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April 8, 2010

LABOR AND EMPLOYMENT CLIENT ALERT

Employers Must Provide Break Time for Nursing Moms



SUMMARY

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act of 2010 (“PPACA”). While the PPACA focuses on making changes to the country’s healthcare system, Congress included an amendment to the federal Fair Labor Standards Act of 1938 (“FLSA”) to allow nursing women to take breaks to express breast milk at work.

Specifically, the PPACA amends the 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.

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EMPLOYERS MUST PROVIDE BREAK TIME FOR NURSING MOMS

On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act of 2010 ("PPACA"). While the PPACA focuses on making changes to the country's healthcare system, Congress included an amendment to the federal Fair Labor Standards Act of 1938 ("FLSA") to allow women to take breaks to pump breast milk at work.

Specifically, the PPACA amends the 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.

Frequency and Duration of Nursing Breaks

The FLSA amendment does not define the phrase "reasonable break time." The U.S. Department of Labor ("DOL") has not yet provided any guidance on the amount of time that must be given for the breaks. Similarly, while the law provides that an employee may take the breaks for up to 1 year after the birth of the child, the law does not state how many breaks the employee may take during any given day or week. Rather, the law provides that a "reasonable break" may be taken "each time" the employee "has need to express the milk." In short, unless it appears that an employee is taking unreasonably long breaks, or that an employee is taking breaks for reasons other than to "express milk," the break time should be provided. We anticipate that the DOL will provide guidance on this issue.

Pay v. No-Pay

The FLSA amendment provides that an employer shall *not* be required to pay for the "reasonable break time." This "no pay" provision, however, may, depending upon the length of the break, conflict with DOL regulations that require employers to pay non-exempt employees for rest periods of short duration (generally up to 20 minutes). The "no pay" statutory amendment appears to trump the DOL regulations. Until the DOL provides guidance on this issue, however, employers should be aware that docking employees for taking "reasonable break time" of up to 20 minutes in duration to "express milk" is not without risk.

Employers should also proceed with caution when dealing with an exempt, salaried employee who takes breaks under the new law. On its face, the new law appears to permit deductions from an exempt employee's salary, as is permitted when a salaried, exempt employee takes unpaid leave under the Family and Medical Leave Act. Absent any guidance from the DOL,

however, making deductions from an exempt employee's salary is not without risk and could jeopardize the employee's exempt status.

50 Employee Threshold and "Undue Burden" Defense

The FLSA amendment does not apply to employers with fewer than 50 employees if the law would impose an "undue hardship." An "undue hardship" is a "significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." The law does not provide any further guidance on the meaning of "undue hardship." Similar terminology, however, appears in other federal employment-law statutes, such as the Americans With Disabilities Act ("ADA"). The "undue hardship" defense under the ADA requires a fact-specific analysis and sets a fairly high threshold for employers. Therefore, many employers with fewer than 50 employees may be covered by the FLSA amendment.

State Laws

Prior to passage of the PPACA, some states, including Florida, already had laws on the books providing rights to nursing mothers. State laws that provide greater rights to nursing mothers remain in effect.

Under Florida law, a mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be, even if the mother's breast or nipple is exposed. In several respects, the new FLSA amendment provides greater rights to nursing mothers than the Florida law. Therefore, Florida employers, in addition to complying with the state law, must provide the new rights accorded by the FLSA amendment.

If you have any questions regarding this amendment to the FLSA, please do not hesitate to contact Andrew L. Rodman at 305-789-3225 or arodman@stearnsweaver.com.

ABOUT THE LABOR AND EMPLOYMENT DEPARTMENT

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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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– Chambers USA, 2009