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Indiana Joins the List of States Providing Legal Protections to Nursing Mothers at the Workplace

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By:

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Returning to work is often cited as one of the main reasons that nursing mothers discontinue breastfeeding. Now, a growing number of states - in recognition of the health benefits of breastfeeding for the nursing mother and child - have passed specific laws giving nursing mothers the right to breastfeed and/or express breast milk in the workplace. In the past year alone, the following jurisdictions became breastfeeding-friendly for working mothers: the District of Columbia, Montana (public employers only), New Mexico, New York, and Oregon. Wyoming and Arkansas passed general laws in 2007 stating that a mother has a right to breastfeed an infant child in any public places where the mother may legally be or where others are present, which does not expressly specify, but could be interpreted to include, places of employment.

On February 27, 2008, Governor Mitch Daniels added Indiana to that growing list. Governor Daniels signed into law a bill that gives rights to nursing mothers in the workplace. The law requires private businesses with 25 or more employees to make reasonable efforts to provide a private location, other than a toilet stall, where an employee can express breast milk *during any period away from the employee's assigned duties*. Indiana does not currently require private employers to provide meal and rest break periods for employees, so the statute's language does not seem to include an additional requirement for private employers to provide a rest break. However, the law requires the employer to provide a private location if there are time periods where an employee is not required to perform assigned duties. Significantly, there is no "undue hardship" provision that employers in the private sector may invoke as a defense (as there is for state employers and their political subdivisions).

Further, Indiana's law is the first of its kind to require employers to accommodate the storage of breast milk. It requires that:

To the extent reasonably possible, an employer shall:

1. provide a refrigerator or other cold storage space for keeping milk that has been expressed; or
2. allow the employee to provide the employee's own portable cold storage device for keeping milk that has been expressed until the end of the employee's work day.

The law does, however, provide protections for employers. Specifically, the law provides that "except in cases of willful misconduct, gross negligence, or bad faith, an employer is not liable for any harm caused by or arising from either of the following that occur on the employer's premises: (1) the expressing of an employee's breast milk; or (2) the storage of expressed milk."

The law also requires state and political subdivisions to provide additional accommodations. Specifically, covered public sector employers must provide reasonable paid break time each day for an employee to express breast milk and a location for doing so in close proximity to the employee's work area. The break time must, if possible, run concurrently with any break time already provided to the employee. An employer need not provide break time if doing so would unduly disrupt the government's operations.

The law does not contain any provisions for remedies for violations of the new law. Thus, the remedies are unclear at this time.

State Senator Vi Simpson, who authored the Indiana bill, stated that it "benefits employers because women with infants are the fastest growing section of the labor force and breastfeeding typically causes lower healthcare costs for the mother and child." Senator Simpson also identified reduced absenteeism and improved employee retention as additional benefits of providing this right to nursing mothers.

Other Jurisdictions that Require Employers to Reasonably Accommodate Nursing Mothers

Although there is no federal law requiring employers to provide accommodations for nursing mothers in the workplace, many states have enacted laws protecting a nursing mother's right to breastfeed and/or express breast milk in the workplace. Generally, these states require or strongly recommend that employers provide a reasonable amount of break time for nursing mothers to express breast milk. Some states also require that employers make reasonable efforts to provide employees with a private and secure room or other location, *other than the bathroom or a toilet stall*, in close proximity to the work area to express milk. Doctors and healthcare professionals recommend that all babies be exclusively breastfed (nothing else is needed) for a *minimum* of six months; after which the introduction of solids and continued breastfeeding for a *minimum* of one year. In following healthcare breastfeeding recommendations, all states with lactation accommodation laws require employers to provide this accommodation for at least one year, but some states do not impose any time limits for the accommodations. Employers in states without time limits for accommodations may, therefore, need to accommodate a nursing mother for as long as she chooses to breastfeed her child. In addition to recently passed laws in the jurisdictions mentioned above, the following states also have lactation accommodation laws for nursing mothers: California, Connecticut, Georgia, Hawaii, Illinois, Minnesota, Mississippi, Oklahoma, Rhode Island, Tennessee and Virginia.

Texas and Washington do not have laws requiring employers to provide nursing mothers with a break or location for expressing milk, but instead encourage businesses to take this route by allowing those with breastfeeding/expressing-breast-milk policies to self designate and advertise as "mother-friendly" and "infant-friendly" workplaces.

Some jurisdictions, including Hawaii and the District of Columbia, prohibit employers from discriminating against women on the basis of breastfeeding.

States Where Legislation Is Pending

Other states are soon likely to join the growing list of jurisdictions to require some sort of accommodation for breastfeeding/nursing mothers. Currently, Alaska, Colorado, Massachusetts, Vermont, and Wisconsin are considering the enactment of similar legislation. The bills are in various stages of the legislative process but generally do not substantially deviate from the general requirements mentioned above.

In view of these legal developments, employers should consider:

- Reviewing their handbooks and policies and establishing a lactation policy in their employee handbooks.
- Training managers, supervisors, and human resources personnel on the right of nursing mothers to breastfeed and/or express breast milk in the workplace.
- Finding and designating a private location that is *not* within the bathroom for nursing mothers to express breast milk.
- Assessing the possibility of providing a separate cold storage space for breast milk as employees may not feel comfortable storing breast milk with employees' lunches.
- Including within their leave of absence paperwork the company's policy on lactation accommodation and the location of and the fact that there is a lactation room for use upon the employee's return.
- Notifying employees upon their return from maternity leave of the company's policy on lactation accommodation.

Employers should consult employment counsel attorneys for the specifics of the laws in their jurisdiction(s) on this issue and for advice on how to address this issue at their workplaces.

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