

PRESIDENT OBAMA'S HEALTHCARE REFORM REQUIRES WORKPLACE BREAKS FOR NURSING MOTHERS

Did you know that the new healthcare reform law contains a provision amending the Fair Labor Standards Act to require employers to provide breaks and a special location for nursing mothers?

When President Obama signed the Patient Protection and Affordable Care Act (PPACA) into law on March 23, 2010, a new and little-discussed provision found at Section 4207 of PPACA which amends Section 7 of the Fair Labor Standards Act (FLSA) imposed new requirements on employers to provide to nursing mothers both reasonable breaks and a unique private space, other than a restroom, to enable them to express milk for their nursing child, which would include either breastfeeding or pumping. This law is currently in effect and employers must take action to comply with this new law.

WHO IS AFFECTED?

Under PPACA's provision amending the FLSA (the Amendment), all employers covered by the FLSA must provide "reasonable break time[s]" for nursing employees to express milk during the one-year period after giving birth to a child each time the employee has a need to lactate.

Smaller employers (those who employ fewer than 50 employees) remain subject to the Amendment unless they can demonstrate that they would incur an undue hardship. The Amendment places the burden on the small employer to establish that compliance would pose a "significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business" if they seek to be excepted from the Amendment. While the US Department of Labor (DOL) has yet to publish regulations or interpretations of the Amendment, cases interpreting other statutes with an "undue hardship" exception demonstrate that such an exception is narrowly interpreted. Thus, small employers cannot ignore this new law and assume that they will be able to prove an undue burden if accused of failing to comply with the law.

The Amendment provides the first federal requirement to offer breaks for nursing mothers, though many states have previously enacted similar protections. Where a state's law offers broader protection for a nursing employee, the state provision prevails. For example, in Colorado, the state has enacted a law requiring employers to provide reasonable breaks to nursing mothers in a private location,

Brussels

+32 (0)2 290 7800

Denver

+1 303.863.1000

London

+44 (0)20 7786 6100

Los Angeles

+1 213.243.4000

New York

+1 212.715.1000

Northern Virginia

+1 703.720.7000

San Francisco

+1 415.356.3000

Washington, DC

+1 202.942.5000

This advisory is intended to be a general summary of the law and does not constitute legal advice. You should consult with counsel to determine applicable legal requirements in a specific fact situation.

© 2010 Arnold & Porter LLP

arnoldporter.com

other than a restroom stall, for up to two years after a child's birth. Where, however, the federal requirement offers a greater protection to nursing mothers than state law, as in the District of Columbia where the relevant local statute required only that employers make a reasonable effort to provide a private location for breastfeeding or pumping, which may have included nearby childcare facilities, the Amendment's requirements will supersede existing state law.

WHAT CONSTITUTES A REASONABLE BREAK?

The Amendment requires that mothers be provided time to express breast milk "each time" the employee has the need to do so. As the Amendment does not specify a set number or duration of permissible breaks, but instead leaves the timing of breaks to the discretion of the employee, employers must be flexible and accommodating.

COMPENSATION FOR REASONABLE BREAKS

The Amendment specifies that "an employer shall not be required to compensate an employee receiving reasonable break time." However, this provision will have to be reconciled with state laws requiring paid rest and meal breaks. Moreover, employers who offer other paid breaks may be required to pay when a mother chooses to use that time to express her milk. For example, if an employer allows smokers to take paid smoke breaks and does not pay a woman while she pumps, the employer risks a discrimination claim.

NURSING ROOMS

In addition to providing the break time, employers must now also provide a place, other than a bathroom, that is private, shielded from view, and free from intrusion by coworkers and the public for mothers to express breast milk. This provision of the Amendment requires an additional commitment of dedicated space by the employer. As this is the most tangible requirement in the Amendment, employers would be wise to act expediently to create or designate a location to be used by nursing employees.

If you have any questions regarding this new law or on how to make your company compliant please contact:

Matthew D. Keiser

+1 202.942.6398

Matthew.Keiser@aporter.com

Sionne Rosenfeld

+1 202.942.6104

Sionne.Rosenfeld@aporter.com