



**Labor & Employment Alert
May 2010**

**New Affordable Care Law Requires Employers to Provide
'Reasonable' Breaks to Nursing Mothers**

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Effective immediately on the passage of the Affordable Health Care Act, employers covered by the Fair Labor Standards Act (FLSA) are required to furnish “reasonable” breaks to nursing mothers to express milk for their infants. The new provision mandates these employers to provide:

(A) a reasonable break time for an employee to express breast milk for her nursing child for one year after the child’s birth; and

(B) 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.

There are two exceptions to these requirements under the health care law:

- Employers are not required to pay employees who take a breastfeeding break— unless a state law requires otherwise (Massachusetts does not currently have a state law requiring payment for such breaks).
- An employer with fewer than 50 employees is exempt if the requirements would “impose an undue hardship” by causing it “significant difficulty or expense” as compared to the employer’s size, resources and business structure.

What is 'Reasonable'?

Exactly what would be considered “reasonable break time” is unclear, and will likely remain so until further guidance is issued. One advocate for nursing mothers has pointed out that the duration of a pumping session depends on each individual mother, so it is “troublesome” to leave the interpretation to the employer. It is likely that some sort of facts and circumstances test with perhaps a safe harbor may be adopted but we will not know until guidance is issued. Until then, employers will have to use their best judgment.



What to Do Now

While it will likely be several months before the Department of Labor issues regulations regarding these new requirements, this amendment to the FLSA became effective when the health care reform bill was signed on March 23, 2010.

Steps that covered employers can take now include:

- Consider what private locations might be available to offer nursing mothers;
- Do not be overly rigid about the duration and frequency of breaks; and
- Use the “interactive process” to deal with issues as they arise.

Remember that employers with fewer than 50 employees are only exempt if they can demonstrate undue hardship. The term “undue hardship” is also subject to varying interpretations, but it generally is a more onerous burden than many employers expect. Thus employers seeking to rely on the undue hardship exemption are well advised to document such hardship and consult with an attorney before deciding how to proceed.

Stay tuned for further guidance and other developments under the new health care reform law.

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If you have any questions or concerns with regard to the implementation of the Act, please contact Katherine A. Hesse, Kathryn M. Murphy or the attorney assigned to your account.

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