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NEW FEDERAL LAW: UNPAID BREAKS AND PRIVATE LOCATIONS REQUIRED FOR NURSING MOTHERS

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On March 23, 2010 the Patient Protection and Affordable Care Act (PPACA), otherwise known as health care reform, was signed into federal law. In addition to its effects on health care and insurance, this law contains a provision that has a direct and immediate impact on nearly all employers, no matter what state they operate within.

The PPACA amended the Fair Labor Standards Act to require most employers to offer reasonable, unpaid break time for nursing mothers to express breast milk. These nursing breaks are required for one year following a child's birth. The new law requires employers to offer nursing mothers a location shielded from view and free from intrusion, other than a bathroom, that can be used for the expression of breast milk. It is important to keep in mind your state law may have different requirements.

This law went into effect immediately and applies to all employers, regardless of size, with one exception. It does not apply to employers with fewer than 50 employees if it would create an undue hardship by causing "significant difficulty or expense in relation to the size, financial resources, nature, or structure of the employer's business." It is important to remember that an undue hardship is usually very difficult to prove. You should seek advice of counsel before you rely on this exemption.

Many states, including Oregon and Washington already have laws related to nursing mothers at work. The state laws are still in effect, but now you must balance which law provides the nursing mother with more benefit. If the federal law is more generous to the employee, the federal law applies. Similarly, if the state law is more generous to the employee the state law applies.

Oregon state law was the model for the new Federal law. The requirements, though similar, are not identical. Like the Federal law, in Oregon an employer must provide reasonable breaks and a private location other than a public rest room in which to express their breast milk.

Unlike the Federal law, Oregon law applies only to employers with more than 25 employees, defines “reasonable” as 30 minutes of break time for every approximately four hour working period, requires the employee to give notice of their need to take breaks, and requires employees to take these breaks at the same time as other breaks or meal periods to the extent feasible.

Oregon employers of fewer than 25 employees must now comply with the Federal law. Additionally, an Oregon employer should seek advice before strictly limiting break time to 30 minutes every four hours, or taking any action based on a lack of notice or failure of the employee to overlap nursing breaks with other breaks already provided. The Oregon law is more generous than Federal law in that it applies to nursing mothers for up to 18 months following the birth of a child, and Oregon employers (with more than 25 employees) must continue to make appropriate breaks and a private nursing location available for 18 months.

Washington law encourages, but does not require, employers to provide breaks and private locations for expression of breast milk while at work. A Washington employer who adopts a policy approved by the department of health that provides flexible scheduling, breaks and work patterns that allow time to express breast milk, who provides a clean and private location other than a restroom for breastfeeding or expressing breast milk, who provides facilities for washing hands and breast-pumping equipment in this location, and who provides a hygienic refrigerator at work for storing breast milk can use the designation “infant-friendly” on promotional materials. Washington employers must now comply with the new Federal requirements. In doing so, employers may wish to consider the possible benefits of meeting the additional requirements necessary to become certified as “infant-friendly.”

Currently there are no regulations for the Federal law that provide additional insight into the application of the law. Once the regulations are developed, there may be additional information regarding the balancing of the conflicts between the state and federal laws.



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