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LABOR AND EMPLOYMENT CLIENT ALERT

DOL Issues Guidance Regarding Break Time for Nursing Mothers



SUMMARY

The Department of Labor recently published “Fact Sheet #73” to provide guidance on an employer’s obligation to provide reasonable break time for nursing mothers.

The DOL Fact Sheet addresses the following issues:

- [Overtime exempt employees are not entitled to the break](#)
- [Undue hardship and the 50 employee threshold](#)
- [Frequency and duration of breaks](#)
- [No compensation required for breaks](#)
- [Location for breaks](#)

[READ FULL ARTICLE](#)

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DOL ISSUES GUIDANCE ON OBLIGATION TO PROVIDE BREAK TIME TO NURSING MOTHERS

On April 8, 2010, we issued a [Labor and Employment Client Alert](#) summarizing the requirements of the Patient Protection and Affordable Care Act of 2010 (“PPACA”), which amended the Fair Labor Standards Act of 1938 (“FLSA”) to require employers to provide:

- “Reasonable break time” for an employee to express milk for her nursing child for 1 year after the child’s birth; and
- A location, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, where the employee may express breast milk.

As noted in our [Client Alert](#), the plain language of the PPACA left many questions unanswered, and left us all waiting for guidance from the U.S. Department of Labor (“DOL”).

Additional guidance finally has arrived. The DOL recently published “Fact Sheet #73” to provide general information about an employer’s obligation to provide reasonable break time to nursing mothers. A copy of the Fact Sheet is attached on page 5.

The DOL Fact Sheet clarifies the following important issues:

Overtime Exempt Employees Not Entitled to the Break

The DOL has clarified that only employees who are **not exempt** from the FLSA’s overtime requirements are entitled to the break time. In other words, under the FLSA, nursing mothers who are exempt from the FLSA’s overtime requirements are not entitled to break time to express milk.

Of course, employers may voluntarily choose to extend the break time entitlement to both overtime exempt and non-exempt employees. Doing so may be a good employee relations decision. Employers, however, should not deduct from a salaried exempt employee’s pay if the employer elects to provide them break time; doing so could jeopardize the exempt classification. On the other hand, it would be permissible for an employer to make a deduction from a salaried exempt employee’s accrued PTO or vacation time for break time spent expressing milk.

Undue Hardship and the 50 Employee Threshold

The FLSA’s break time amendment does not apply to employers with fewer than 50 employees if the law would impose an “undue hardship” on the employer. According to the DOL, “[a]ll employees who work for the covered employer, **regardless of work site**, are counted when

determining whether this exemption may apply.” Therefore, an employer with fewer than 50 employees at one particular location, but more than 50 employees in the aggregate at all locations, is obligated to comply with the break time requirements of the FLSA amendment, and may not attempt to avail itself of the “fewer than 50 employee” undue hardship exception.

For those employers with fewer than 50 employees in the aggregate, regardless of location, an undue hardship is determined by looking at the difficulty or expense of compliance in comparison to the size, financial resources, nature, and structure of the employer’s business. Therefore, what may be an undue hardship for one employer with fewer than 50 employees may not be an undue hardship for another employer with fewer than 50 employees. The inquiry will be fact specific and likely a fairly high threshold for many employers to meet.

Amount of Time for Breaks

According to the DOL, employers are required to provide a “reasonable amount of break time” to express milk, and such breaks must be given “as frequently as needed” by the nursing mother. In terms of the length of the break, what is “reasonable” will depend largely on the employee’s needs, as the amount of time needed to express milk varies by woman. Unless it is clear that an employee is abusing her break time rights, employers are advised to defer to the employee with respect to the length of the break, and the number of breaks taken each day.

Compensation for Breaks

According to the DOL, “[e]mployers are not required under the FLSA to compensate nursing mothers for breaks taken for the purpose of expressing milk.” If, however, the employer already provides paid breaks (normally no longer than 15-20 minutes) to its employees, and the nursing mother uses that break time to express milk, then the nursing mother must be compensated in the same way the other employees are compensated for break time. Also, if the nursing mother performs otherwise compensable work during the nursing break, and therefore is not completely relieved from duty during the nursing break, then the nursing mother must be paid for the entire break. To avoid having to pay nursing mothers for the break time, employers should establish and enforce a policy prohibiting nursing mothers from performing any work during the break.

Location of Breaks

The DOL reiterates the statutory language that a bathroom, even if private, is not a permissible location for the break. According to the DOL, employers are not required to maintain a space that is dedicated solely for nursing mothers’ use, but a shared-use room must be available to be used privately (and shielded from view and free from intrusion) when needed by a nursing employee to express milk.

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The DOL also states that the location provided “must be functional as a space for expressing milk.” While the DOL does not clarify what it means by “functional,” we advise employers to establish a location that, at a minimum, has an electrical outlet, a locking door, adequate ventilation, and a chair. While not expressly required under the FLSA amendment, we also recommend that employers provide a small refrigerator, or a shelf in a currently maintained refrigerator, where employees can store their breast milk.

Keep in mind that various State laws may provide nursing mothers with greater rights than the PPACA’s amendment to the FLSA. Under Florida law, for example, a mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be, even if her breast or nipple is exposed.

