



BURNING BENEFITS NEWS

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A S S O C I A T E S

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NURSING MOMS ENTITLED TO REASONABLE BREAKS UNDER THE FLSA

Section 4207 of the Patient Protection and Affordable Care Act amended section 7 of the Fair Labor Standards Act (the “FLSA”) by adding a new subparagraph (r) which permits nursing mothers to take reasonable breaks each time there is a need to express breast milk for a nursing child in a location free from intrusion, effective as of March 23, 2010.

Reasonable Breaks. Employees may take breaks to express breast milk for a nursing child for one year after the child’s birth. The new law does not define what a ‘reasonable break time’ is, or the number of breaks that must be provided other than to say ‘each time there is a need to express breast milk’. Thus, it appears employers are prohibited from regulating the frequency of breaks.

Private Location. The employer must provide a location “...shielded from view and free from intrusion from co-workers and the public...”, and other than a bathroom (even if private), for employees to express breast milk. Since a bathroom is an explicitly prohibited location for this activity, the employer will need to consider other suitable private rooms. Any space/room not dedicated to a nursing mother’s use must be available when needed to meet the requirements of the statute. Employers should ensure that employees using the room have a mechanism by which to designate the room ‘in use’ or ‘is occupied’ in order to comply with the “...shielded from view and free from intrusion...” requirement.

Break Time is Unpaid. Only employees who are not exempt from the FLSA requirements are entitled to reasonable breaks to express breast milk. Employers need not oblige exempt employees under the FLSA, but may be obligated to provide breaks under more generous state laws. Under the new law an employer is not required to pay employees receiving reasonable break time for this activity, unless the employer already provides compensated breaks. Also, since the term ‘reasonable break time’ is undefined under the new law, it is unclear what happens if the break time is less than 20 minutes. Under federal law ‘short’ break periods of 20 minutes or less are otherwise compensable and would be considered ‘hours worked’. Under Michigan law break periods of less than 15 minutes must be paid and counted as ‘hours worked’. This lack of harmony between federal and state laws on paid breaks will need to be clarified. Generally, Michigan’s wage and hour laws do not apply to an employer covered by the FLSA, but it is possible (e.g., if the minimum wage under Michigan law is greater than under the federal FLSA). For now it is unclear how Michigan will address the interplay of the federal law with state law.

Employer Exemption if Compliance with the Law Imposes an Undue Hardship. An employer with fewer than 50 employees may be exempt from these requirements if it can show that allowing such breaks would impose an “undue hardship.” “Undue hardship” means compliance would cause the employer significant difficulty or expense when considered in relation to factors such as the size of the business, the financial resources of the business or the nature and structure of its operation. As a practical matter, it may be difficult to meet the hardship exemption. All employees who work for the covered employer, regardless of worksite, are counted when determining whether this exemption applies.

New Federal Law Does Not Override Greater State Law Protections. The Act does not preempt state laws that provide greater protections to employees, such as paid break time for nursing mothers or providing break time beyond one year after the child’s birth. Michigan is not among many states that currently have a state law in place dealing with nursing mothers in the workplace. Thus, employers who do business in multiple state locations may have obligations that differ from Michigan.

Employer Action

Employers should review their break policies and inform individuals responsible for administering break time policies to ensure compliance with the new law. At this time, we lack information as to the range of penalties and other potential liability an employer might face for lack of compliance. There no doubt will be civil penalties and perhaps additional penalties on top of that for willful or repeated violations. Also, employers should beware of potential liability that might result from a finding that it retaliated against an employee who exercised her rights under the new law. As noted, we also need guidance on the interplay between state and federal laws and the new Act on the “unpaid” nature of the break time.

Other Information

We will continue to update our clients on this new law as guidance becomes available. The U.S. Department of Labor, Wage and Hour Division, has just published some general information about this new law under: *Fact Sheet #73: Break Time for Nursing Mothers under the FLSA*. You can get a copy of the fact sheet by visiting the Wage and Hour Division Website: <http://www.wagehour.dol.gov>.

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