

## **Labor Department Issues Request for Information on Breaks for Nursing Mothers**

The Department of Labor issued a request for information on December 21, 2010 clarifying the Patient Protection and Affordable Care Act's requirement that employers provide reasonable break times and space to nursing mothers. Over the past several months many IPMA-HR members have asked exactly how the new law should be implemented. The DOL's interpretation and request for information are not official regulations but should shed light on the DOL's likely position if the law is challenged.

The law became effective in March 2010 and requires employers to provide not only a reasonable break time but also a place for the mother to express milk that is shielded from view, is private and is not a restroom. The break time provisions apply only to non-exempt employees. Comments on the request for information are due by February 22, 2011. To submit comments, or for more information, see the notice in the Federal Register:

<http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=24540&Month=12&Year=2010>

The DOL's interpretation of the law includes the following:

- If an employer provides paid break time to non-exempt employees for other purposes than the amount of that paid break time must be provided to nursing mothers to express breast milk. For example if an employer allows workers a paid 20-minute break during the day and a nursing mother requires 25 minutes to express milk, then only 5 minutes should be unpaid.
- The Department encourages employers to be flexible and allow nursing mothers to work longer hours to make up for unpaid break time.
- What is a "reasonable" amount of time for the break? The DOL consulted the Department of Health and Human Services and the Centers for Disease Control and determined that the amount of time will depend not only on the amount of time to express the milk but also time needed to gather and clean supplies and store the milk as well as the location of the lactation room.
- The DOL states that nursing mothers will typically need two to three breaks during an eight-hour shift and the frequency will vary as the child grows and begins eating solid foods.
- The Patient Protection Act requires employers to provide, "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." The DOL said this requires an employer to provide a room where practical and where it is not to provide partitions or curtains, partitions and curtains can also be used if there are multiple nursing mothers at one time.
- The room cannot be a bathroom but if there is a lounge or anteroom adjacent to the bathroom, that would suffice as long as there is a door separating the lounge area from the bathroom and there is an area that can be shielded from view and free from intrusion. The DOL is specifically seeking comment on when a room adjacent to a bathroom could meet the law's requirement.
- The employer is not obligated to maintain a permanent dedicated space for nursing mothers. A temporary solution is fine.
- The DOL said a locker room would not be appropriate because of health risks particularly related to MRSA.

- The DOL will not consider an employer to be in compliance with the law if the location of the room is too far away or the number of women needing the space makes it impractical for a nursing mother to actually take a break.
- The space must, at a minimum, contain a place for the mother to sit and a flat surface other than the floor to place the pump. Ideally, the location will have electricity so that a nursing mother can use an electric pump instead of just a battery operated or manual pump.
- The mother must have access to safe storage for the milk, allowing the mother to bring an insulated storage container for the milk or use of a refrigerator. For work spaces that are not in offices, this can provide a unique challenge. The DOL is looking for feedback on when spaces such as managers' offices, utility closets and other such spaces might be deemed acceptable for expressing milk.
- The DOL is also looking for feedback on how a place can be provided to employees who are not in one location during a shift, such as mail delivery workers, bus drivers, law enforcement officers and EMTs.
- The Department believes that if an employee is working at a client site, it remains the employer's responsibility to provide a location and that the employer should work with the client to provide space.
- The DOL encourages nursing mothers to provide their employers with advance notice of their need to take breaks. The department is looking for feedback on how to address the notice issue and notes that employers may ask expectant mothers if they plan to take breaks to express milk at work. This informs the employee of her rights and allows time for the employer to make any adjustments.
- There is an undue hardship provision exempting employers with fewer than 50 employees (who also meet additional requirements). In counting the number of employees, employers should reach further than under the FMLA. Employers should consider all employees who work for the employer at all worksites regardless of distance and the number includes part-time and full-time employees.
- The DOL also believes that it is necessary to fix the number of employees at a certain point in time for deciding whether or not an employer has 50 or more employees. Although the number of employees might vary week to week, a nursing mother will need to know whether or not breaks are going to be available. The DOL suggests picking a fixed time, such as when a mother first needs the break or when an expectant employee first requests the break. The DOL is seeking feedback on this provision.
- In addition to having fewer than 50 employees, an employer wishing to use the "undue hardship" exemption must show significant difficulty or expense. The DOL believes that this is a stringent standard and that most employers will only qualify in limited circumstances. Small employers should not assume that they will be exempt. The DOL will look at each case individually. The DOL is seeking feedback on whether or not this provision should be interpreted the same way as under the Americans with Disabilities Act.

- The DOL does not believe that breaks to express milk are covered by the Family and Medical Leave Act (FMLA). The DOL does not believe that expressing milk at work is bonding with or caring for a newborn.
- The Wage and Hour Division (WHD) is responsible for enforcing the law, including conducting investigations and gathering data on employment conditions. Employees may also file a complaint with the WHD.
- There are no penalties for employers that fail to comply but the WHD can seek injunctive relief on behalf of employees. An employer that fires an employee for requesting or taking breaks will violate the Fair Labor Standards Act and the WHD may seek injunctive relief, reinstatement and lost wages for the employee. Similarly, firing an employee for filing a complaint will violate the FLSA's prohibition on retaliation.