



Court Rejects Individual Enforcement Of FLSA Breastmilk-Break Requirement

Insights

7.20.12

An Iowa federal court has dismissed a worker's claim which alleged that her employer failed to comply with the federal Fair Labor Standards Act's Section 7(r) requirement regarding breacktime for the purpose of expressing breastmilk. Under this 2010 FLSA amendment, employers are required among other things to provide places for such breaks that are "shielded from view and free from intrusion from coworkers and the public."

Private Enforcement of Section 7(r) Not Authorized . . .

In *Salz v. Casey's Marketing Company*, the employee sued after she had allegedly complained about the presence of a video camera in the room in which she took these breaks, later received reprimands about performance matters, and thereafter "left her position." Senior Judge Donald E. O'Brien ruled that the employee could not enforce Section 7(r) in her lawsuit.

The court reasoned that (i) the FLSA does not require compensation for these breaks; and (ii) a worker's remedy for a violation of FLSA Section 7 is limited to seeking unpaid wages. According to the judge, the employee's only redress under Section 7(r) itself was to complain to the U.S. Labor Department.

. . . But There Are Other Remedies!

However, the court refused to dismiss her "constructive discharge" and retaliation claims brought under FLSA Section 15(a)(3). This provision says in part that it is unlawful to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to" the FLSA. In the court's view, an employer violates Section 15(a)(3) by taking adverse action against an employee because she asserted her rights under Section 7(r).

There have been significant questions about the enforcement of Section 7(r) since it was adopted as a part of the 2,700-page Patient Protection and Affordable Care Act. Perhaps little or no thought was given to these matters in the confused and frenetic circumstances under which the PPACA was enacted.

Nevertheless, as we said at the time, it seems clear that Section 7(r) transgressions can subject an employer to a USDOL investigation, to a USDOL lawsuit for court-ordered compliance (backed by contempt-of-court remedies), and to USDOL civil penalties of up to \$1,100 for each willful or

repeated violation. Furthermore, as the *Salz* decision illustrates, an employer could face substantial liability for retaliating against an employee who invokes the requirements of Section 7(r).