

Reasonable Break Time for Nursing Mothers Required Under FLSA

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The Patient Protection and Affordable Care Act (the "Affordable Care Act") amended section 7 of the Fair Labor Standards Act ("FLSA"), to require employers to provide nursing mothers reasonable break time and a place to express breast milk. The new requirement became effective when the Affordable Care Act was signed on March 23, 2010.

Interpretive guidance from the U.S. Department of Labor, Wage and Hour Division (the "Department") published December 21, 2010 ("Guidance") notes that breaks to express breast milk cannot properly be considered to be leave under the Family Medical leave Act (FMLA) or counted against an employee's FMLA leave entitlement. While employees are entitled to take FMLA leave to bond with a newborn child, the Department does not consider expressing milk at work to constitute bonding with or caring for a newborn child.

Who is Covered: The break time for nursing mothers provision does not apply to exempt employees, although the Department encourages employers to provide break time for all nursing mothers including those who may be exempt.

As a practical matter, an employer will most likely find it difficult explaining the intricacies of the law to an exempt employee who asks for time to express breast milk at work.

Reasonable Break Time: Under the law, employers are required to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk. The law states that "[a]n employer shall not be required to compensate an employee receiving reasonable break time [for expressing breast milk] for any work time spent for such purpose."

Under New Jersey law, any break less than 20 minutes is considered "working time," meaning that it must be paid and included as time worked when calculating overtime.

The Department expects that nursing mothers typically will need breaks to express milk two to three times during an eight hour shift. Longer shifts will require additional breaks to express milk. The Department also observes that the length of time necessary to express milk also varies from woman to woman. The Guidance indicates the expression breast milk alone typically takes about 15 to 20 minutes, but there are many other factors that will determine a reasonable break time. Employers should consider these factors when determining how they will provide both reasonable break time and space for nursing mothers

Some of the factors employers should consider in determining whether the time needed for a nursing employee to express milk is "reasonable" include:

(i) The time it takes to walk to and from the lactation space and the wait, if any, to use the space;

- (ii) Whether the employee has to retrieve her pump and other supplies from another location;
- (iii) Whether the employee will need to unpack and set up her own pump or if a pump is provided for her;
- (iv) The efficiency of the pump used to express milk (employees using different pumps may require more or less time);
- (v) Whether there is a sink and running water nearby for the employee to use to wash her hands before pumping and to clean the pump attachments when she is done expressing milk, or what additional steps she will need to take to maintain the cleanliness of the pump attachment
- (vi) The time it takes for the employee to store her milk either in a refrigerator or personal cooler.

A Proper Place: The break time for nursing mothers provision requires that employers 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 Department's interpretation of the requirement that the space be “shielded from view and free from intrusion” is that it requires employers where practicable to make a room (either private or with partitions for use by multiple nursing employees) available for use by employees taking breaks to express milk. Where it is not practicable for an employer to provide a room, the requirement can be met by creating a space with partitions or curtains. Any windows in the designated room or space should be covered to ensure the space is “shielded from view.” With any space provided for expressing milk, the employer must ensure the employee's privacy through means such as signs that designate when the space is in use, or a lock on the door.

The employer is not obligated to maintain a permanent, dedicated space for nursing mothers. A space temporarily created or converted into a space for expressing milk or made available when needed by a nursing mother is sufficient provided that the space is shielded from view, and free from intrusion from coworkers and the public.

While a bathroom, even if it offers privacy, does not meet the requirements of the statute, an anteroom or lounge area connected to the bathroom may be sufficient to meet the requirements of the law. For example, if there is a wall with a door separating the lounge area from the bathroom, and if there is a space for nursing mothers within the lounge that is “shielded from view” and “free from intrusion,” this would likely meet the requirements of the law.

Locker rooms that function as changing rooms (i.e., for changing in and out of uniforms) may also be adequate as long as there is a separate space designated within the room for expressing milk that is shielded from view and free from intrusion. According to the Guidance, however, the Department does not believe that a locker room where there is not sufficient differentiation between the toilet area and the space reserved for expressing breast milk would meet the requirements of the law because it presents similar health and sanitation concerns as a bathroom. There is concern that locker rooms may not be appropriate because such wet environments are at risk of being contaminated with pathogenic bacteria and have been linked to outbreaks of infections.

Storage: The Department interprets an employee’s right to express milk for a nursing child to include the ability to safely store milk for her child. While employers are not required to provide refrigeration options for nursing mothers for the purpose of storing expressed milk, they must allow a nursing mother to bring a pump and insulated food container to work for expressing and storing the milk and ensure there is a place where she can store the pump and insulated food container while she is at work. The Guidance suggests that this is similar to providing employees with a place to store lunch or meals that they bring to work in insulated food containers. In many workplaces the nursing mother will be able to keep the pump and insulated container near her work space, but in some settings it may be necessary to have a separate place for her to stow the pump and insulated food container (e.g., a locker, closet, cabinet, or other space where the pump and container will not be disturbed or contaminated).

Alternate Worksites: It is the Department's view that the statutory language makes it the obligation of the employer to provide the space, regardless of where the employee is located. In situations where the employee is off-site, the Department recommends that the employer arrange with the client to allow the employee to use a space at the client's site for the purpose of expressing milk.

No Fixed Worksite: The Department is seeking additional public comments that address how employers can provide adequate break time and space for nursing employees who are not in a fixed place during a work shift (e.g., bus drivers, mail or parcel delivery workers, law enforcement officers, emergency medical technicians, etc.).

Notice to Employees: The Guidance encourages nursing employees to give employers advance notice of their intent to take breaks at work to express milk. The Department may require a poster at a future date present the guidance states that a simple conversation between an employee and a supervisor, manager, or human resources representative about the employee's intent to take breaks for the purpose of expressing breast milk would facilitate an employer's ability to make arrangements to comply with the law before the nursing mother returns to work. The Guidance notes that an employer may ask an expectant mother if she intends to take breaks to express milk while at work.

Undue Hardship: Under the law, “[a]n employer that employs less than 50 employees shall not be subject to the requirements of the law, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business. The employer bears the burden of proof that compliance with the nursing mothers break time provision would be an undue hardship.

Resources for Employers

The Health Resources and Services Administration within U.S. Department of Health and Human Services has published a resource kit, *The Business Case for Breastfeeding*, which includes materials for management, human resource managers, and others involved in implementing on-site programs for lactation support and may be accessed [here](#).