



DAILY LABOR REPORT



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FLSA

The Patient Protection and Affordable Care Act amends the Fair Labor Standards Act to require employers to allow work breaks for nursing mothers and to provide facilities for them to express milk. In this BNA Insights article, attorney Angela L. Simmons with Thompson Hine in Cleveland takes a close look at the language of the law and corresponding state laws and offers suggestions for employers seeking to comply with the new requirements.

Understanding Workplace Accommodations for Nursing Employees

BY ANGELA L. SIMMONS

One significant yet seemingly little known aspect of President Obama's "health care reform act" requires employers to provide breaks and accommodations for their employees who are breastfeeding ("lactation breaks"). Specifically, the Patient Protection and Affordable Care Act ("PPACA"), Section 4207, amends the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207, by requiring employers to provide reasonable unpaid break time for employees to express their breast milk (the act).

There are three basic requirements in the act:

- the breaks are required for up to one year after the child's birth;

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- the breastfeeding employee is allowed breaks as needed to express milk; and

- the employer is required to provide a private room, other than a bathroom, that is free from intrusion, in which the employee may express her breast milk.

There is an exemption for employers of fewer than 50 employees for which compliance with these requirements would impose an undue hardship. The amendment further provides that it does not supersede state laws that offer greater protections to employees.

I. The Basis for the Workplace Accommodations.

While the law creates additional burdens for employers, it addresses two important issues. First, it accommodates some of the difficulties faced by the growing number of women who are both working and breastfeeding and who, practically speaking, cannot sacrifice one for the other. Indeed, the general consensus for decades has been that breast milk is the healthiest way to feed an infant. As a result, more than 70 percent of new

mothers now breastfeed immediately after birth.¹ While most of those women who are employed full time return to work within the first year of giving birth, only 25 percent of them combine working and breastfeeding for at least a month.² As advocacy groups continue to encourage breastfeeding beyond the first month, that number will likely increase. Thus, the logical result is that more and more employers will have employees who need lactation breaks during the workday and the demand or need for an employment accommodation for these mothers is likely to increase.

Second, the law provides some legal protection for women who may otherwise feel discriminated against based on their decision to breastfeed. For several years, women have sought protection through the courts under the Pregnancy Discrimination Act (PDA) for disparate treatment that was allegedly based on their nursing responsibilities. Generally, however, courts have held that the PDA did not provide relief for the alleged discrimination.³ Thus, advocacy groups have lobbied for many years for a federal law that protects nursing mothers who wish to express milk in the workplace. Arguably, to the extent such discrimination exists, this law fills the “gap” that exists in the PDA.

II. Federal and State Law Compliance Issues.

While the federal act is fairly simple, there are two basic concerns for employers. First, because the federal law became effective when it was signed in March 2010, and does not supersede greater state laws, employers in certain states must quickly determine which law applies. Subsequently, these employers also will have to determine how to develop and implement their policies to comply with both federal and state requirements as necessary. Second, where only the federal law applies, employers will need to understand how to comply with the act for either common or unusual situations.

It is worth noting that once the related federal regulations are issued, many, if not all, of these concerns will be addressed. For now, the Department of Labor (DOL) has issued some interim guidelines for the federal law, which are discussed below, as relevant.⁴

A. Which Is “Greater?” Distinctions in the Federal and State Laws. As an initial matter, 19 states and the District of Columbia have laws that affirmatively protect an employee’s right to express milk in the workplace.⁵ Of those locations, only 17 actually *mandate* that employ-

ers provide break time and some kind of accommodation, which are:⁶

Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Maine, Minnesota, Montana,⁷ New Mexico, New York, Oklahoma, Oregon, Rhode Island, Tennessee, and Vermont.⁸

The other two states, Hawaii and Mississippi, provide much less protection than the federal law. In these two states, employers are prohibited from forbidding employees from expressing milk during a meal period or break period. There is no mandate that the break be affirmatively provided, nor that a particular accommodation be provided. Thus, because Hawaii and Mississippi only prohibit interference with lactation during breaks, without mandating them, they are superseded by federal law. Indeed, there also is protection against discrimination based on exercising FLSA rights.

