

August 7, 2015

David Weil
Administrator, Wage and Hour Division
U.S. Department of Labor
Frances Perkins Building
200 Constitution Ave, NW
Washington, DC 20210

Dear Mr. Weil:

Section 4207 of the Patient Protection and Affordable Care Act gives covered women workers the right to reasonable break time and a private location, other than a bathroom, to express milk at work. We applaud the Department's efforts to provide additional information to employers and employees about this law. This provision provides a vital right for working women and their families, improves maternal and child health, and benefits businesses' bottom lines.

There can be no doubt that the "Break Time" law has had an immense, positive impact on breastfeeding families. Yet confusion about the law's requirements remains. The U.S. Breastfeeding Committee (USBC), American Civil Liberties Union (ACLU), and many other local and community-based organizations regularly field requests for clarification on the rights of breastfeeding employees and requirements of employers. It is critical that the provision be implemented in a way that meets the goals of the statute, which was intended to ensure that covered 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 U.S. Department of Health and Human Services.

In order to identify areas where further clarification would be helpful, the USBC recently conducted a review of all inquiries it has received on the law, and a gap analysis to assess how existing Department of Labor information sources address questions routinely received from both employees and employers. The gap analysis compared the information currently available on each facet of the law in Fact Sheet #73, the associated FAQs, and the 2011 Request for Information (RFI).

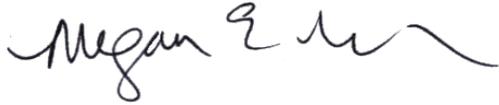
We understand from the FAQs that the RFI only provides "useful information for employers to consider," and not full-fledged regulations or enforcement policies. **However, there is substantial additional detail in the RFI that, if added to the FAQs or Fact Sheet, would make a profound difference in strengthening implementation and plugging gaps that have caused immense confusion for employers and employees alike. Moreover, since the issuance of the RFI, additional areas have emerged where it is clear that further clarification is necessary.**

Based on this gap analysis, the USBC has developed, with review and input from the ACLU, the 20 enclosed recommendations to enhance implementation information available via the FAQs and Fact Sheet #73. We are pleased to jointly offer these recommendations, and would welcome the opportunity to meet with you to discuss them, as well as any additional actions that can be taken to better support the Department's implementation efforts.

We will be in touch within the next few weeks to schedule a meeting. If you have any questions, please contact USBC Deputy Director Amelia Psmythe at apsmythe@usbreastfeeding.org or 773.359.1549 x23.

Thank you for your continued support of breastfeeding families.

Respectfully submitted,

A handwritten signature in black ink that reads "Megan Renner". The signature is fluid and cursive, with the first name being more prominent.

Megan Renner
Executive Director
U.S. Breastfeeding Committee

A handwritten signature in black ink that reads "Galen Sherwin". The signature is cursive and somewhat stylized, with the last name being more prominent.

Galen Sherwin
Senior Staff Attorney, Women's Rights Project
American Civil Liberties Union

cc: Christine Schott, Sabrina Steel

The United States Breastfeeding Committee completed a gap analysis to assess how existing federal guidance on the “Break Time for Nursing Mothers” law addresses questions from employees and employers. Based on this analysis, the United States Breastfeeding Committee and American Civil Liberties Union jointly recommend the following actions to improve implementation of the “Break Time for Nursing Mothers” law:

Coverage Under the FLSA Nursing Mothers Provision

Recommendation 1: There is widespread confusion about which employees are covered by the “Break Time for Nursing Mothers” law. We recommend highlighting existing resources to help mothers determine coverage under the law.

Recommended language to be added to Fact Sheet #73 section on Coverage and Compensation: For help determining whether you are covered, call the Wage and Hour Division at 1-866-487-9243, or use the online [Fair Labor Standards Act Advisor](#).

Unpaid Break Time: Extended Work Day

Recommendation 2: Employees have expressed concern that exercising their rights under the “Break Time for Nursing Mothers” law will impact other workplace benefits. We recommend adding language that encourages flexibility, particularly in cases where health insurance benefits relate to hours worked; however the Department should clarify that employers should not require employees to work longer hours to make up for the unpaid break time.

