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****EMPLOYMENT LAW ALERT****

By: S. Whitney Rahman

As part of the recently passed Patient Protection and Affordable Care Act, Congress has amended the Fair Labor Standards Act (“FLSA”) to require employers to provide “reasonable” break time for a nursing mother employee to express breast milk, for a period of one year after the employee gives birth. The breaks must be given “each time such employee has need to express the milk.” Patient Protection and Affordable Care Act, Section 4207.

In addition, the employer must provide a private area for the employee to use for this purpose. The area cannot be a bathroom, and must be shielded from view and free from intrusion, either by coworkers or the public.

While the provision states that an employer is not required to compensate an employee for this break period, it is not clear how this break time works in conjunction with other provisions of the FLSA, particularly as to whether this time will count as “time worked” for purposes of calculating overtime. Generally, short rest breaks that are 20 minutes or less in length, are considered to be time worked, while rest breaks longer than 30 minutes, if the employee is completely relieved from work, may be excluded from time worked. See 29 C.F.R. § 785.18. Similarly, meal breaks, which generally must be at least 30 minutes or longer, and where the employee is completely relieved from work, also do not count as time worked. 29 C.F.R. § 785.19. The break envisioned by Section 4207 does not fit precisely into either existing break category. Accordingly, it probably is a good idea to count the time as time worked, to avoid any FLSA problems, and to avoid the necessity of having the employee punch out each time she takes such a break.

The new law states that employers with fewer than 50 employees are not subject to its provisions, but only if its requirements “would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.” Thus, small employers are not automatically exempt from the requirements of this provision. Instead, each small employer

should make an assessment of their facility and business to see whether such accommodations can be made, both from a structural prospective of being able to provide an appropriate space for the employee to take breaks, and from the prospective of whether the employer can afford to allow such breaks. The law provides no guidelines as to what standard must be met to show an undue hardship. Traditionally, under other laws such as the Americans with Disabilities Act, undue hardship is a difficult standard to meet, and small employers should make every effort to comply with the law, if at all possible.

If your company does business in a state that has a more stringent requirement for breaks to express breast milk, those provisions will continue to apply as well.

If you have any questions about this law, or have any other employment or labor law issues you need to discuss, please call Whitney Rahman or John Roland at 610-372-5588.