



February 22, 2011

Montaniel Navarro
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-3502
Washington, DC 20210

Re: RIN 1235-ZA00
Reasonable Break Time for Nursing Mothers

Dear Mr. Navarro:

Section 4207 of the Patient Protection and Affordable Care Act gives covered women workers the right to reasonable break times and a private location, other than a bathroom, to express milk at work. We applaud the Department's efforts to provide additional guidance to employers and employees about this new law. This provision promotes fair treatment of working mothers, improves maternal and infant health, and benefits businesses' bottom lines.

It is critical that the provision be implemented in a way that meets the goals of the statute. The statute was intended to ensure that covered working mothers have workplace support and protections that allow them to continue to provide breast milk for their children for the first year of life, as recommended by all major medical authorities, including the Department of Health and Human Services. We appreciate this opportunity to offer the following comments in response to the Department's Request for Information on this provision.

(1) The guidance should explain which employees are covered under the law and encourage employers to provide pumping breaks regardless of official coverage.

The Department's guidance should clearly state which employees are covered by § 4207. This provision covers nursing mothers who are non-exempt employees covered by the FLSA, for one year after the child's birth. The guidance also should encourage employers to provide pumping breaks regardless of official coverage. In his December 22, 2010 Memorandum to Heads of Executive Departments and Agencies, Director of the Office of Personnel Management John Berry stated that the rationale for the law "applies to all executive branch employees" and instructed agencies to apply the requirements to all employees "in order to ensure consistent treatment of nursing mothers." For the same reasons, the Department should encourage *all* employers with nursing employees to provide pumping breaks to *all* such employees, regardless of official coverage. To dispel any unfounded concerns about this provision, the guidance should also clarify that employers with no nursing employees are not required to provide lactation space.

In addition, because of the myriad health and economic benefits of breastfeeding, the Department should encourage employers to allow women pumping breaks for more than one year after the child's birth. The guidance should clearly state that the law also applies to mothers who did not give birth to their child, as adoptive mothers and mothers who use a surrogate may still chose to breastfeed with the assistance of lactation-inducing drugs.

(2) The guidance should permit flexibility in the frequency of breaks.

The language of the provision states that “an employer shall provide a *reasonable break time...each time* such employee has need to express the milk” (emphasis added). Any guidance on the frequency of breaks must reflect the basic fact that nursing mothers have different needs, and these needs may change over time. The standard set by the Department must be flexible so that an individual woman's physiological needs are met. Thus, rather than set a hard and fast standard that may not work for all women, we recommend a standard similar to that set in New York, which states that a break every 3 hours is reasonable “in most circumstances.”

The Department should create a minimum standard based on the presumption that a break every 3 hours is reasonable for most women. This would mean 3 breaks in an 8 hour shift or 4 breaks in a 12 hour shift. One of the breaks might double as a lunch break, if time permits. The guidance should also make clear that for some women this may be insufficient and that employers have a responsibility under the statute, which requires reasonable breaks, to work with individual employees to determine what is reasonable.

(3) The guidance should ensure that the breaks are of sufficient duration.

Using a double electric pump, most women can start and finish a pumping session in 20 minutes. Of course, not all women will have access to a double electric pump, in which case the process would take longer. Even though the actual act of expressing milk generally takes about 20 minutes, a reasonable break for pumping must be longer. In order to pump, a woman must also (1) go to the lactation space; (2) wash her hands; (3) set up the pump; (4) dismantle the pump; (5) clean the pump; (6) store the milk; and (7) return from the lactation area.

Thus, the Department's guidance must make clear that the employers' obligation to provide “reasonable break time” encompasses the amount of time necessary for a woman to express milk *and* accomplish activities 1-7. The time needed for several of these activities will often be under the employer's control, and employers can and should be encouraged to work with employees to help streamline the process, for example, by establishing a convenient location with an electrical outlet and a nearby sink and refrigerator.

We support the Department's preliminary interpretation that an employer may not, through its choice of location, make it too burdensome for a woman to actually use the location. If, for example, the employer designates a room that is a significant distance from the woman's work location, so that a woman would lose more than a small amount of pay while on break simply because she has to travel to and from the location, the employer should not be considered in compliance with the law for failure to provide a reasonable break.

