

San Francisco Approves New Protections for Nursing Mothers in the Workplace

JULY 5, 2017

On June 30, 2017, San Francisco Mayor Ed Lee signed the [Lactation in the Workplace Ordinance](#) (Ordinance) expanding existing protections for nursing mothers working in San Francisco, which will become effective on January 1, 2018.

The Ordinance applies to all private employers in San Francisco, unless an employer can establish that compliance would impose an undue hardship (e.g., significant expense or operational difficulty) when considered in relation to the size, financial resources, nature, or structure of the employer's business.

While the California Labor Code and the federal Fair Labor Standards Act already require most employers to make reasonable efforts to provide lactation breaks and locations to nursing mothers ([Cal. LC §§ 1030-1033](#); [29 U.S.C. § 207\(t\)](#)), the Ordinance goes further than existing law in (i) requiring an employer to provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for the employee's child, and (ii) providing specific requirements for lactation areas, employer policies, and recordkeeping.

Lactation Area Requirements

The Ordinance requires employers to provide a lactation area for a nursing mother that is clean and free of hazardous materials, contains a chair and surface space for a breast pump (e.g., a table or counter), and has access to electricity. The lactation area may be available for non-lactation uses, but (i) an employee's lactation breaks must take precedence over other uses, and (ii) the employer must provide notice to other employees of the room's primary function. Employers in multi-tenant buildings that cannot accommodate the employee within the employer's workspace may also meet the lactation location requirements by designating a room or space that is shared with other tenants in the building.

Lactation Accommodation Policy

The Ordinance also requires employers to develop and implement a written lactation accommodation policy. The policy must:

- State that employees have a right to request lactation accommodation;
- Specify how employees may submit a request for lactation accommodation;
- Require the employer to respond to a request for lactation accommodation within five business days;
- Require the employer and employee to engage in an interactive process to determine the appropriate lactation break periods and location;
- State that if, in response to a request for lactation accommodation, a covered employer does not provide the required accommodation, the employer must provide the employee a written response that identifies the basis upon which the employer has denied the request; and
- State that retaliation against an employee for exercising rights under the ordinance is prohibited.

The policy must be distributed to all employees upon hire, and a copy of the policy must be offered to any employee who inquires about or requests pregnancy or parental leave. Employers must also update their employee handbooks to include the new lactation accommodation policy.

Record-keeping Obligations

Under the Ordinance, employers will be required to maintain a record of employee requests for lactation accommodations for three years. The record must include the employee's name, the date of the request, and a description of how the employer resolved the request.

Enforcement

The Office of Labor Standards Enforcement (OLSE) will be responsible for enforcing the lactation accommodation requirements of the ordinance through administrative penalties. For violations occurring during 2018, however, the OLSE will only issue warnings and a Notice to Correct. As of January 1, 2019, the OLSE may impose administrative penalties up to \$500 per violation, and employers who do not promptly comply with a Notice to Correct may be liable for up to \$50 per day of continuing violation, and \$50 per employee as to whom the violation occurred.

The Ordinance does not expressly provide employees with a private right to sue for violations of the Ordinance (other than by filing a complaint with the OLSE), and it is not yet clear whether courts will permit such a private right of action.

The Ordinance Continues San Francisco's Parent-Friendly Agenda

The Ordinance is the latest parent-friendly legislation to come out of San Francisco this year. In March, the city enacted another ordinance that requires all city buildings available for public use to have a diaper-changing space made available to both men and women. And in January, San Francisco became the first city in the nation to require private employers to provide fully paid parental leave. For more information on San Francisco's Paid Parental Leave Ordinance, view our briefing here.

Next Steps for Employers

Employers with employees in San Francisco should make sure to have designated lactation areas comply with the ordinance's specific standards, and should develop a lactation accommodation policy to include in employee handbooks and distribute among employees. We expect that employers claiming an exemption from the Ordinance's coverage on undue hardship grounds will face a very high burden, and therefore recommend that employers considering an exemption consult with counsel to evaluate their options.

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