If you have any questions regarding these DOL guidelines, please do not hesitate to contact Andrew L. Rodman at 305-789-3225 or arodman@stearnsweaver.com.

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Fact Sheet #73: Break Time for Nursing Mothers under the FLSA

This fact sheet provides general information on the break time requirement for nursing mothers in the Patient Protection and Affordable Care Act (“PPACA”), which took effect when the PPACA was signed into law on March 23, 2010 (P.L. 111-148). This law amended Section 7 of the Fair Labor Standards Act (FLSA).

General Requirements

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 the milk.” Employers are also required to 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 FLSA requirement of break time for nursing mothers to express breast milk does not preempt State laws that provide greater protections to employees (for example, providing compensated break time, providing break time for exempt employees, or providing break time beyond 1 year after the child’s birth).

Time and Location of Breaks

Employers are required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk as well as the duration of each break will likely vary.

A bathroom, even if private, is not a permissible location under the Act. The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mother’s use, it must be available when needed in order to meet the statutory requirement. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view, and free from any intrusion from co-workers and the public.

Coverage and Compensation

Only employees who are not exempt from the FLSA’s overtime pay requirements are entitled to breaks to express milk. While employers are not required under the FLSA to provide breaks to nursing mothers who are exempt from the overtime pay requirements of Section 7, they may be obligated to provide such breaks under State laws.

Employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with the provision would impose an undue hardship. Whether compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer’s business. All employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply.

Employers are not required under the FLSA to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, where employers already provide 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

break time. In addition, the FLSA's general requirement that the employee must be completely relieved from duty or else the time must be compensated as work time applies. See [WHD Fact Sheet #22, Hours Worked under the FLSA](#).

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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Andrew Rodman is a Shareholder in the Labor and Employment Law Department. He represents and advises clients on a broad range of labor and employment related matters under state and federal law. In particular, Mr. Rodman's practice focuses on employment law discrimination and harassment, whistleblower and retaliation litigation, overtime and wage and hour litigation, non-compete and trade secret litigation, and employment law counseling on issues such as hiring, discipline, reduction in force and termination, leave and time-off issues, accommodation issues, and drafting of employee handbooks and employment contracts.

Prior to joining the Firm, Mr. Rodman worked as an associate in the New Haven, Connecticut firm Siegel, O'Connor, Schiff & Zangari, and in the Boston, Massachusetts firm Stoneman Chandler & Miller. In each of those firms, Mr. Rodman represented management in all aspects of labor and employment law.

Representative Experience

- Defense of employers in state and federal courts and administrative agencies in discrimination, retaliation, harassment, and wage and hour lawsuits brought under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Florida Civil Rights Act, and other federal, state and local EEO laws and regulations governing the employment relationship
- Litigation on behalf of clients in matters relating to non-compete, confidentiality and non-solicitation agreements, as well as actions for theft of trade secrets
- Works with clients in conducting internal investigations of employment discrimination claims and preparing position statements for administrative agencies in response to charges of discrimination and retaliation
- Conducts internal audits for employers to ensure compliance with state and federal minimum wage and overtime laws

- Advises clients on day-to-day employment related matters, including drafting and implementing personnel policies and procedures, managing employee discipline and termination, conducting internal investigations, handling plant closings and layoffs, wage and hour practices, employee leave issues, and employee drug testing. Mr. Rodman also conducts training sessions for clients concerning state and federal EEO requirements

Presentations

- The Collective Action Lawsuit – What It Is And How To Prevent It
- Wages Are Now A Class Act: New Trends In FLSA Litigation
- Incoming Wage & Hour Lawsuits – Are You A Target?
- Occupational Safety Health Act: Newsflash – OSHA Is Not Dead
- Equal Employment Opportunity Commission's Technical Assistance Program Seminar (TAPS) - Americans with Disabilities Act Amendments of 2008

ABOUT THE LABOR AND EMPLOYMENT DEPARTMENT

We understand that our clients are in an extremely competitive business market and that employers (large and small in both the public and private sectors) need timely, practical business-oriented advice on labor and employment issues. We understand that our clients must deliver services faster and better to remain competitive and profitable. We also understand that “human resources” are not a commodity, but real people with real workplace problems that are often difficult for our clients to address alone. We believe that partnering with our clients to provide strategic preventive counseling, training (in English, Spanish and Creole), audits and legal representation is the best antidote to complex and challenging workplace problems.

We also believe that if our clients become involved in a lawsuit, grievance, arbitration, claim of discrimination or wrongful discharge in any legal forum, they each deserve ethical and zealous representation. We are experienced trial attorneys, not just “litigators.” We are also labor attorneys with “in the trenches” experience in dealing with unions seeking to represent blue collar, white collar and professional employees.

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*“The team, comprised of 18 attorneys in Miami, Tampa and Fort Lauderdale, **offers a superb service and extremely high-quality work.** The group is considered to be **among the best in the state** and the lawyers have a great depth of experience across a range of areas including union avoidance issues, employment discrimination litigation, noncompete agreements, and representing clients before administrative agencies. However, its practice is by no means confined to these areas and the lawyers are also **adept at dealing with a broad range of issues** including increased amount of litigation of late, particularly in relation to age discrimination and wage and hour class action along with FLSA-related matters. The team has been described as **synonymous with labor and employment in Florida and extremely experienced.**”*

– **Chambers USA**