



California Makes Sweeping Changes to Lactation Accommodation Requirements

Insights

10.11.19

Following San Francisco's lead, California will soon significantly expand the obligation of most employers to provide break time and a location to express breast milk. The new law, just signed into effect by Governor Newsom on October 10, 2019, will become effective January 1, 2020. What do California employers need to know about their new obligations?

Federal, State, and Local Governments Get Involved

As we discussed last year, 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.

On the federal level, 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.

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

Several local jurisdictions have taken things a step further and adopted their own workplace policies in this area. For example, late San Francisco Mayor Lee signed the Lactation in the Workplace Ordinance in 2017. That ordinance went into effect on January 1, 2018, requiring businesses to provide employees with breaks and a designated location for lactation. Additionally, employers in San Francisco 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.

Now, California has taken things one significant step further and joined San Francisco by adopting a detailed list of requirements employers must oversee when it comes to lactation accommodations. Governor Brown had vetoed very similar legislation just last year. But by signing into law [Senate Bill 142](#) (introduced by Senator Scott Weiner), Governor Newsom has ensured that several significant changes to existing state law will soon take effect. Here is a summary of the impending requirements.

Break Time “Each Time” Needed

Current law provides that an employer must provide a reasonable amount of break time to allow employees to express breast milk. The break time shall, if possible, run concurrently with any break time already provided to the employee. Such break time that does not run concurrently with authorized rest time under existing law is unpaid.

SB 142 specifies that the break time shall be provided “each time such employee has need to express milk.”

Significant Expansion of Lactation Room Requirements

Under current state law, employers are required to make reasonable efforts to provide employees with the use of a room or **location other than a bathroom** in close proximity to the employee’s work area, for the employee to express breast milk in private. However, SB 142 enacts some significant new requirements related to lactation rooms.

First, the new law repeats that a lactation room shall not be a bathroom, and shall be in close proximity to the employee’s work area. It adds the requirement that the room must be shielded from view and free from intrusion while the employee is lactating.

Second, the new law provides that a lactation room must:

- Be safe, clean, and free of hazardous materials, as defined;
- Contain a surface to place a breast pump and personal items;
- Contain a place to sit; and
- Have access to electricity or alternative devices, including, but not limited to, extension cords or charging stations needed to operate an electric or battery-powered breast pump.

Third, SB 142 provides that an employer shall provide access to a sink with running water and a refrigerator suitable for storing milk (or another cooling device) in close proximity to the employee’s workplace.

Fourth, the new law provides that, where a multipurpose room is used for lactation among other uses, the use of the room for lactation shall take precedence over the other uses, but only for the time it is being used for lactation purposes.

Exceptions and Accommodations

SB 142 makes a number of accommodations for certain employers.

First, an employer in a multitenant building or a multiemployer worksite may comply with the law by providing a space shared among multiple employers within the building or worksite if the employer cannot provide a lactation location within the employer's own workspace.

Second, employers or general contractors that coordinate a multiemployer worksite shall either provide lactation accommodations or provide a safe and secure location for subcontractor employers to provide lactation accommodation on the worksite, within two business days, upon written request of any subcontractor employer with an employee who requests an accommodation.

Third, an employer may comply with the requirements of the law by designating a lactation location that is temporary due to operational, financial, or space limitations. These temporary spaces shall not be a bathroom and shall be in close proximity to the employee's work area, shielded from view, free from intrusion while the employee is expressing milk, and otherwise meet the requirements of the law

Finally, an employer with fewer than 50 employees may establish an exemption from any of the lactation room requirements if it can show that it would impose an undue hardship when considered in relation to the size, financial resources, nature, or structure of the employer's business.

Raising the Stakes for Non-Compliance

Under existing Labor Code Section 226.7, an employer that fails to provide a meal or rest or recovery period as required by law is required to pay the employee one additional hour of pay at the employee's regular rate of pay for each workday that the break is not provided.

SB 142 raises the stakes for failing to provide lactation accommodation by specifying that the denial or reasonable break time or adequate space to express breast milk shall be deemed a violation of Section 226.7. Alleged meal and rest period violations are a favorite target of PAGA lawsuits, so it is anticipated that employers will begin to see PAGA lawsuits over lactation accommodation issues as well.

In addition, the Labor Commissioner may impose a civil penalty in the amount of \$100 for each day that the employee is denied break time or adequate space to express milk. Moreover, SB 142 makes it unlawful for an employer to discriminate or retaliate against an employee for exercising their rights under the lactation accommodation law.

Mandated Employer Lactation Policy

SB 142 also requires employers to develop and implement a policy regarding lactation accommodation that includes:

- A statement about an employee's right to request lactation accommodation;

- The process by which the employee makes the request;
- An employer's obligation to respond to the request; and
- A statement about an employee's right to file a complaint with the Labor Commissioner for any violation of the law.

SB 142 specifies that the employer shall include the lactation policy in an employee handbook or set of policies that the employer makes available to employees, and distribute the policy to new employees upon hiring and when an employee makes an inquiry about or requests parental leave. In addition, if the employer cannot provide break time or a location that complies with the policy, the employer is required to provide a written response to the employee.

Next Steps

SB 142 goes into effect on January 1, 2020. Prior to that date, you should carefully review your procedures for providing lactation accommodation in accord with the requirements of the new law. In particular, you should develop and implement a lactation policy for inclusion in employee handbooks or other policies, and establish a method for distribution to new hires and employees inquiring about parental leave. For some employers, this new law may require making physical changes to the workplace in order to comply with the new requirements. For more information about this new law, please contact your Fisher Phillips attorney, or one of the attorneys in any of [our five California offices](#).

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