Employers Must Give Reasonable Break Time to Non-Exempt Employees who are Nursing Mothers

The health care reform laws enacted earlier this year are far-reaching and have wide implications. Under the subtitle, “Creating Healthier Communities,” the health care reform laws amend the Fair Labor Standards Act (“FLSA”) to require employers to allow non-exempt employees who are nursing mothers to take breaks during the day to express the milk.1 The currently available details of this requirement are summarized below.2

ABOUT THE LAW - IN GENERAL

Beginning March 23, 2010, an employer must provide “a reasonable break time” to an employee who is a nursing mother “each time such employee has the need to express milk for her nursing child.” The employer must accommodate breaks for a nursing mother for at least one year after the child’s birth.

The law only applies to employees who are nursing mothers and who are non-exempt employees under the overtime pay requirements of Section 7 of the FLSA. The law does not apply to nursing mothers who are exempt from the FLSA’s overtime pay requirements.

NURSING MOTHER BREAK AREA

The employer must provide a place, other than a bathroom, for a nursing mother to take this break. The place must be “shielded from view and free from intrusion from coworkers and the public.”

The space provided “must be functional as a space for expressing breast milk.” Furthermore, if the space is not dedicated to the nursing mother’s use, “it must be available when needed.” An employer is allowed to temporarily create or convert a space for use by a nursing mother, or make available a space when needed by the nursing mother, as long as the space is shielded from view, and free from any intrusion from co-workers and the public.

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1 Section 7(r) of the Fair Labor Standards Act of 1938 (29 U.S.C. 207), as added by Section 4207 of the Patient Protection and Affordable Care Act, Public Law 111-149 (March 23, 2010), which can be found at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ148.pdf.

2 See also, Fact Sheet #73, Break Time for Nursing Mothers under the FLSA, as published by the Wage and Hour Division of the U.S. Department of Labor. This Fact Sheet can be found at http://www.dol.gov/whd/regs/compliance/whdfs73.pdf.
PAY NOT REQUIRED DURING THE BREAK

Employers are not required to pay employees for breaks for the purpose of expressing milk. However, if the employer already provides compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for that break time. In addition, the employee must be completely relieved from duty during this break time otherwise the employee must be compensated for the break time as if it were work time.

**BHFS Comment:** This law raises many questions that we hope will be addressed in regulations. For example, it is not clear whether under the requirement to provide a “reasonable break time,” employers could impose limits on the length and number of nursing mother breaks employees may take each day.

SMALL EMPLOYER EXCEPTION

Employers with fewer than 50 employees are not required to provide this nursing mothers’ break time if meeting this requirement “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.” An employer must count all employees, regardless of work site, when determining whether this small employer exemption may apply.

**BHFS Comment:** We assume that this determination will be based on each small employer’s individual facts and circumstances, but we hope there will be some guidance as to what is meant by undue hardship or significant difficulty.

 EFFECT ON STATE LAW

This federal law is not intended to override any state law that provides greater protections to an employee who is a nursing mother (for example, if a state law requires an employer to provide compensated break time, provide break time for exempt employees, or provide break time beyond one year after the child’s birth).

**BHFS Comment:** More than 20 states have laws on the books regarding required work breaks for nursing mothers.³ Contact your employment counsel for more information about the state laws that may apply to your business.

CONSIDERATIONS FOR EMPLOYERS

Among the things about this law that employers should be considering are:

- Small employers should not assume they are exempt from the law. They should consult with employment law counsel about this rule and its applicability to them.

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Employers must decide whether to provide these breaks to all employees who are nursing mothers, regardless of whether they are exempt or non-exempt.

Employers should identify an appropriate place for nursing mothers to take this required break, if no location already has been established. So as to be prepared, this should be done for each work location that has female employees of childbearing age.

Employers should keep in mind that, until more guidance is issued, they must be flexible regarding the frequency and length of an employee's nursing mother breaks.

Employers should prepare and distribute a “nursing mothers’ break” policy, incorporate that policy into its employee handbook and train managers appropriately.

Employers should be on the lookout for regulations providing additional details about this law and its application and be prepared to adapt their policy and practice as necessary.

Now also is a good time for employers to review applicable state law requirements regarding nursing mothers and make sure they are compliant with those laws -- especially if the state laws are stricter than this federal law.