(4) The guidance should provide specifications about the lactation space.

- a) The statute requires a location shielded from view and free from intrusion by co-workers or the public. The Department’s guidance to employers should offer possible ways to meet this requirement including a door that locks; or if that is not feasible, a space with a door and walls that cannot be seen under, through, or over; or a space partitioned with full-length curtains or screens that can be secured from the inside or is accompanied by clear signage. Employers should establish a well-communicated policy that clearly states that the space is off limits when it is being used for a nursing mother’s break. Lactation spaces that are shared by multiple women should offer curtains or screens.
- b) The guidance should also make clear that there should be a seat and a clean surface where the woman can place her equipment. The provision of electricity is also recommended.
- c) The guidance should require proper ventilation, lighting, climate control, cleanliness, and freedom from mold, bacteria, and chemical contaminants in any lactation space.
- d) The woman must be able to wash her hands in fresh water before expressing milk and wash her pump parts afterwards; the location for this washing *may* be a bathroom.
- e) We support the Department’s preliminary interpretation that an employee’s right to express milk includes “the ability to safely store the milk for her child.” This should include space to store her equipment also. The employee may be expected to provide her own insulated cooler and frozen ice packs.
- f) The statute stipulates that the nursing break location is a space “other than a bathroom.” This could be interpreted as a space without a toilet in it. A **separate room adjoining a bathroom or a locker room** may be acceptable if it meets all other requirements—i.e., ventilation, cleanliness, freedom from moisture. A stall within a communal bathroom or locker room would not be acceptable. The presence in a locker room of noxious substances from the workplace (such as pathogens, dust, chemical contaminants, or radioactive substances) or a very moist climate where bacteria might breed could render it unsuitable for a nursing break location.
- g) Weather permitting, some women are comfortable expressing milk in a vehicle, using opaque screens on the windows and a pump that plugs into the vehicle’s power supply. This would be a reasonable accommodation only if the nature of the workplace is such that other options are not feasible and this setup is acceptable to the employee.
- h) **Dual-use or multiple-use spaces such as a manager’s office, conference room, storage space, utility closet, or break room** may be acceptable if they meet all other requirements. This is an issue that calls for discussion among users of the space. Arrangements that displace or inconvenience supervisors or coworkers may not be feasible due to the potential for harassment, discrimination, or retaliation. All users should be able to rely on having the room when they need it; thus, a system for scheduling or

reserving the room in advance should be agreed upon by all users. The employer should be responsible for ensuring that the discussion takes place.

- i) Employers may designate **one lactation room for use by multiple employees**, but, if more than one woman is expected to use the room simultaneously, the employer must ensure that that each worker's privacy is protected by, for example, making sure that there are opaque partitions within the room. Nursing mothers typically value peer support, so sharing a lactation space often works to their advantage. However, women also need to feel safe and free from stress when they express milk, and individual variations in comfort level can be anticipated when women share a lactation space. Scheduling and negotiation may be necessary.
- j) The statute does not require that the location provided be on the employer's premises; therefore, particularly in instances where the employer lacks onsite space, the Department should encourage employers to use creative solutions to finding a place for nursing breaks. For example, employers that are located in the same building can designate **one shared space for all nursing employees of those employers**. Each employer, however, remains responsible for ensuring that its own workers get their break times, that all are able to express milk as needed, and that the provided space meets the requirements of the statute. And while it may be convenient for several businesses to share one lactation room, employers should not require their employees to use a central room if it means they use break time waiting for a turn or to travel for an unduly long time to and from the room.
- k) Some **employees are not in a fixed place during a work shift**. Workers who follow a fixed route through the day, such as bus drivers, letter carriers, or parcel delivery workers, may be able to identify places along their route where they can schedule a regular lactation break.
- l) When **employees work at other sites**, their employer is still responsible for their welfare. Thus the employer should take the initiative to arrange milk expression space for an employee when she is off site. Suggestions we have offered for shared spaces and employees not in a fixed place may also apply here.

