DOL Publishes Guidance On FLSA Lactation-Break Requirement

Insights
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The U.S. Labor Department has released its general views about the meaning of the federal Fair Labor Standards Act's new lactation-break requirement that was the subject of our April 1, 2010 post. You will recall that FLSA-covered employers must now grant breaktime to a worker for the purpose of expressing breastmilk for her nursing child.

Fact Sheet #73 specifically confirms some of our original analyses, including that:

◊ This FLSA amendment took effect when the Patient Protection and Affordable Care Act was signed into law on March 23; and

◊ The provision does not apply to employees who are completely exempt from the FLSA's overtime requirement.

USDOL has not specified any minimum number of, frequency of, or duration for these breaks. It says only that the amount of time must be "reasonable", and that the breaks must be permitted "as frequently as needed" by the employee.

Echoing the amendment, the Fact Sheet states that an employer must provide a place *other than* a bathroom (even a private one) as a location for the break. The location need not be reserved exclusively for a nursing employee's use. Furthermore, it may be a place that is temporarily created or converted for this purpose or that is made available when needed. However, DOL emphasizes that the location must be:

- Functional as a space for expressing breastmilk;
- Shielded from view; and
- Free from any intrusion by co-workers or the public.

USDOL acknowledges the amendment's clear statement that employers are not obligated to treat these breaks as compensable worktime. However, in a continuation of USDOL's recent "interpretative" actions, the Fact Sheet declares 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

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- The lactation break must be treated as time worked if the employee is not "completely relieved from duty" during the break.

Whether these two pronouncements are permissible or even entirely correct under the FLSA is subject to debate, as is the effect of USDOL's having announced them in an informal "Fact Sheet". Even so, legal uncertainty, the possible impact of laws other than the FLSA, human-resources considerations, and prudence suggest that employers would be wise to follow them pending further developments under the amendment.

The Fact Sheet also clarifies how the "fewer than 50 employees" threshold must be determined in the exception for small employers who are prepared to prove that complying with the requirement causes undue hardship. USDOL says that *all* employees who work for the covered employer must be counted – *not* just those who work at a particular worksite. That is, employers whose total number of employees is 50 or more are precluded from even trying to invoke this exception.

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