As indicated below, the remaining 17 state laws are very much like the federal law, but some contain greater and/or lesser requirements than the federal law.⁹

■ **Who to Accommodate?** Under the federal law, lactation breaks are not mandated for employees who are exempt under Section 207 of the FLSA. As the DOL notes, however, states do not necessarily make this distinction. In fact, as of this writing, none of the states herein limits nursing mother accommodations to non-exempt employees. Therefore, on the issue of who to accommodate, all such state laws supersede federal law.

■ **Compliance Exceptions: States With Less Protection Than Federal Law.** While federal law excuses employers of fewer than 50 employees if compliance would create an undue hardship, in *Arkansas, Connecticut, Georgia, Illinois, Indiana, Maine, Minnesota, Montana, New York, Oregon, Rhode Island, Tennessee,* and the *District of Columbia*, the laws mandate accommodations where “reasonably possible” or require only that employers make a “reasonable effort” to provide certain accommodations regarding the room—e.g., that it be close to the work area.

■ **Break Period: States With Less Protection Than Federal Law.** Federal law requires that the break be provided “as needed” by the mother. However, in *Georgia, Illinois, Minnesota, Oregon, and Tennessee*, the break times must be concurrent with already provided breaks, where possible. As well, *Oregon* specifies that employers provide only a 30-minute rest period to express milk during a four-hour period, unless the employer and employee agree otherwise.

■ **The Lactation Room: States With Greater and Less Protection Than Federal Law.** Federal law prohibits the employer from using its bathrooms to accommo-

¹ Wendy I. Slavit, *Investing in Workplace Breastfeeding Programs and Policies: An Employer’s Toolkit* (Center for Prevention and Health Services, National Business Group on Health 2009).

² *See id.*

³ *See e.g., Puente v. Ridge*, 324 Fed. Appx. 423, 106 FEP Cases 678 (5th Cir. 2009) (explaining that the Pregnancy Discrimination Act does not impose an affirmative duty on employers to accommodating lactation breaks).

⁴ *See*, <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf>

⁵ Alabama and Texas, meanwhile, protect only a mother’s right to *breastfeed* in any location where she is otherwise authorized to be present.

⁶ The following states have statutes that merely *encourage* workplace accommodations for nursing mothers: North Dakota, Virginia, Washington, and Wyoming

⁷ These mandates apply to public employers only.

⁸ Georgia and Oklahoma’s statutes seem ambiguous in that they say an employer “may” provide lactation breaks; but other language in their states provides that the employer is not required to accommodate the nursing mother “if” certain circumstances exist. Despite the ambiguity, given the latter language, this article treats the accommodation breaks under Georgia and Oklahoma as mandatory.

⁹ These distinctions are not all-inclusive, but highlight those differences deemed most noteworthy for this article.

date lactation breaks. But in *Arkansas, Maine, New Mexico, Rhode Island*, and the *District of Columbia*, the lactation room must also be “clean” or “sanitary.” Conversely, in *California, Mississippi, New York, and Oklahoma*, there is no mandate regarding the nature or condition of the lactation room.

■ **The Accommodation Period: States With Greater Protection Than Federal Law.** Federal law provides for accommodations up to the first year after birth, but *Colorado, New York, Maine, and Vermont* provide for accommodations beyond first year of a child’s life. Colorado provides for a two-year accommodation; and New York, Maine, and Vermont provide a three-year accommodation.

B. Impact for Employers. Despite the various differences between state and federal laws, the above-noted differences are, on balance, relatively minor and are reconcilable with federal law. First, the “reasonable effort” difference may actually be a distinction without a difference. For example, *Colorado, Connecticut, Oregon, Rhode Island, and District of Columbia* laws define “reasonable effort” as an effort that does not impose an undue hardship. While not all states define “reasonable effort” exactly this way, this definition or something similar, would likely apply in other states. Accordingly, for states that only require a reasonable effort to provide a lactation room, that effort would likely amount to the same undue hardship standard under the federal act.

Further, although some states require that lactation breaks run concurrently with the standard break policy, they also note that this is required only “if possible.” Thus, this difference is likely insignificant since the language “if possible” should necessarily allow for need-based breaks. Finally, in terms of the different requirements regarding the room, regardless of the mandates, employers should generally expect to provide a clean room in all cases. To be sure, the federal guidelines prohibit the use of a bathroom as a lactation room presumably because of its unsanitary nature. Thus, it would make sense that any room that is provided should not be unsanitary.

