LEGAL UPDATES

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Department of Labor Issues Preliminary Interpretation for Nursing Mothers at Work Requirements

Service

Labor & Employment

On December 21, 2010, the Wage and Hour Division of the Department of Labor (WHD) issued preliminary interpretations of the employer's obligations under the Patient Protection and Affordable Care Act (PPACA) Nursing Mothers at Work provisions. That portion of the statute requires most employers to provide "reasonable break time for an employee to express breast milk for her nursing child for one 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 workers and the public, which may be used by an employee to express breast milk."

Although these provisions became effective when President Obama signed the PPACA on March 23, 2010, this preliminary interpretation gives employers guidance on how the law will be interpreted and enforced going forward. The WHD has also invited comments from the public about the issues raised in the preliminary interpretation.

Key Points in the Interpretation

Coverage: The law applies only to non-exempt employees of an "enterprise" (a business with two or more employees that has annual sales of at least $500,000, or a hospital, a business providing medical or nursing care for residents, schools and preschools and government agencies). It also covers employees who are "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

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Compensation for Break Time: Although the law does not require the employer to compensate covered employees, the interpretation clarifies that if the employer already provides compensated breaks to employees, the covered employees must be paid for that portion of time expressing milk equal to the time paid other employees during breaks. The employer does not have to compensate for time that exceeds the paid break time. The WHD encourages employers to permit nursing employees to make up unpaid break time.

Reasonable Break Time: The interpretation requires employees to take into consideration the frequency and number of breaks a nursing mother "might need and the length of time she will need to express breast milk." The analysis of reasonable time will also include the time it takes to get to the lactation site, the time it takes to gather, set up and clean a breast pump or other supplies and to secure and store the milk. The WHD encourages nursing employees to give employers notice of the intent to take breaks, and clarifies that it is permissible for the employer to ask an expectant mother if she intends to take breaks to express milk.

Expression Site: The statute requires the employer to provide nursing employees "a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public." The interpretation indicates that an employer is in compliance if it has partitions, curtains or other means of affording privacy, as well as signage or a lock to ensure no interruption.

Ease of access is also critical as the interpretation indicates that locating sites too far from the work area or having too few sites to accommodate the number of nursing employees would make the employer non-compliant with the statute. Moreover, the site must be functional and must have, at a minimum, a place to sit, a flat surface other than the floor for the breast pump and would ideally have access to electricity. Employers must also provide an area for storing breast pumps and milk in such areas as a locker, cabinet or closet.

Small Employer Exemption: This exemption from the law applies only to employers with fewer than 50 employees and only if the employer can demonstrate that compliance with the statute would cause the employer "significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business."

FMLA: The WHD has determined breaks under this statute would not properly be considered FMLA or counted against the FMLA leave entitlement.

Enforcement: Complaints will be received and handled by the WHD, which can seek injunctive relief. Termination of an employee protected by the statute for exercising her rights under the law could result in litigation by the WHD to obtain reinstatement and reimbursement of lost wages.

What This Means to You

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Covered employers who have policies and procedures for compliance with the requirements under the statute should compare these against this guidance to evaluate whether they meet these interpretations of the legislation and make adjustments as necessary, particularly in the determination of a “reasonable break time.” Employers not yet in compliance should immediately establish such policies and procedures consistent with these interpretations. Finally, the WHD has requested public comment about the interpretations. Such comments will be received until February 19, 2011. Comments may be submitted through the Federal eRulemaking Portal: http://www.regulations.gov, or by mail to Montaniel Navarro, U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-3502, Washington, D.C. 20210.

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