FLSA Lactation-Break Comments Urge Expansive Approach

Insights
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The period has now closed for submitting information and comments relating to the U.S. Labor Department's "preliminary interpretations" of the 2010 federal Fair Labor Standards Act lactation-break amendment. We highlighted these preliminary interpretations in a December post. If USDOL adopts even a portion of the positions put forth by many commenters, employers will be faced with yet another legal minefield.

Does The FLSA Sometimes Require Paid Lactation Breaks?
Several commenters continue to suggest or insinuate that lactation breaks of 20 minutes' duration or less must be treated as worktime under the FLSA. Their positions overgeneralize an already loosely-worded USDOL interpretation from 1940 that "[r]est periods of short duration, running from 5 minutes to about 20 minutes," must be counted as worktime. *See* 29 C.F.R. § 785.18. The rationale for this view was that such breaks "promote the efficiency of the employee" so as to inure mainly to the employer's benefit. Lactation breaks serve laudable purposes for many reasons, but they are not "rest breaks" and are in no meaningful sense principally for the employer's benefit.

More importantly, any attempt to graft the rest-break interpretation onto the lactation-break amendment runs afoul of the plain words of the amendment: "An employer shall not be required to compensate an employee receiving reasonable break time . . . for any work time spent for such purpose." Policy preferences cannot override the words of the statute itself.

Some comments suggest that the time an employee spends retrieving pumping supplies and in other, unspecified "travel time" should not be considered a part of the break itself. There is no basis for such a carve-out, especially in light of the amendment's use of the phrase "any work time".

Many push for a USDOL statement that lactating employees using paid break time for that purpose must be paid in the same way that other employees are for the break time. They further advocate statements that employers ought to allow an employee to use paid break time to express breastmilk but could not "force" her to do so. Most seem to concede implicitly that the FLSA amendment *itself* has nothing to do with such things, because for support they refer to federal and state discrimination laws and to laws in some states dealing with lactation breaks. It might well be that employers should maintain the proposed policies for a variety of legal and non-legal reasons, but there is no basis for any USDOL pronouncements predicated upon laws it does not enforce and as to which it has no particular expertise.

Submissions Contain An "Interpretation" Wish-List

Various commenters also pressed for other provisions too numerous to summarize here. Among the additional proposed pronouncements are that:

◊ Employers "should" permit lactating employees to extend workdays or to modify meal periods in order to avoid losing compensable worktime, but employers could not require them to do so.

◊ Employers and their customers or clients at whose premises lactating employees work can be "joint employers" with equal responsibility and liability under the lactation-break amendment.

◊ Adoptive mothers, or mothers who used surrogates, who choose to breastfeed with the assistance of lactation drugs are covered by the requirement.

◊ Employers would be required to provide a specific notice of amendment-related rights above and beyond any statement of rights included in a DOL poster.

◊ Employers must deal on an individualized basis with how often a particular employee "has need" to express breastmilk but would not be permitted to require an employee to provide any related justification or documentation for what she says.

The Bottom Line

Even if USDOL issues no further interpretative material incorporating these or other provisions urged, employers should expect many of the commenters' views to be incorporated into USDOL's enforcement posture and to show up in lawsuits by individual employees.