Recommended Language for Added FAQ:

Q: Will exercising my rights under the “Break Time for Nursing Mothers” law impact my other workplace benefits?

A: The Department does not believe that breaks to express breast milk can properly be considered leave and should not impact employer provided health care coverage or other employee benefits. The Department encourages employers to provide flexible scheduling for those employees who choose to make up for any unpaid break time; however, employees should not be required to work longer hours to make up for the unpaid break time. Employees who elect to use their paid breaks (if any) for other purposes must still be afforded the unpaid breaks to which they are entitled.

Reasonable Break Time: Frequency, Duration, Factors to Consider

Recommendation 3: As detailed in the Department’s Request for Information on Break Time for Nursing Mothers, the amount of time needed is impacted by many factors, including travel time, pump set up, pump break down, cleaning and packing, and milk storage. We recommend that in assessing the reasonableness of break time provided to a nursing employee, the Department considers all the steps reasonably necessary to express breast milk, not merely the time required to express the milk itself.

Recommended Language for Added FAQ:

Q: How much time is considered “reasonable”?

A: The length of time necessary to express milk varies from woman to woman. The act of expressing breast milk alone typically takes about 15 to 20 minutes, but there are many other factors that will determine a reasonable break time. Employers should consider these factors

when determining how they will provide both reasonable break time and space for nursing mothers. For example, factors such as the location of the space and the amenities nearby (e.g., proximity to employee's work area, availability of sink for washing, location of refrigerator or personal storage for the milk, etc.) can affect the length of break an employee will need to express milk. Some of the factors employers should consider in determining whether the time needed for a nursing employee to express milk is "reasonable" include:

- (i) The time it takes to walk to and from the lactation space and the wait, if any, to use the space;
- (ii) Whether the employee has to retrieve her pump and other supplies from another location;
- (iii) Whether the employee will need to unpack and set up her own pump or if a pump is provided for her;
- (iv) The efficiency of the pump used to express milk (employees using different pumps may require more or less time);
- (v) Whether there is a sink and running water nearby for the employee to use to wash her hands before pumping and to clean the pump attachments when she is done expressing milk, or what additional steps she will need to take to maintain the cleanliness of the pump attachments;
- (vi) The time it takes for the employee to store her milk either in a refrigerator or personal cooler.

Recommendation 4: As detailed in the Department's Request for Information on Break Time for Nursing Mothers, the frequency of breaks needed to express breast milk varies depending on factors such as the age of the baby, the number of breast feedings in the baby's normal daily schedule, whether the baby is eating solid food, and other factors. We recommend that the Department add a clause to the pre-existing sentence to inform that the frequency and duration of milk expression breaks will vary by the health of the mom and baby, and also by the child's age.

Recommended Language Change for Fact Sheet 73 section on Time and Location of Breaks:

Employers are required to provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk as well as the duration of each break will likely vary from mother to mother. In addition, an employee's needs may change over time according to the child's age and feeding schedule, as well as the health of the mother and child.

Recommendation 5: Many employers do not know where to turn for support while seeking to comply with the "Break Time" law. We recommend highlighting employer resources, including:

- Office on Women's Health:
 - [Supporting Nursing Moms at Work: Employer Solutions](#)
- Health Resources and Services Administration Maternal and Child Health Bureau:
 - [Business Case for Breastfeeding](#)
- U.S. Breastfeeding Committee:
 - [Workplace law webpage](#)
 - [Directory of state breastfeeding coalitions](#)

Recommended Language for Added FAQ:

Q: Are there resources available to help employers comply with the "Break Time for Nursing Mothers" law?

A: Information on best practices and employer resources are available from the following sources:

- Office on Women's Health:
 - [Supporting Nursing Moms at Work: Employer Solutions](#)
- Health Resources and Services Administration Maternal and Child Health Bureau:
 - [Business Case for Breastfeeding](#)
- U.S. Breastfeeding Committee:

- [Workplace law webpage](#)

Many state breastfeeding coalitions also provide support and resources to help employers develop lactation policies and programs. The U.S. Breastfeeding Committee [Coalitions Directory](#) provides an updated list of state, territorial, and tribal breastfeeding coalitions.

