



DOL Releases Lactation-Break "Preliminary Interpretations", Seeks Comment

Insights

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The U.S. Labor Department has now published what it calls its "preliminary interpretations" and a request for information regarding the federal Fair Labor Standards Act lactation-break amendment we wrote about in April and July. The deadline for submitting information and comments is **February 22, 2011**. Employers should give serious consideration to weighing-in on these "preliminary interpretations".

The material says that the "reasonable break time" required should be evaluated according to individualized considerations of both the time spent expressing milk and "steps reasonably necessary" to that activity. In USDOL's view, the length of a required break will depend upon a variety of things, like:

- How much time it takes to express the milk (USDOL anticipates 15 to 20 minutes),
- Time spent walking to and from the break location, and any time waiting to use the space,
- Time spent retrieving, unpacking, and setting-up a pump and related supplies,
- The efficiency of the pump,
- Time spent in washing, in cleaning the pump and attachments, and in any related steps, taking into account whether there is a sink with running water nearby, and
- Time spent storing the milk in a safe manner.

As for the frequency and number of breaks, USDOL will consider factors such as:

- The baby's age as this relates to the child's feeding needs,
- The number of feedings in the baby's normal daily schedule,
- Whether the baby is eating solid food, and
- How often the baby usually nurses.

USDOL anticipates that the number of necessary breaks will "typically" be two or three during an eight-hour shift (and possibly more for longer shifts). Apparently, then, USDOL would not consider total breaktime of, say, 45 to 90 minutes each workday to be out of the ordinary. USDOL also says that these breaks might not track the employee's regular break times or meal periods.

According to USDOL, employers are required to make a suitable room available for use "where practicable" (although this room need not necessarily be a permanent space dedicated to that purpose). If it is not "practicable" to do so, the employer must "create a space with partitions or curtains" that is also otherwise appropriate under the amendment. USDOL says that employers are not complying with the break requirement if the space is so far from the employee that it is "impractical" for her to take the breaks, or if the number of employees needing to use the space means that this "prevents" an employee from taking breaks or "necessitates a prolonged waiting time".

USDOL continues to "interpret" the amendment to mean that:

- ◇ An employer allowing paid breaks must compensate a nursing employee in the same way it does others if she uses such a break in order to express breastmilk; and
- ◇ The break must be treated as worktime if the employee is not "completely relieved from duty" (apparently ascribing this to a non-existent "general requirement" in the FLSA itself).

For a variety of reasons, both the correctness of these positions under the FLSA and DOL's authority to propound them are subject to serious question. Nonetheless, DOL clearly intends to impose them.

These "preliminary interpretations" touch upon and seek input with respect to other subjects also, such as:

- Whether and under what circumstances managers' offices, locker rooms, utility closets, storage spaces, or anterooms or lounges associated with bathrooms might be adequate break spaces,
- What approaches there might be to situations in which employees (such as drivers) do not perform their jobs at a fixed place of work,
- How to comply with the requirement when an employee works at a client's or customer's place of business,
- How the employer is to be notified about the employee's intention to take lactation breaks (including whether a "simple conversation" should suffice), and
- How the under-50-employee "undue hardship" exemption will apply (indications are that DOL intends to construe it very restrictively).

The Bottom Line

Although this latest release is couched as a request for public comment for USDOL's use in "formulating further guidance", there is some hint that instead it might actually be USDOL's last pronouncement on the subject for the foreseeable future. Moreover, USDOL states that it does not intend to issue regulations "[a]t this time" (it is not apparent by what authority USDOL would do so in the absence of any empowering language in the amendment itself).

Even so, employers ought to study these materials carefully and should submit their reactions and any suggestions or objections. For one thing, a muted response risks a later argument that the "regulated community" tacitly embraced USDOL's views in their entirety.