

THE COMMENT PERIOD FOR NEW “REASONABLE BREAK TIME” REQUIREMENTS FOR NURSING MOTHERS IS QUICKLY COMING TO A CLOSE – EMPLOYERS SHOULD DECIDE NOW WHETHER TO OFFER COMMENT

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Included within the more than 2,000 pages of the Patient Protection and Affordable Care Act (“PPACA”), signed into law by President Obama on March 23, 2010, was an amendment to the Fair Labor Standards Act (“FLSA”) requiring employers to provide “reasonable break time” for nursing mothers to express breast milk. Although the rule became effective immediately, the Department of Labor (“DOL”) has published only preliminary guidance. Citing the varying potential impact of this new requirement on different employers and industries, the DOL is soliciting comments and information from the public to assist it in interpreting the Reasonable Break Time rule. **Comments will be accepted through February 22, 2011.** This comment period offers employers a valuable opportunity to influence the DOL’s interpretive guidance.

This Alert describes some of the DOL’s preliminary interpretations of the new rule and points out specific issues on which the DOL is currently seeking input.

Reasonable Break Time

The Reasonable Break Time rule requires employers to “provide a reasonable break time for an employee to express breast milk for her nursing child for one year after the child’s birth each time such employee has need to express milk.” 29 U.S.C. § 207(r)(1)(A). Moreover, employers must “provide a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public” for nursing employees. 29 U.S.C. § 207(r)(1)(B).

Facility Issues

The new rule requires employers to provide “a place, other than a bathroom, that is shielded from view and free from intrusions by coworkers and the public” to allow employ-

ees to express milk. The DOL guidance states that employers are “not obligated to maintain a permanent, dedicated space for nursing mothers” under this provision. Rather, a temporary space created or converted into a space that meets the privacy requirements of the law will suffice. At a minimum, the space provided “must contain a place for the nursing mother to sit, and a flat surface, other than the floor, on which to place the pump.” Echoing its comments on the length and frequency of breaks, the DOL emphasizes that all of the circumstances will be taken into account in assessing compliance with the facility requirements. Recognizing the challenges that these rules will pose for employers with space limitations (like restaurants and small retail establishments) and those that employ workers in non-fixed locations (like bus drivers, parcel delivery workers, law enforcement officers and medical emergency technicians), the DOL has requested public comment and advice on creative solutions for compliance under these more challenging circumstances. The DOL notes that while a bathroom is not an appropriate break space under the rule, an anteroom or lounge area connected to the bathroom might be sufficient. The DOL is soliciting comments specifically on whether and under what circumstances the use of such rooms for Reasonable Break Time purposes could comply with the law.

Finally, the DOL contends that an employer has a statutory obligation under the PPACA to comply with the requirements of the Reasonable Break Time rule regardless of where the employee performs her job. As such, the DOL’s view is that employers are required to ensure that their employees have access to an acceptable space even when working off-site, such as at a client worksite. The DOL is seeking comment on how employers can meet these obligations for off-site employees.

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Notice

Although the DOL acknowledges that employers will need notice from employees who expect to utilize the rule to express breast milk in order to comply with the obligation to provide appropriate space and time for breaks, the agency does not give advice about how that notice can be obtained. Rather, the DOL notes only that employers are permitted to ask pregnant employees if they intend to take breaks to express milk while at work. The DOL has asked for comments about how to address notice issues consistent with the rule's purposes, bearing in mind that the employer must provide break time and appropriate space "each time such employee has need to express the milk." 29 U.S.C. § 207(r)(1)(A).

Undue Hardship

The new rule provides an exemption for employers with fewer than 50 employees, where compliance with the rule would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." The DOL will not grant prospective undue hardship exemptions and predicts that employers will be able to successfully invoke the exemption "only in limited circumstances."

The DOL intends to use the FLSA workweek standard to determine whether an employer has 50 employees. The DOL has solicited comments regarding the appropriate point in time at which to count the number of employees when determining whether an employer can assert an undue hardship defense. The DOL has also requested com-

ments on whether "undue hardship" should be interpreted the way the term is interpreted under the Americans With Disabilities Act.

Although the DOL has stated that it does not presently intend to issue formal regulations on the Reasonable Break Rule, employers that foresee compliance difficulties because of space limitations or non-fixed work sites may want to take advantage of this opportunity to provide comment to the DOL. All comments will be made publicly available. The February 22 deadline for comments is fast approaching. ♦

This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking legal action.

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