



## First-Ever FLSA Break Requirement

### Insights

#### 4.01.10

The federal Fair Labor Standards Act now requires covered employers to grant breaktime to a worker for the purpose of expressing breastmilk for a nursing child. The employer must also provide a suitable location for her to do so.

This obligation is contained in the new FLSA Section 7(r) that was buried in a little-noticed part of the Patient Protection and Affordable Care Act. So far as we can tell, the provision took effect immediately when the law was signed on March 23, 2010.

Employers need not pay for the break. No minimum break length is specified, but the break must be a "reasonable" one. Employers are required to provide places for the breaks that are "shielded from view and free from intrusion from coworkers and the public." The location cannot be a bathroom.

The employee must be permitted to take a break each time she needs to express milk. The break requirement extends for one year after the child is born.

An employer of fewer than 50 workers would be excepted from the requirement if allowing the breaks would cause "undue hardship". This condition is met only if the employer will face significant difficulty or expense in light of the employer's size, financial resources, nature, or business structure. We anticipate that this high standard will likely be a hard one to meet as a practical matter.

We assume that Section 7(r) does not apply to employees who are completely excluded from the FLSA's overtime section. For example, this would be the case as to those who qualify for one or more of the executive, administrative, professional, or "outside salesman" exemptions. However, employers should approach this on an exemption-by-exemption basis, because some FLSA exceptions are more-limited in scope.

It is not clear what might be the full range of potential liabilities for failing to comply with this provision. Clearly, the Labor Department could seek a court injunction requiring compliance. Substantial liability could also flow from an employer's having retaliated against a worker who asserts her right to this break.

A number of states already require these kinds of breaks. Section 7(r) does not override any such laws that extend greater employee protections than it does.

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**UPDATE:** Some have suggested that this amendment conflicts with current U.S. Labor Department "regulations" stating that employers must treat brief breaks as worktime. Certain Labor Department interpretative guidelines and opinions do say that short rest periods, coffee breaks, snacktimes, and smoking breaks count as compensable hours worked. A number of courts have adopted most of these views.

Even so, and while a definitive answer must await future developments, it is difficult to see how these Labor Department statements could override the *statute's* directive that "[a]n employer shall not be required to compensate an employee receiving reasonable break time . . . for any work time spent for such purpose." The Labor Department or the courts might eventually construe "reasonable break time" to mean some presumptive minimum number of minutes. But interpretations issued decades ago seem insufficient in themselves to impose any requirement that breastmilk-expressing breaks be treated as compensable worktime when the statute itself says otherwise.

Whether pertinent *state* laws mean that these breaks are to be handled as hours worked is of course a different question.

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[FLSA Lactation Break Amendment.pdf \(33.29 kb\)](#)