



USDOL Provides Enforcement Statistics On FLSA Breastmilk-Break Requirement

Insights

1.25.13

The U.S. Labor Department recently responded to our July 2012 Freedom of Information Act request for documents relating to its enforcement of the federal Fair Labor Standards Act's Section 7(r). This provision requires covered employers to grant breaktime to an employee for the purpose of expressing breastmilk for her nursing child. We have been following developments regarding this provision since employers first found out that it was included in 2010's Patient Protection and Affordable Care Act.

USDOL sent no documents, but it did provide a summary of enforcement data and related information.

Dozens Of Investigations And Violations

The information covers the period from Section 7(r)'s effective date of March 23, 2010 through June 11, 2012, which USDOL says is the most recent available. During that time, the Wage and Hour Division concluded 54 Section 7(r) investigations. The Division found one or more violations in 36 of them.

The Division classified 29 of the violations as involving a "failure to provide space" for the break. The response did not disclose how many of these instances involved an employer's providing *no* space, as opposed to its having provided space that was inadequate or inappropriate in some way.

Five violations were said to consist of a "failure to provide break time." USDOL gave no further information about these scenarios.

In all 36 cases in which the Division found violations, the employers reportedly "remedied the problem" in unspecified ways and agreed to comply with Section 7(r) in the future. USDOL also said, "In three cases the employer provided back wages to compensate the employee for compensation lost when her hours were cut or when she quit her job due to the failure to provide the break time." Presumably, these situations involved allegations of retaliation or claims that the worker quit but was constructively discharged as a result of the violation claimed; USDOL did not expand upon its statements.

In one case, USDOL reports, "the employee was reinstated." This might refer to the situation it mentioned in which the employee "quit her job." In any event, presumably the reinstated worker was

mentioned in which the employee "quit her job". In any event, presumably the reinstated worker was terminated (constructively or otherwise) supposedly due to an assertion of her Section 7(r) rights.

Points Of Emphasis

The overwhelming proportion of alleged violations arose from an employer's failure to provide any space, adequate space, and/or appropriate space for a break. Section 7(r) itself requires that the space be shielded from view, free from intrusion from co-workers and the public, usable for expressing breastmilk, and something other than a bathroom.

USDOL's 2010 "Preliminary Interpretations" elaborate upon this, saying among other things that:

- ◇ Employers are required to make a suitable room available for use (at least temporarily) "where practicable";
- ◇ If this is not "practicable", the employer must "create a space with partitions or curtains" that is otherwise appropriate; and
- ◇ The obligation to provide suitable space also applies to employees who work offsite.

See 75 Fed.Reg. 80073, 80075-77 (December 21, 2010). USDOL adds that:

- ◇ The space may not be so far from the employee that it is "impractical" for her to take the breaks; and
- ◇ The arrangement is inadequate if the number of employees needing to use the space effectively "prevents" an employee from taking breaks or "necessitates a prolonged waiting time."

Id.

The Bottom Line

The enforcement information underscores more generally that employers must *ensure* that they:

- ◇ Know, understand, and comply with all of their Section 7(r) obligations; and
- ◇ Take no adverse action against an employee who seeks to or does exercise her rights under Section 7(r).