Some examples of creative solutions that meet the basic requirements of the law may include:

- Malls or airports with designated rooms accessible to all employees.
- Retail strip malls with small front spaces and a connecting space behind the shops that allow all workers in the mall to use a common space in the back.
- Use of facilities at cooperating neighboring businesses.
- Use of designated space in public buildings by employees who follow a fixed route during the day, such as police officers, bus drivers, letter carriers, or parcel delivery workers: for example, a bus driver might use a lactation room at a WIC clinic or a police officer might use a lactation room at a City government building.
- A mobile employee arranging to meet up with her caregiver along her route so she can visit and nurse her baby while she eats her lunch.

(5) The guidance should address the interaction with paid break times.

Through employer policies, collective bargaining agreements, and existing state laws or federal laws, many employees have an existing right to paid breaks during the work day. The statute, however, requires only unpaid time. In light of some employees' existing rights to paid breaks, we support the Department's preliminary interpretation that, at the election of the worker, paid break time can be taken concurrently with unpaid pumping time. If the worker makes that election, she should be paid for the amount of time she spends pumping that is covered by the paid break provision. The Department's guidance also should make clear that women should not be *forced* by the employer to use their paid break time concurrently with their unpaid pumping time. Finally, the guidance should specify that existing regulations on paid break time, for example time spent on-call, still apply.

If the employee uses unpaid break time, the guidance should encourage employers to allow women to extend their work day (if they so choose), to ensure that the employee will not lose wages because of unpaid time spent expressing milk. The guidance should also specify that break time taken to express milk cannot be considered to be, or deducted from allocations of, sick leave, personal leave, vacation leave, or other paid time off.

(6) The guidance should specify that break time taken to express milk will count toward all benefits, whether the break time is paid or unpaid.

The guidance should state that break time taken to express milk should count toward hours used to calculate allocations of and/or eligibility for sick leave, personal leave, vacation leave, and other paid time off, and benefits such as health insurance, life insurance, retirement benefits, profit sharing, etc.

(7) The guidance should address proper communication and publication of these rights.

The existence of this provision is not well known. To ensure that women know their rights and employers understand their responsibilities, the Department should include information on § 4207 in its publications and in the posters it creates for employers to post in their workplaces. The Department should create a model "know your rights" sheet for employers to give workers. We also recommend that the agency include information on § 4207 in its employer and employee trainings on the FMLA and minimum wage and overtime laws. The Department should require employers to provide pregnant women who are covered employees notice of this provision. In all of the Department's model notification and posters, it should be made clear that workers may have more rights under certain state laws. And all postings and notifications should be made available in multiple languages, as is the case for posters and notifications required under other statutes.

(8) The guidance should address enforcement of § 4207.

Even a short-term interruption in pumping or nursing can have a significant negative effect on lactation. Thus it is imperative that the Department's enforcement of the statute is rapid enough that the women affected will be able to get help in a timely manner that allows them to keep breastfeeding. Absent such a process, vindication of a woman's rights under this provision will do very little, as she may not be able to resume nursing. The Department's guidance should specify how § 4207 will be enforced by the Department, and what actions an

individual worker can take to enforce the law either through the Department or through a private right of action. The guidance should specify the type of relief available for violations of the law, including back pay, liquidated damages, injunctive relief, and attorney's fees.

(9) The guidance should address issues surrounding notice.

A simple conversation between an employee and a supervisor, manager, or human resources representative should provide sufficient notice of the employee's intent to take breaks for the purpose of expressing milk. Such a conversation would trigger the employer's legal requirement to make arrangements for break time and lactation space "each time such employee has need to express the milk." 29 U.S.C. 207(r)(1)(A). Notice responsibilities should apply in both directions.

The employer should:

- a) Notify all employees that it supports nursing mothers by providing unpaid break time and a suitable space for milk expression. This notification ensures that everyone, including co-workers, is aware that this support is provided and expected.
- b) Notify each pregnant employee of her rights at the time she discusses her plans for maternity or family leave, providing details of the program and how to avail herself of the breaks and the lactation space.
- c) Open a dialogue with the employee before she returns to work, reviewing the details of scheduling nursing breaks and using the space. The employer can decide the best time for this dialogue, which ideally should take place at least two weeks before the end of the employee's leave. This dialogue is particularly important if no space for nursing breaks has previously been identified by this employer. The mother may already have ideas about a lactation space, and the employer may need time to make small modifications, such as a curtain, screen, or signage.
- d) Follow up with the employee a few days after her return to work and periodically thereafter. This follow-up should include feedback about the suitability of the lactation space and how well the break time is meeting her needs.

