outlet, have access to a sink with hot and cold running water, and shall be located no more than 500 feet from the farthest employee workstation or within two adjacent floors.

SB 937 also requires employers to develop and implement a lactation accommodation policy that includes (1) a statement about an employee’s right to request lactation accommodation, (2) the process by which an employee makes a request for accommodation, (3) the employer’s obligation to respond to accommodation requests, and (4) a statement about an employee’s right to file complaints with the Labor Commissioner for violations. This policy must be provided to new employees or when an employee makes an inquiry about or requests parental leave, and included in employee handbooks or policies.

Employers would be required to respond to employee requests for lactation accommodations within five days. If the employer cannot provide break time or a location that complies with the law, the employer must provide a written response to the employee.

SB 937 also contains protections against retaliation, and increases civil penalties for violations from \$100 to \$500. Employees may bring complaints before the Labor Commissioner or bring a civil action. If the employee prevails, the court may award attorney's fees.

Finally, the bill requires the Labor Commissioner to develop a model policy, model accommodation request form, and a "best practices" guide that includes specified optional but recommended amenities.

Next Steps

AB 1976 has cleared the Assembly Labor Committee and the Assembly Appropriations Committee, and will soon be headed to the Assembly Floor for a full vote by that body. SB 937 has been referred to the Senate Committee on Labor and Industrial Relations and will be heard on April 11, 2018.

We'll keep you updated on developments as the legislative year progresses. Were the bills to be signed into law, they would go into effect on January 1, 2019.

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