

Break Time for Nursing Mothers

Under the Fair Labor Standards Act



U.S. Department of Labor
Wage and Hour Division



Break Time for Nursing Mothers Under the Fair Labor Standards Act

The Patient Protection and Affordable Care Act (“Affordable Care Act”) amended section 7 of the FLSA requires employers to provide nursing employees with:

- Reasonable break time to express breast milk
- A place, other than a bathroom, that may be used to express milk
- For up to one year after the child’s birth

The new requirement became effective March 23, 2010, when the President signed the ACA into law.



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Eligible Employees

- Employees who work for a covered employer
- Employees who are covered on an individual basis
- Employees who are covered by section 7 of the FLSA (generally, employees entitled to overtime pay)



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Coverage

Employer coverage

Enterprise coverage:

- At least two (2) employees
- At least \$500,000 a year in business

If an employer is covered, all the employees of the employer are entitled to FLSA protections, unless the employee falls within one of the FLSA's exemptions.

Individual coverage

Even if the employer is not a covered enterprise, individual employees may be covered and entitled to FLSA protections if they are engaged in interstate commerce.

Activities that constitute engaging in interstate commerce may include making telephone calls to other states; typing letters to send to other states; processing credit card transactions; or traveling to other states.



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Exemptions from Break Time for Nursing Mothers

The most common of the overtime pay exemptions that apply to the nursing mothers break time requirement is the “white collar” exemption, which applies to certain:

- Executive Employees
- Administrative Employees
- Professional Employees



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Reasonable Break Time

The Affordable Care Act requires employers to provide:

- “Reasonable break time”
- “Each time such employee has need to express the milk”
- For 1 year after the child’s birth.

As the Act does not define “reasonable break time,” the Department is working to develop guidance on this issue.



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Wage and Hour Division



Compensation for Break Time

Employers are not required to provide compensated break time. As with other breaks under the FLSA, the employee must be completely relieved from duty, or the break time must be compensated as work time.

If an employer already provides paid break time and if an employee chooses to use that time to express breast milk, she must be compensated for that time just as other employees would be compensated for break time.



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Space Requirements

An employer shall provide:

- A place, other than a bathroom
- Shielded from view
- Free from intrusion from coworkers and the public
- That may be used by an employee to express breast milk.

An employer may temporarily designate a space or make a space available when needed by the employee; the location must be functional as a space for expressing milk.



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Additional Issues to Consider

- Securing space from intrusion
- Space adjacent to restrooms
- Dual use rooms
- Storage of milk and pumps
- Notice



Undue Hardship Defense

- An employer that employs fewer than 50 employees is not required to provide break time and space if it would pose an undue hardship.
- Number of employees is determined by counting employees at all worksites, regardless of location or part-time status.
- Undue hardship is defined as “causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.”



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Wage and Hour Division



Interaction with State Laws

The federal provision explicitly states that it does not preempt a state law that provides “greater protections” to employees than those provided by the federal law.

Over 20 states have laws related to breastfeeding or expressing milk in the workplace

- See the National Conference of State Legislatures (NCSL) for a compilation of relevant state laws

<http://www.ncsl.org/issuesresearch/health/breastfeedinglaws/tabid/14389/default.aspx>



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Wage and Hour Division



Enforcement

The Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) administers and enforces the FLSA.

The WHD and information on the laws it enforces can be found on the internet at the following address: www.wagehour.dol.gov

Voice Phone: 1-866-487-9243 (1-866-4US-WAGE)

*TDD Phone: 1-877-889-5627



U.S. Department of Labor
Wage and Hour Division



Enforcement

If employee is discharged or in any manner discriminated against because she has filed a complaint, the employee may file a retaliation complaint with the Department or may file a private right of action under the FLSA for retaliation seeking reinstatement, lost wages, and other appropriate remedies.

If employer does not comply, the Department could file suit to seek injunctive relief under the FLSA, including reinstatement and lost wages if appropriate.



U.S. Department of Labor
Wage and Hour Division



Additional Resources

Federal resources

Department of Health and Human Services (HHS) tool kit: "The Business Case for Breastfeeding"
<http://www.womenshealth.gov/breastfeeding/government-programs/business-case-for-breastfeeding/index.cfm>

Centers for Disease Control and Prevention (CDC) Toolkit/Paper about workplace lactation Programs
<http://www.cdc.gov/nccdphp/dnpao/hwi/toolkits/lactation/index.htm>

Other resources

U.S. Breastfeeding Committee (federal and non-federal partners) maintains a state directory of organizations
<http://www.usbreastfeeding.org/Coalitions/CoalitionsDirectory/tabid/74/Default.aspx>

International Lactation Consultant Association maintains a workplace lactation directory so ERs can find local consultants to help set up workplace lactation programs
http://www.ilca.org/i4a/member_directory/feSearchForm.cfm?directory_id=6&pageid=3725&showTitle=0

Note: These resources provide general guidance on workplace lactation and do not address the FLSA requirement to provide breaks for nursing mothers. WHD does not endorse these organizations or guarantee the accuracy of the information they provide.



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