The employee should:

- a) Notify her employer before she returns to work, confirming her intent to take breaks for milk expression and reviewing the details of her break schedule and the lactation space. Employers are encouraged to set a time for this dialogue, but should provide breaks regardless of the timing of such notice.
- b) Inform her employer if she needs to revise her schedule for breaks. While the nursing mother is the best judge of what the law describes as her "need to express the milk," her employer has legitimate concerns about predictability and productivity in the workplace. Successful milk expression depends on several factors, including the employee's comfort and stress level during her breaks. As these factors cannot be controlled entirely by either the employer or the employee, the process of negotiating break time and place will benefit from a willingness on both sides to make reasonable adjustments.
- c) Phase out her nursing breaks when she is no longer nursing.

Employers must comply with their legal obligations to ensure that such conversations are carried out in an appropriate and professional manner. Employers must remain cognizant of their legal obligations—and inform

supervisors and employees of these obligations—to avoid unlawful discrimination, harassment, and retaliation against nursing mothers. To the extent that employers inquire whether expectant mothers intend to take breaks to express milk while at work, employers should provide assurance that the employee will not be subject to discrimination, harassment, or retaliation when exercising this statutory right.

(10) The guidance should note that laws at the federal, state, and local levels prohibit discrimination, harassment, and retaliation.

Unfortunately, some women may face discrimination, harassment, or retaliation in relation to these new workplace requirements. Bias against nursing women, pregnant women, mothers, or women generally can manifest in the form of personnel decisions, harassment, or retaliatory actions. By the same token, some women may be subjected to sexual harassment by supervisors or coworkers. Inappropriate actions or comments by management officials or coworkers could lead to violations, not only of this provision of the Fair Labor Standards Act, but also of equal employment opportunity laws.

Further, the guidance should state that individuals who believe they have faced discrimination, harassment, or retaliation can report these problems to the Department of Labor and can also contact the Equal Employment Opportunity Commission (EEOC) to obtain further information about their legal rights or to file a charge. The guidance should not only provide contact info for the EEOC, but also list the EEOC’s website, which provides relevant information about these rights.

(11) Employers should not be eligible for the undue hardship exemption if they have 50 or more employees in total, either at the time that the worker first provides notice or at the time such breaks are needed.

The Department seeks comment on the proper interpretation of the statute’s undue hardship exemption. The statute clearly states that to avail itself of the undue hardship exemption, an employer must have fewer than 50 employees. This exemption states:

An employer that employs less than 50 employees shall not be subject to the requirements of this subsection [regarding reasonable break time for nursing mothers], if such 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.

29 U.S.C. 207(r)(3). As the Department recognized, the undue hardship exemption sets out a “stringent standard,” and small employers will qualify for the undue hardship exemption “only in limited circumstances.” The employer must be able to prove that providing reasonable space and time for unpaid breaks for one year after a child’s birth would cause *significant* difficulty or expense.

The Department seeks comment on the appropriate point at which to count the number of employees for purposes of determining whether then employer may assert an undue hardship defense. Clearly, if the number of employees is 50 or greater at the time that the employee first provides notice of the need for breaks, the

employer should not be eligible for the undue hardship exemption for the duration of the time that the employee requires breaks to express milk. Additionally, if the number of employees rises to 50 or more at any time, the employer should no longer qualify for the exemption. In that circumstance, employees should be notified that they will be eligible for breaks for the duration of the time that such breaks are required. We support the Department's preliminary interpretation that covered employers must count all employees who work for the employer, including all work sites, when determining whether the undue hardship exemption might apply.

As the Department recognized, "a nursing mother necessarily relies on the availability of the breaks, and fluctuation in the ability to express milk at work may cause the woman to lose the ability to produce sufficient milk for her child, frustrating the purpose of the law." It is critical that working mothers can take reasonable breaks for the duration of the time that they intend to nurse, regardless of fluctuations in the size of the workforce.

(12) As the Department has already recognized, the undue hardship exemption sets out a "stringent standard," and small employers should qualify "only in limited circumstances."

