

Break Time for Nursing Mothers – DOL Releases Details

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Ever since the Patient Protection and Affordable Care Act was signed into law in March, employers have been asking questions about a section that pertains to nursing mothers who would like to express breast milk. The U.S. Department of Labor (DOL) Wage and Hour Division published Fact Sheet #73 last week, which provides some answers.

Who Does This Affect?

The requirements only apply to employees who are not exempt from the overtime pay requirements spelled out in the Fair Labor Standards Act (FLSA).

In addition, employers with fewer than 50 employees are not subject to the new law if compliance would impose an "undue hardship," which can be determined by looking at the "difficulty or expense of compliance" for the employer in comparison to "size, financial resources, nature, and structure of the employer's business."

What is the Employer's Responsibility?

According to the Fact Sheet, employers are required to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express milk." Employers must provide "a place, *other than a bathroom*, that is shielded from view and free from intrusion from coworkers and the public. . ."

Even though a bathroom is considered private, this will not satisfy the requirements. The location must be "functional as a space for expressing milk," and if it is not a space specifically designated for nursing mothers than it "must be available when needed in order to meet the statutory requirement." An employer can satisfy this requirement by creating or temporarily converting a space, as long as it is made available when needed by the nursing mother.

Employers also must provide a "reasonable amount" of break time. The frequency and duration of the breaks needed for the nursing mother to express milk will likely vary.

The FLSA does not require employers to compensate nursing mothers for breaks taken to express milk. However, if the employer already compensates employees for certain breaks, then employees who use the compensated break time to express milk "must be compensated in the same way that other

employees are compensated for break time." Also, if the employer does not completely relieve employees from their duties, then the time must be compensated as work time.

State Laws May Prevail

Keep in mind that if you are in a state that provides greater protections to nursing mothers, the state law will still apply. Michigan does not have such a law, except that Michigan's wage and hour laws do come into play with respect to "unpaid" breaks. Under the Michigan Minimum Wage Law, the State Wage/Hour Division takes the position that breaks of less than 15 minutes must be counted as working time and must be paid. And while the Michigan Minimum Wage Law generally does not apply to employers who are covered by the FLSA, it does apply if the minimum wage under the FLSA is less than under state law. This means that there could be a claim for unpaid minimum wages under the Michigan law if employers do not pay nursing mothers for short breaks to express breast milk.

In addition, employees may be able to make a claim for unpaid wages (including overtime) under the Michigan Payment of Wages and Fringe Benefits Act. The Michigan Wage/Hour Department has not issued a formal position on the interplay between the new federal law and Michigan's wage and hour laws, and it may be some time before cases come before the Wage/Hour Division or the courts, which will provide clearer answers.

Additional Information

You can view the fact sheet at <http://www.dol.gov/whd/regs/compliance/whdfs73.htm>. If you have any questions about the requirements or how to implement them, please contact a member of the Warner Norcross & Judd Labor and Employment Practice Group.