

# “What keeps you up at night?”

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## Labor Department issues fact sheet on mandatory break times for nursing mothers

By Ira M. Shepard

### SUMMARY

**Under the recently passed Patient Protection and Affordable Care Act ("PPACA"), aka "Health Care Reform," employers are now required to allow reasonable break times for nursing mothers in the workplace.**

A provision of the recently enacted health care reform legislation (PPACA) amended the Fair Labor Standards Act ("FLSA") to require employers to provide "a 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 needs to express the milk." Last week, the U.S. Department of Labor ("DOL") issued a fact sheet clarifying employers' obligations in this area.

### TIME AND LOCATION OF BREAKS

Employers are required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk as well as the duration of each break will likely vary by employee.

According to the DOL, employers are required to 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 to express breast milk. Even a private bathroom is not a permissible location. The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mother's use, it must be available when needed in order to meet the statutory requirement. 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.

### COVERAGE AND COMPENSATION REQUIREMENTS

Employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance would impose an undue hardship. Whether compliance would be an undue hardship

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is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer’s business.

Only employees who are not exempt from the FLSA’s overtime pay requirements are entitled to such breaks. Employers are not required under the law to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time. In addition, the FLSA’s general requirement that the employee must be completely relieved from duty or else the time must be compensated as work time applies.

Finally, the requirement of break time for nursing mothers to express breast milk does not preempt state laws that provide greater protections to employees (for example, providing compensated break time, providing break time for exempt employees, or providing break time beyond one year after the child’s birth).

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