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## Department of Labor Fact Sheet Details New Break Time Requirement for Nursing Mothers

By: John Kalter

On July 22, 2010, the United States Department of Labor ("DOL") issued a Fact Sheet regarding a little-known amendment to the Fair Labor Standards Act ("FLSA"). The amendment – which was contained in the new health care legislation signed into law on March 23, 2010 – requires certain employers to provide "reasonable" break time and break rooms to *non-exempt* nursing mothers to express breast milk for a nursing child. The Fact Sheet can be located at <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf>. The FLSA does not require lunch or coffee breaks, and, as a result, this amendment may catch some employers off guard.

The Fact Sheet specifies that the new amendment does *not* apply to employers with fewer than 50 employees "if compliance with the provision would impose an undue hardship." According to the Fact Sheet, however, all employees who work for an employer – regardless of work site – are counted to determine whether the small-employer exemption applies. The concept of an undue hardship is not well defined but, according to the Fact Sheet, involves a balancing of the difficulty or expense of compliance with the amendment versus the size, financial resources, nature and structure of the particular employer's business. As a result of this ill-defined term and the fact that, in other contexts such as the Americans with Disabilities Act, "undue hardship" has been narrowly read against employers, it is possible that a narrow reading will also be given to the concept of "undue hardship" under the amendment. If this becomes the case, some employers with fewer than 50 employees may also be subject to the requirements of the amendment.

Under the amendment, a covered employer must 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 the milk." The Fact Sheet specifies that this requirement must be met "as frequently as needed by the nursing mother" and that the frequency of such breaks and their duration will likely vary.

The amendment also specifies that a covered employer must provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." The Fact Sheet clarifies that no bathroom – even if private – satisfies this requirement of the amendment. Employers may create temporary space or convert an area into a space that complies with the amendment provided such space meets the requirements for privacy and lack of intrusion.

The amendment only applies to *non-exempt* employees of covered employers. A non-exempt employee who utilizes such break time need not be paid for it, unless (1) her employer already provides paid breaks and the employee uses that paid break time to express milk or (2) the employee is not completely relieved from duty during the break.

The following is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

Wisconsin and many other states already have laws addressing nursing mothers, and the new federal amendment to the FLSA does not preempt these state laws. Rather, where a state law provides greater protections to nursing mothers than the FLSA amendment, the state law's protections continue to apply. On March 10, 2010, Wisconsin enacted a law that specifies that a mother may breastfeed her child in any public or private location where the mother and child are otherwise authorized to be. In such a location, no person may prohibit the mother from breastfeeding her child, direct her to move to a different location to breastfeed, direct her to cover herself or her child while breastfeeding or otherwise restrict her from breastfeeding. The interaction of this law with the federal FLSA amendment is, as yet, unclear.

Employers who may be covered by this new amendment to the FLSA should be aware of its requirements, together with those of state law regarding nursing mothers. Members of Godfrey & Kahn's Labor & Employment practice group can assist you in interpreting these laws as they impact your workplace.

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