



## **LABOR AND EMPLOYMENT LAW UPDATE**

### **Nursing Mothers Entitled to Work Breaks**

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act of 2010, which includes a nursing mother amendment to the federal Fair Labor Standards Act (“FLSA”). The FLSA governs employee wage and hour issues nationwide.

Under this new provision, which is effective immediately, covered employers must provide “reasonable” unpaid breaks to allow nursing mothers to express breast milk for up to one year after the birth of a child. The law does not indicate how many breaks must be given during the work day or how long they must last, but rather, simply permits such breaks whenever milk needs to be expressed. Authorities with the La Leche League International, which promotes breastfeeding, suggest that such breaks may be needed approximately every three hours when the child is less than 6 months of age. As the child grows, breast milk will not normally need to be expressed as frequently. Nursing mother breaks likely will take 15-30 minutes on average, to allow the employee time to set up the breast pumping equipment, express the milk, and clean and put away the equipment and milk.

Additionally, covered employers must provide a room, other than a bathroom, that is shielded from view, provides adequate privacy, and is not subject to interruptions by coworkers or the public, to permit the breast-feeding employee to express breast milk.

Employers with less than 50 employees are exempt from the break requirements if they can prove that breaks would create an “undue hardship” by causing the employer significant difficulty or expense when balanced against the employer’s size, financial resources, nature, and business structure.

Literally written, the break requirement only applies to employees who are “non-exempt” from the FLSA’s overtime and minimum wage provisions. Typically, these are hourly employees. However, this may be a drafting oversight on the part of Congress, and could be clarified when the Department of Labor ultimately issues regulations about the amendment. Employers may opt to provide nursing breaks to exempt employees as well.

While the FLSA did not previously mandate breaks, if an employer chose to provide them, the employer was required to pay employees for breaks of less than 20 minutes in duration. The nursing mother amendment is the first time that the FLSA has mandated breaks, and they may be unpaid. This may create unfairness issues if an employer permits, for example, a smoker to take multiple 20 minute smoke breaks during the day, which are paid, but requires nursing mothers to take their breaks unpaid. Many employers may simply opt to make the nursing mother breaks of less than 20 minutes paid as well.

Approximately half the states already have state laws requiring breaks for nursing mothers. The FLSA amendment does not preempt these laws, and employers in those states should continue to comply with state law requirements if they provide similar or greater protection for nursing mothers.

Even though Congress and the Department of Labor have yet to provide clear guidance to impacted employers, such employers should take the following steps:

1. inform managers and supervisors of the need to provide “reasonable” breaks for nursing mothers;
2. revise break policies and time card policies to reflect this new type of break;
3. make sure that nursing mothers are not retaliated against for exercising their rights under this FLSA amendment; and
4. determine what rooms will be provided to the breast feeding employees for purposes of milk expression. At a minimum, they must be private, not be a bathroom, and have an electrical outlet for use with electric breast pumps.

The Department of Labor is empowered to enforce this new law. It is anticipated that impacted employees may be able to seek injunctive relief and attorneys’ fees for violations.

**Your employment law attorneys at McAngus Goudelock and Courie are here to assist you. Please contact Amy Jenkins at 843-576-2917 or [amy.jenkins@mgclaw.com](mailto:amy.jenkins@mgclaw.com); Edward Rawl at 803-227-4930 or [erawl@mgclaw.com](mailto:erawl@mgclaw.com), Webster Harrison at 919-719-8209 or [webster.harrison@mgclaw.com](mailto:webster.harrison@mgclaw.com) or Tracey Downs at 704-643-6303 or [tracey.downs@mgclaw.com](mailto:tracey.downs@mgclaw.com).**

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