

Labor and Employment **ADVISORY**

April 6, 2010

FLSA Amendment Requires Break Time for Nursing Mothers to Express Milk

The recent passage of health care reform has saturated the news media for weeks; however, one provision that will affect many employers has received little press. The Patient Protection and Affordable Care Act, signed into law by President Obama on March 23, 2010, amends the Fair Labor Standards Act (FLSA) to require employers to provide time for nursing mothers to express breast milk. Specifically, Section 4207 of the new law, "Reasonable Break Time for Nursing Mothers," provides that, for a period of up to one year following a child's birth, employers must give an employee "reasonable break time" each time she needs to express milk. The law also requires employers to provide a location, other than a bathroom, shielded from view and free from intrusion where the employee can express milk.

Though the law specifies that the break time is unpaid, it does not give any guidance as to the definition of "reasonable break time" or set forth any limit to the number of breaks that can be taken per day. The provision was introduced into the health care reform bill by Oregon Senator Jeff Merkley, and it is modeled after Oregon's current state law. Oregon's law became effective in 2007 and defines "reasonable time" as 30 minutes for every four hours worked.

The new requirement applies broadly to all employers covered by the FLSA. Only employers with less than 50 employees are potentially exempt, if the requirements would impose an "undue hardship" by causing significant expense or difficulty in relation to the size, financial resources, nature or structure of the business. The statute does not further define "undue hardship" or specifically address whether the employee or the employer has the burden of proving undue hardship. However, experience with other employment-related laws suggests that the burden will ultimately rest with employers and may be difficult to prove.

This is the first federal law to require breaks for nursing mothers, though many states have already enacted similar statutes. Currently 24 states, Puerto Rico and the District of Columbia have laws about breastfeeding in the workplace. If a state law has greater protections for nursing mothers than the new federal law, the employer must follow the state law requirements.

While it will likely be several months before the Department of Labor issues regulations regarding these new requirements, this amendment to the FLSA became effective when the health care reform bill was signed on March 23, 2010. To avoid potential claims, employers should be aware of the break requirements and consider what private locations they may be able to offer nursing mothers to express breast milk. Employers who receive a request from nursing mothers should not be rigid regarding the frequency and duration of the breaks and should communicate with the employee to resolve any problems. Employers with less than 50 employees are cautioned not to assume exemption from the requirements, but should consult with counsel regarding the undue hardship standard set forth in the law.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

If you would like to receive future *Labor and Employment Advisories* electronically, please forward your contact information including e-mail address to labor.advisory@alston.com. Please be sure to put “**subscribe**” in the subject line.

If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

Alston & Bird's Labor and Employment Group

ATLANTA

Ashley D. Brightwell
404.881.7767
ashley.brightwell@alston.com

Lisa H. Cassilly
404.881.7945
lisa.cassilly@alston.com

Brett E. Coburn
404.881.4990
brett.coburn@alston.com

Patrick L. Coyle
404.881.4367
patrick.coyle@alston.com

Clare H. Draper IV
404.881.7191
clare.draper@alston.com

R. Steve Ensor
404.881.7448
steve.ensor@alston.com

Marilee Fiebig
404.881.4374
marilee.fiebig@alston.com

Kimberly L. Fogarty
404.881.4502
kim.fogarty@alston.com

Charles A. Gartland II
404.881.4978
chuck.gartland@alston.com

Matthew J. Gilligan
404.881.7158
matt.gilligan@alston.com

Melissa S. Hsieh
404.881.7371
melissa.hsieh@alston.com

Molly M. Jones
404.881.4993
molly.jones@alston.com

J. Thomas Kilpatrick
404.881.7819
tom.kilpatrick@alston.com

Christopher C. Marquardt
404.881.7827
chris.marquardt@alston.com

Charles H. Morgan
404.881.7187
charlie.morgan@alston.com

Edmund M. Morrell
404.881.7953
edmund.morrell@alston.com

Glenn G. Patton
404.881.7785
glenn.patton@alston.com

Robert P. Riordan
404.881.7682
bob.riordan@alston.com

Jonathan A. Roth
404.881.7551
jon.roth@alston.com

Eileen M. Scofield
404.881.7375
eileen.scofield@alston.com

Alicia P. Starkman
404.881.4994
alicia.starkman@alston.com

Jeremy Tucker
404.881.7653
jeremy.tucker@alston.com

Camille W. Ward
404.881.7876
camille.ward@alston.com

CHARLOTTE

Susan B. Molony
704.444.1121
susan.molony@alston.com

DALLAS

Jon G. Shepherd
214.922.3418
jon.shepherd@alston.com

NEW YORK

Stephen S. Hart
212.210.9463
stephen.hart@alston.com

LOS ANGELES

Lindsay G. Carlson
213.576.1038
lindsay.carlson@alston.com

Erin L. Connolly
213.576.1024
erin.connolly@alston.com

Rory J. Diamond
213.576.1146
rory.diamond@alston.com

Martha S. Doty
213.576.1145
martha.doty@alston.com

Mitra M. Eskandari-Azari
213.576.1058
mitra.azari@alston.com

Jesse M. Jauregui
213.576.1157
jesse.jauregui@alston.com

Deborah Yoon Jones
213.576.1084
debbie.jones@alston.com

Eliza Karapetyan
213.576.1020
eliza.karapetyan@alston.com

Sayaka Karitani
213.576.1026
sayaka.karitani@alston.com

Nicole C. Rivas
213.576.1021
nicole.rivas@alston.com

Casondra K. Ruga
213.576.1133
casondra.ruga@alston.com

Michael D. Young
213.576.1135
mike.young@alston.com

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

Chase Tower
Suite 3601
2200 Ross Avenue
Dallas, TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

Suite 600
3201 Beechleaf Court
Raleigh, NC 27604-1062
919.862.2200

SILICON VALLEY

Two Palo Alto Square
Suite 400
3000 El Camino Real
Palo Alto, CA 94306-2112
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.756.3300

www.alston.com

© Alston & Bird LLP 2010