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Nursing Mothers Get Unpaid Breaks in Health Care Law

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While employers are trying to quickly understand their current and future health insurance obligations and costs under the newly enacted Patient Protection and Affordable Care Act of 2010, other little-known provisions of the Act are coming to light. One of these provisions is the Nursing Mother Amendment, which adds to the Fair Labor Standards Act a requirement that all U.S. employers covered by the FLSA allow nursing mothers to take unpaid breaks to express breast milk.

The Nursing Mother Amendment, which appears in Section 4207 of the PPACA, is effective immediately.

Under the Amendment, all FLSA-covered employers have two obligations: First, an employer must permit a "reasonable break time" for an employee to express breast milk for her nursing child for the first year of the child's life. These breaks must be given "each time such employee has need to express the milk." The Amendment does not define "reasonable," nor does it identify the number of breaks that must be given during a work day. Instead, the number and duration of the breaks appears to be dictated by the amount of time and frequency the mother claims to need to express the milk. According to La Leche League International, an organization which promotes and supports breastfeeding, mothers with infants under 6 months of age can expect to express milk about every 3 hours, and as the infant grows, the need to express milk will usually be reduced. Therefore, an employer can expect to be required to give breaks to nursing mothers one to three times per eight-hour work day. Furthermore, because mothers will need time not only to express the milk, but also to sanitize and store the equipment at the end of each break, breaks could last between 15 and 30 minutes or more depending on the location of the break room and necessary facilities.

Second, the employer must provide a private location other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public. For a larger employer, this may require multiple private locations to accommodate several employees, or alternatively, scheduling may be necessary. One general room for all nursing mothers would not appear to be sufficient.

Generally under the FLSA, breaks of less than 30 minutes in duration are compensable; however, the Nursing Mother Amendment provides that these new mandatory "nursing breaks" are unpaid. For some companies, this may result in unpalatable

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disparities. For example, an employer that permits smoking breaks must compensate the smokers during the break if it is less than 30 minutes, while a mandatory break of the same duration for expressing milk would not be compensable. Such disparities may discourage employers from actually docking pay for nursing breaks.

The mandatory break requirements apply to all employers covered by the FLSA unless the employer can show that it employs fewer than 50 employees and that the requirements would impose an undue hardship causing the employer "significant difficulty or expense when considered in relation to size, financial resources, nature or structure of the employer's business."

The Amendment does not preempt state laws that are more protective of nursing mothers. Several states, including California, Georgia, Illinois and New York, already have laws relating to breastfeeding in the workplace.

And of course, many employers already voluntarily provide these benefits to their employees who are nursing mothers.

Finally, because the Nursing Mother Amendment is an amendment to the FLSA, employees can file complaints of violations with the Department of Labor, or they can pursue private actions against employers. Because back pay would not apply where the employer wrongfully denied an unpaid break, it is anticipated that claims for injunctive relief, retaliation and attorneys' fees will be of most concern and consequence to employers.

For more information about the Nursing Mother Amendment, please contact the Constangy attorney of your choice.

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