

Federal Health Care Law Gives Nursing Mothers a Break

EMPLOYERS: Shielded, separate room must be provided.

Nursing mothers who work for larger companies (50+ employees) are afforded new protections under the federal health care law. The Patient Protection and Affordable Care Act amends the Fair Labor Standards Act to require these larger employers to provide nursing mothers “reasonable break time” to express breast milk and a private comfortable place to do so.

California lawmakers enacted a similar lactation accommodation statute back in 2001. However, the new federal law must be followed to the extent it provides nursing moms with greater protection.

The new law exempts employers who have fewer than 50 employees where such smaller employers can establish that meeting the new federal requirement imposes an “undue hardship” on the business.

What does the new law require?

The new law requires employers to provide “reasonable break time” to a nursing mother each time she needs to express her breast milk. This break must be offered throughout the first year of the baby’s life.

Since California’s lactation accommodation requirement does not contain a one year limit, California employers (and out-of-state employers employing employees in California) must allow the break for so long as the employee is still nursing her new baby.

The statute does not define what constitutes “reasonable break time” and the U.S. Department of Labor hasn’t done so either. Presumably, an employer will be in compliance where the employer permits nursing moms to use their established break time to express breast milk. However, where the break time requested does not coincide with established break times, the employer must nevertheless

offer the accommodation (time off), though the time off for this purpose need not be paid.

Must employers provide a private location for nursing mothers to express their breast milk?

Yes. In a significant departure from existing lactation accommodation law, the new federal law requires employers to actually provide “a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public.” This is in marked contrast with California’s existing requirement that employers make “reasonable efforts” to find such a location.

The only exception is for smaller employers (those with fewer than 50 employees) where the business can establish that compliance would impose an “undue hardship”. Congress defined the term undue hardship as a set of circumstances causing “significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure” of the business. This is a difficult standard to meet. Businesses wishing to take advantage of this exception must be prepared to prove that they cannot afford to do so. A business owner’s unsubstantiated assertion to that effect will not be enough.

Do employers have to pay nursing mothers for the time spent on this break?

It depends on when the break is taken. State law obligates an employer to allow an employee two paid ten minute rest breaks in a typical



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eight hour shift. If the employee can express her breast milk during her two state mandated rest periods, then the break must be paid. If the employee needs additional time, the break must be allowed, but the time need not be paid.

Compliance

- If you employ 50 or more employees, find a suitable location as near as possible to the employees’ work location. It must be a private location, other than a bathroom, shielded from view and free from intrusion from co-workers and the public. At a minimum, outfit the area with a door lock and consider a sign on the door that says “private” or words to that effect. Also, provide a comfortable place to sit and be sure that there are some refrigeration facilities available for the employee to store the breast milk.

- If you have fewer than 50 employees, try to do the same. If you conclude that the business would incur an undue hardship with full compliance, invest now in a consultation with an employment law expert who can assist you in assessing your undue hardship defense.

- Amend your employee handbook or policy manual to identify this benefit.

- Train all supervisors on the requirements of the law and new company policy. Too often, the supervisors will unwittingly undercut compliance by making statements to employees which are at odds with the law and company policy.

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