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DOL PROVIDES HELP AND SEEKS
FEEDBACK ON LACTATION BREAKS LAW

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Since the March 23, 2010 passage of the Patient Protection and Affordable Care Act which included **The Nursing Mother Amendment** to the Fair Labor Standards Act, many employers have struggled with their legal obligation to accommodate nursing mothers who need to express milk during the work day.

The U.S. Department of Labor has issued a Fact Sheet and published FAQ's, and on December 21, 2010, it published a **Request for Information** seeking "creative solutions" to further assist employers with compliance. In addition to requesting feedback, the DOL provided some helpful interpretive guidance.

The DOL recognized some of the difficulties with the law's one-size-fits-all approach to the country's diverse workplaces. For example, the DOL acknowledged the challenge faced by employers with employees who do not work in a fixed place during a work shift, such as bus drivers, delivery workers, paramedics and police officers.

Reasonableness of Breaks - The Act requires employers to provide "reasonable break time" for employees to express breast milk. The legislation, however, does not define "reasonable." The DOL says that it does not intend to provide a bright line definition. Instead, the reasonableness of the breaks will depend on the age of the baby, whether the baby is eating solid food, the baby's normal feeding schedule, and similar considerations. The mother of a baby under six months old can be expected to take about three 20- to 30-minute breaks per eight-hour shift. The "reasonable" number of breaks and amount of time required for each break will be driven substantially by the employee. The DOL has also made clear that the time needed per break includes not only the time it takes to express milk, but also the time necessary to prepare to express the milk, and to clean the equipment and store the milk following milk expression.

Exempt Employees - The federal law applies only to employees who are not exempt from the overtime requirements of the FLSA: Employers do not have to provide exempt employees with lactation breaks. If employers decide to provide lactation breaks to exempt employees, they cannot make them unpaid by deducting the time from the employees' salaries. This would be an impermissible deduction that would destroy the exemption. Also, some state laws may require employers to provide lactation breaks to exempt employees.

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Choice of Paid or Unpaid - With respect to payment for the break time, the federal law may actually provide more choice to employers in states with lactation accommodation laws. Most state laws that already had similar mandatory breaks claim to permit the breaks to be unpaid, but if the breaks were less than 30 minutes, the time would be compensable under the FLSA, which would trump the state law. Therefore, employers in these states still had to pay the employees for the nursing breaks regardless of what the state statutes said. But because the health care law amended the FLSA and specifically provides that nursing breaks may be unpaid, the employers now have a true choice as to whether to pay for such breaks regardless of their duration.

That being said, some employers will elect to pay for nursing breaks as a simple matter of fairness. Because the FLSA requires it, employees who take unscheduled breaks of less than 30 minutes for other reasons are entitled to compensation. Although it is legal, it may not seem fair to compensate these employees while docking the pay of nursing mothers who take breaks of similar length to express milk. (It should be noted that employees who use existing paid breaks concurrently with their lactation breaks must still be paid for the original break time like the other employees.)

Location for Breaks - Employers must provide a private location, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public. For larger employers, this may require multiple private locations to accommodate several employees, or alternatively, scheduling may be necessary. One general room for all nursing mothers is probably not sufficient. The DOL has recognized that not all employers have separate rooms in some work locations, and in those situations, the DOL says that the employer may create adequate locations by setting up partitions or curtains. Also, the space can be temporary during the time that it is needed. Employers, however, should take note that if the designated space is impractical for this purpose, or if there are long waits to use the space, the DOL will consider the employer to be non-compliant. Although not in the legislation itself, the DOL has said that at a minimum, the space must contain a place for the nursing mother to sit, and a flat surface other than the floor on which to place the pump (and presumably the milk). The DOL also suggests (but does not require) that the location have electricity, a sink, and even a refrigerator. The employer must ensure that the employee has an appropriate location to store the milk, such as space for a cooler or insulating container. If storage space is not provided, the DOL will consider the employer to effectively be denying the employee her rights under the law.

Undue Hardship - The mandatory break requirement applies to all employers covered by the FLSA unless the employer can show that it employs fewer than 50 employees total *and* that such 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 DOL has stated that this is a stringent standard which will apply only in very limited circumstances. If an employer has 50 or more employees company-wide, it must comply with the law at all of its locations – even locations with only a single employee – regardless of any claimed undue hardship.

Notice – There are no employer posting, policy or notice requirements written into the law. The DOL encourages employees to provide advance notice to their employers so the employer can prepare for compliance. It is also lawful for an employer to ask a pregnant employee whether she intends to take lactation breaks after the baby is born.

Preemption - The Nursing Mothers Amendment does not preempt state laws if they are more protective of the employees. Among others, California, Georgia, Illinois and New York have laws relating to breastfeeding in the workplace.

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Remedies - The DOL says that an employee will not have a private right of action based only on denial of breaks, which will not necessarily result in lost wages because lactation breaks may be unpaid. However, an affected employee may file a complaint with the DOL, which may investigate, seek injunctive relief, and seek reinstatement or back pay for employees who are terminated or demoted as a result of taking breaks.

On the other hand, an employee will have a private right of action where she can claim retaliation for filing a complaint or causing the DOL to institute a proceeding regarding lactation breaks. For these claims, a prevailing employee may recover lost wages, liquidated damages, and attorneys' fees.

For more information about the Nursing Mother Amendment and the DOL's guidance, please contact the Constangy attorney of your choice.

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