

Briefing

Labor & Employment Practice

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Section 4207 of the Patient Protection and Affordable Care Act of 2010

I. Employers Must Provide Breaks for Nursing Mothers

The Patient Protection and Affordable Care Act of 2010 (PPACA) amends Section 7 of the Fair Labor Standards Act (FLSA) by adding the requirement that employers provide “reasonable break time for nursing mothers.” Under Section 4207 of PPACA, employers must make available the following: (1) reasonable breaks for employees to express breast milk; (2) a location free from intrusion in which to take those breaks.

A. Employers Must Provide Reasonable Breaks

Although Section 4207 does not quantify what is a reasonable length of time for a nursing mother break, it explicitly states that employers are not required to compensate employees for these breaks if they are taken during “work time.”¹ Employers are not granted discretion to regulate the frequency with which employees take breaks to express milk; rather, nursing mothers are entitled to take reasonable breaks “each time such employee has need.” Employees may take these breaks until the nursing child is one year old.

B. Breaks Must be in a Private Location

Employers must provide a private place where employees can go to express milk. This location must be “shielded from view” and “free from intrusion from coworkers or the public.” Section 4207 expressly forbids the use of bathrooms as venues for nursing mother breaks.

C. Small Employer Exception

Not all employers are subject to the new break requirements of Section 4207. Employers with less than 50 employees, who would experience “undue hardship” in the course of providing nursing mother breaks, are exempt. Undue hardship is determined by weighing the “significant difficulty or expense” of providing breaks against the “size, financial resources, nature, or structure” of the business.

II. Section 4207 Does Not Preempt State Law That is More “Employee Friendly”

If state law provides “greater protections to employees” than the protections in Section 4207, employers must adhere to the more expansive provisions. Seventeen states currently have laws that require employers to provide lactation breaks.² While many have provisions that are similar

¹ The FMLA generally considers breaks lasting between five and 20 minutes to be “common in industry” and counts that time as hours worked. The PPACA does not make clear if employees who choose to overlap their “common in industry” break time with their breaks used to express milk must be compensated. A number of states that have enacted laws pertaining to nursing mother breaks either require that such breaks be taken at the same time as other rest breaks whenever possible (Arkansas, California, Georgia, Illinois, Indiana, Minnesota, Montana, Oklahoma, Oregon, Rhode Island, Tennessee), two states leave it up to the employee to decide whether they want to take breaks concurrently (Colorado, Maine), one state goes as far as to require employees to take their breaks to express milk during other rest periods (Connecticut), and three states do not make any express requirement (New Mexico, New York, Vermont).

² The following 17 states, as well as the District of Columbia and Puerto Rico, have laws pertaining to nursing mothers: Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Maine, Minnesota, Montana, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Tennessee, Vermont.

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to Section 4207, no state exactly mirrors federal law. In fact, many states include one or more provisions that are broader than Section 4207. Examples of state law provisions that expand employee protection include: allowing mothers to continue taking breaks until the nursing child is anywhere from 18 months to three years old;³ requiring employers to make reasonable efforts to provide lactation rooms close to an employee's work area;⁴ requiring that employers either make reasonable efforts to provide refrigeration for breast milk or, in some employment settings, allow employees to bring their own refrigeration devices to work;⁵ providing break rooms with electrical outlets so employees can plug in breast pumps;⁶ and allowing employees who take unpaid breaks to make up the time by staying later to work.⁷ If an employer's state law includes greater employee protections such as these, the more protective provisions govern.

III. Action Plan for Employers

Because Section 4207 went into effect upon enactment, employers must take immediate action to bring policies and practices into compliance. Below is a non-comprehensive list of next steps for employers.

A. Amend Policies and Practices to Reflect Section 4207 of PPACA and Applicable State Law

Review employee break policies and update as necessary to include nursing mother breaks. If your state has no law governing nursing mother breaks or if state law provides fewer employee protections than Section 4207, amend your policies to include reasonable breaks for nursing mothers in an out-of-sight location that is free from intrusion.

On the other hand, if state law provides employees with greater protection than Section 4207 requires, review existing policies to confirm that they are in compliance with state statutes. Remember, if you operate a multi-state business, you must review the laws of each relevant state and update policies as regionally appropriate.

B. Update Employee Handbooks, Training Materials and Policy Manuals

Revise employee handbooks and other printed materials to reflect the new break policy. After employee handbooks are amended, provide current employees with a copy of the update. Revise manager and supervisor training materials to include

updated policies.

C. Train Managers About New Policies and Procedures for Breaks

Conduct training sessions for current managers and supervisors to educate them about changes in your company's break policy. Inform them that when nursing mothers who qualify request breaks to express milk, managers must allow them to take a reasonable break in an appropriate location. Facilitate easy implementation of the policy by providing managers and supervisors with a list of locations at their work site that can be used as nursing mother break rooms.

D. Identify Physical Spaces in All Places of Business to Serve as Appropriate Nursing Mother Break Locations

Conduct a physical survey of each business site where employees report to work. Identify places that can be used by mothers who take breaks to express milk. Section 4207 does not specifically require a separate room be made available for employees; however, it does require that employees be "shielded from view" and "free from intrusion" during their break. Consider creative solutions for offices with windows such as erecting an opaque screen or installing window coverings. Remember, bathrooms do not qualify as appropriate locations under Section 4207.

E. Troubleshooting

Companies with workforces across multiple states will have to ensure compliance with the FLSA, and state laws where applicable, and train managers accordingly. Some companies such as some national retailers, foodservice chains, and the like, may have physical space challenges. Should locks be placed on doors? What liabilities might a locked door create? What if the locations do not have a small office or place (other than a bathroom) where a door can be closed? Is an organization required to build a space? What if state law requires that electricity and refrigeration be present? What does it mean to be out of public view and free from physical intrusion? For service, technology, and sales companies, other considerations, such as those related to mobile employees, may exist. Certain reasonable accommodations may also trigger wage-hour considerations, like split-shift issues in certain states.

Because this is a new federal law, federal case law will not be guiding at the outset. Federal courts may look to state law lactation break cases for guidance, but the courts are not bound

³ Colorado, Maine, New York

⁴ Oregon (up to 18 months); Colorado (up to two years); Maine, New York and Vermont (up to three years)

⁵ Arkansas, California, Colorado, Connecticut, Georgia, Indiana, Minnesota, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Tennessee

⁶ Montana

⁷ Oregon

by state decisions. Considering the applicable regulations and law from akin areas of employment law may be useful in troubleshooting issues specific to an organization in areas where the lactation law may not be developed.

While implementing a new national policy with potentially differing requirements across particular states, which may trigger other new considerations, may seem daunting, if approached and executed properly it can be a systematic, contemplative and discreet task. Specific, advance consideration of a company's challenges in implementing this new law, combined with thoughtful review, planning, and execution will make the process go more smoothly.

If you have questions regarding this legislation, please contact one of the Labor & Employment Relations Practice Group partners listed below.

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