

PUBLICATION

Accommodating the Breastfeeding Employee

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The Scenario: Female employee returns from 12-week maternity leave. Upon her return to work, she requests permission to use break time to express breast milk. Additionally, she requests a private room other than a bathroom for this purpose. Do you have to accommodate this request?

The Answer: Likely, yes.

The Patient Protection and Affordable Care Act (PPACA) was enacted on March 23, 2010. Among its myriad provisions, the PPACA (also known as "Health Care Reform" or "Obamacare") amended the Fair Labor Standards Act (FLSA) to allow "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." Additionally, employers must provide "a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk." These "reasonable break time" provisions were effective with the bill's signing on March 23, 2010.

There are certain exceptions to this law, but as a practical matter it is better to provide the accommodation, even if not strictly required to do so. For example, the "reasonable break time" provisions do not apply to employees who are exempt from overtime under the FLSA, including so-called "white collar" exemptions (executive, administrative, professional or outside salesperson), but employers should allow these exempt employees time to express breast milk as a matter of fairness, and certainly if required by State law, such as in Arkansas. Similarly, there is an exception for employers with less than 50 employees if the employer can demonstrate "undue hardship" will result from providing the accommodation. The "undue hardship" standard is high, and it may be more costly to address this issue with the Wage and Hour Division of the Department of Labor than to simply comply with the "reasonable break time" provisions.

So, with the general premise that employers should comply with the "reasonable break time" provisions, what does this mean for your business? What does "reasonable break time" mean? How many breaks should be offered per shift? How long should each break last? Do you have to provide a room with a locked door? Do you have to provide a refrigerator for storage of the expressed breast milk?

The "reasonable break time" provisions are emerging areas of the law, but we suggest the following:

- Make an individualized assessment of the employee's request and circumstances when determining the length and frequency of breaks. The DOL suggests two or three breaks of 15-20 minutes each in an eight-hour shift. However, more breaks may be needed based upon the needs of the baby and the length of the shift.
- If all employees take designated breaks (for example, 15 minutes in the morning and 15 minutes in the afternoon), allow the breastfeeding employee to use those regularly scheduled breaks to express breast milk and provide additional time to those breaks if necessary. You should not take any disciplinary action for an employee who is late returning from a designated break period because she was using a reasonable break time to express breast milk.

- Give consideration not only to how long it takes to actually express the breast milk, but also to such things as the time it takes for the employee to walk from her work station to the private place, as well as the time it takes to set up and clean the expressing equipment and to store the expressed milk.
- Remember that a bathroom, even a private bathroom, is not an acceptable private place.
- The private place does not have to be dedicated solely to the employee; however, it must be available when needed. Per the DOL, "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."
- The private place should have a place to sit, a door with a lock, and blinds/drapes on any windows. If a lock is not available, the door should have a sign, "Private. Do not enter without knocking AND receiving permission to enter."
- The private place should have an area to store the expressed milk. A refrigerator is not required.
- For hourly employees, if the break is 20 minutes or less, compensate the employee for the break time.
- Do not retaliate against an employee who is using reasonable break time to express breast milk.
- Consider any state-specific laws that may apply. For example:
 - In Mississippi, "No employer shall prohibit an employee from expressing breast milk during any meal period or other break period provided by the employer." Miss. Code Ann. § 71-1-55.
 - In Arkansas, "An employer shall provide unpaid break time each day to an employee who needs to express milk for her child in order to maintain milk supply and comfort ... An employer shall make a reasonable effort to provide a private, secure, and sanitary room or other location in close proximity to the work area, other than a toilet stall, where an employee can express her breast milk." Ark. Code Ann. § 11-5-116.
 - In Georgia, "An employer may provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child. The employer may make reasonable efforts to provide a room or other location (in close proximity to the work area), other than a toilet stall, where the employee can express her milk in privacy. The break time shall, if possible, run concurrently with any break time already provided to the employee. An employer is not required to provide break time ... if to do so would unduly disrupt the operations of the employer. O.C.G.A. § 34-1-6.
- Finally, seek legal advice to assist with compliance with these laws.