Ultimately, rather than wrestle with these differences, employers should comply by using a policy that implements the greatest protection overall. Thus, for example, in New York—where the accommodation period is longer, but only a reasonable effort is required and there are no specifics regarding the room—an employer’s policy would provide for a three-year accommodation; with a reasonably clean, non-bathroom, lactation room; and it would provide the room unless there is an undue hardship under the federal standard.

The bottom line is that while employers in states with lactation break laws are obligated to follow the law that provides greater protection, there are few material differences between most of those states’ laws and the act. The differences that do exist can and should be reconciled into one policy that encompasses the greatest of the federal and state protections.

III. Federal Law Guidelines.

Federal regulations for the act are pending, so in the interim employers should seek legal counsel for assistance with particular issues. Counsel may, for example, be able to give guidance on unique situations by interpreting other related or similar aspects of the FLSA

regulations. Nevertheless, there are few considerations that are worth noting for now:

■ General Compliance.

Because the law is effective immediately, an employer’s first step is to ensure that it has the space available when needed. Even if there are administrative issues to be addressed, the provision of a lactation room should not be put on the back burner. Indeed, employers are not likely going to be excused from compliance based on their internal administrative delays.

Administratively, policy updates and training are essential. Employers should immediately update their policies and procedures for compliance with the amendment’s requirements—and advising employees of their rights. Notwithstanding whether the regulations will require employers to post a notice of this right, doing so is a relatively easy way to help minimize risks for noncompliance. Employers also need to advise and train their managers and supervisors regarding this requirement. This is especially so for those who will work most closely with the employees and actually manage the breaks.

Finally, employees should be trained on the requirements under these laws. Employees are on the front line of these issues, and can either intentionally or inadvertently hamper an employer’s ability to comply with laws. Thus, to help avoid liability or unnecessary delays based on co-worker interference, educating all employees is an important step.

■ Developing the ‘Lactation Room.’

The DOL guidelines state:

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.

In addition to the above, and the pending federal regulations, employers also should let common sense guide their actions. For example, some employers wonder whether they must install a lock for the designated room to make it “free from intrusion.” While a lock generally would make a room free from intrusion, employers should consider whether something as simple as an “In use” sign is sufficient based on workplace practices. If, for instance, the designated room is one that otherwise has multiple uses and frequent traffic, a lock may be more effective than simply a sign. Conversely, if the room is an empty office that garners little traffic, a sign may suffice. In short, “free from intrusion” is a nebulous phrase, and, for now, depends on the circumstances. Ultimately, however, employers should be guided by sound discretion.

■ Undue Hardship.

Employers of fewer than 50 employees are exempted only if the accommodation would impose an undue hardship. The act states that an “undue hardship” is determined by weighing the “significant difficulty or expense” of providing breaks against the “size, financial resources, nature, or structure of the employer’s business.”

This would necessarily be a case-by-case determination. But, for the most part, an employer should be careful to distinguish between “undue hardship” and simply an inconvenience. Employers are encouraged to

think objectively about solutions to inconveniences. There are many resources available for employers needing insight on how best to accommodate a nursing employee.¹⁰ But if it decides that compliance would indeed create an undue hardship, it should have documentation to back up that assertion.

■ **Break Times and Length.**

Because the breastfeeding mother determines when she needs a lactation break, supervisors should be cautioned to not hinder an employee's lactation break based on, for example, a perception that an employee is

abusing her break time or simply take a seemingly unreasonable amount of time. Rather, supervisors should be encouraged to simply document their concerns and observations. To the extent there are concerns regarding abuse, the best thing an employer can do is have the supervisor and employee keep track of time and the length of each break. Documentation is the best tool for addressing disputes that arise later. In the meantime, unless a particular person's break times are a significant issue for the business, it is probably not worth creating a dispute on the issue.

In sum, as we await federal regulations, employers should simply use their best judgment in complying and seek legal counsel to address unique situations.

¹⁰ Investing in Workplace Breastfeeding Programs and Policies: An Employer's Toolkit, *supra*.