The undue hardship exemption in the Affordable Care Act should be interpreted in the same way that the undue hardship exemption of the Americans with Disabilities Act is interpreted. The ADA requires employers to provide reasonable accommodations to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. Using language similar to the Affordable Care Act's undue hardship provision, the ADA states:

...The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth [as follows]. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—(i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. 12111(10). Due to similarities in the statutory language and intent, the undue hardship exemption in the Affordable Care Act should be interpreted consistent with the undue hardship standard under the Americans with Disabilities Act. An employer with less than 50 employees would be exempt from § 4207, only if providing time and space for employees to pump would imposed an undue hardship.

Consistent with interpretations under the ADA, the “undue hardship” language sets out a stringent standard. The legislative history of the ADA has been construed to equate “undue hardship” with “unduly costly” as compared to the benefits to the worker as well as to the employer’s resources. *Vande Zande v. Wisconsin Dep’t of Admin.* 44 F.3d 538, 543 (7th Cir. 1995). The Supreme Court has held that an undue burden “either imposes undue financial and administrative burdens on [an employer] or requires a fundamental alteration in the nature of the program.” *School Bd. Of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987) (citations omitted). The Second Circuit has held that “undue hardship” is a relational term, and as such “it looks not merely to the costs that the employer is asked to assume, but also to the benefits to others that will result.” *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 139 (2d Cir. 1995).

The Equal Employment Opportunity Commission has issued pertinent guidance on the proper interpretation of the ADA’s undue hardship provision that should apply in this context, as well.¹ For example, “an employer [should not be permitted to] claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else.”² Undue hardship should be measured against the entire operations of the employer, rather than just one department.³

In short, employers with less than 50 employees would have to satisfy a stringent standard to qualify for the exemption. These employers must prove that providing reasonable breaks for nursing mothers would cause an undue hardship, by causing *significant* difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business. Employers should qualify for this exemption in only very limited circumstances.

The statute imposes minimal time and space requirements to accommodate nursing mothers. Moreover, employers should have existing policies in place regarding breaks for employees. Thus, it should be difficult for employers to demonstrate that providing reasonable breaks for nursing mothers would truly impose an undue hardship. And, as discussed above, there are numerous ways for employers to meet the space requirements, many of which will require very little additional expense for employers.

Employers who might otherwise claim an undue hardship should be encouraged to think creatively, in collaboration with their employees. Experience has shown that employees and employers should be able to develop mutually acceptable solutions. Numerous states already have standards in place requiring reasonable breaks for nursing mothers, so many employers already have structures, practices, and policies in place. In 2007, Oregon passed a similar statute titled “Rest Breaks for Breast Milk Expression.” ORS 653.077. The Oregon law uses parallel “undue hardship” language. In Oregon, employers can seek an exemption from Oregon Bureau of Labor and Industry if they claim an undue hardship. Although a few Oregon companies originally sought to file for exemptions, these employers ultimately found a way to meet the needs of their breastfeeding mothers, and the exemptions were not granted.

¹ See “Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act,” October 17, 2002, available at http://www.eeoc.gov/policy/docs/accommodation.html#N_16.

² *Id.*

³ 42 U.S.C. 12111(10); 29 C.F.R. § 1630.2(p)(2)(ii),(iii).

Providing breaks for nursing employees benefits not only mothers and their babies, but also benefits businesses. For the vast majority of employers, these breaks should provide benefits that outweigh any associated costs. For these reasons, the guidance should encourage employers to offer reasonable breaks for nursing mothers regardless of official coverage.

Conclusion

Thank you for this opportunity to provide comments. This guidance will help to ensure a vital right for working women and their families. Please feel free to contact Megan Renner, Executive Director of the United States Breastfeeding Committee, at (202) 367-1132 or mrenner@usbreastfeeding.org if you have any questions regarding these recommendations. USBC also maintains a list of Frequently Asked Questions (FAQs) and resources for employers and employees, available on our website at the link below:

<http://www.usbreastfeeding.org/Workplace/WorkplaceSupport/WorkplaceSupportinFederalLaw/tabid/175/Default.aspx>

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robin Stanton". The signature is fluid and cursive, with the first name "Robin" and last name "Stanton" clearly distinguishable.

Robin W. Stanton, MA, RD, LD
Chair