Space for Expressing Breast Milk: Definition, Privacy

Recommendation 6: Many spaces used by breastfeeding employees do not include a lock or other means for ensuring privacy. As a result, many employees report being walked in on or otherwise interrupted while expressing breast milk during the work day. We recommend providing additional guidance from the Request for Information on Break Time for Nursing Mothers to address these privacy concerns. In addition, we recommend that the Department state that a sign clearly demonstrating that the space should not be entered is acceptable as a means to ensure privacy as long as it is accompanied by a well-communicated policy on employee behavior, including a sexual harassment policy that covers harassment on the basis of pregnancy and related conditions, including lactation.

Recommended Language for Added FAQ:

Q: What are the privacy requirements?

A: The space provided must be shielded from view and free from intrusion. Where practicable, employers are required to make a room (either private or with partitions for use by multiple nursing employees) available for use by employees taking breaks to express milk. Where it is not practicable for an employer to provide a room, the requirement can be met by creating a space with partitions or curtains. Any windows in the designated room or space should be covered to ensure the space is "shielded from view." With any space provided for expressing milk, the employer must ensure the employee's privacy through means such as a lock on the door or signs that designate when the space is in use accompanied by a well-communicated policy on employee behavior, including a sexual harassment policy that covers harassment on the basis of pregnancy and related conditions, including lactation.

Recommendation 7: In many locations, the most suitable space for breastfeeding employees is in a manager's office. However, these spaces often contain security cameras which compromise the employee's privacy. The USBC requests that the Department address these concerns, and that an affirmative statement be made declaring that presence of a camera in a location does not qualify a business for undue hardship.

Recommended Language for Added FAQ:

Q: What if the only space available has a security camera?

A: In many worksites, the most suitable pumping space is a manager's office. However, these spaces often contain security cameras, compromising the employee's privacy. Solutions to overcome this issue include turning the camera off, covering the camera lens, use of a curtain, tent, partition or poncho, or ideally, designation of a different milk expression station. The best solution for your worksite will depend on the office layout and the comfort of the employee. The Department does not consider the presence of a camera to qualify a business for undue hardship.

Space: Temporary, not Dedicated

Recommendation 8: Although the law does not require employers to dedicate permanent space for use by nursing employees, we recommend encouraging employers to always have a plan for

how to accommodate a breastfeeding employee. The case of an employee visiting from another branch or worksite is a good example of why this may be necessary.

Recommended Language for Added FAQ:

Q: Do employers need to create a permanent, dedicated space for use by breastfeeding employees?

A: Although the law does not require employers to dedicate permanent space for use by nursing employees, employers should always have a plan for how to accommodate a breastfeeding employee, should the need arise, such as in the case of an employee visiting from another branch or worksite.

Space: Adjoining Bathrooms

Recommendation 9: As discussed in the Request for Information on Break Time for Nursing Mothers, many possible locations can be considered as a space for employees to express breast milk during the workday. In consideration of health and hygiene, we recommend that the Department clarify that an anteroom or lounge area connected to the bathroom would be sufficient only if fully separated from the toilet area by a permanent/closed wall, smoke free, and if "shielded from view" and "free from intrusion".

Recommended Language for Added FAQ:

Q: Can an anteroom or lounge area connected to a bathroom be offered to employees?

A: An anteroom or lounge area connected to the bathroom would be sufficient only if fully separated from the toilet area by a permanent/closed wall, meeting the same threshold for pumping stations located within locker rooms with shower areas. This area must be in a smoke free area and meet the requirements of being shielded from view and free from intrusion.

Space: Locker Rooms

Recommendation 10: As discussed in the Request for Information on Break Time for Nursing Mothers, many possible locations can be considered as a space for employees to express breast milk during the workday. In consideration of health and hygiene, we recommend that the Department clarify that a locker room will meet the requirements of the law only if there is no toilet or shower, or if the pumping space within the locker room is separated from the toilet or shower by a closed wall. If there is a toilet and/or shower within the locker room that is not separated by a closed wall, then the room must be treated as an adjoining bathroom.

Recommended Language for Added FAQ:

Q: Does a locker room meet the space requirements of "Break Time for Nursing Mothers" law?

A: A locker room will meet the requirements of the law only if there is no toilet or shower, or if the pumping space within the locker room is separated from the toilet or shower by a closed wall. If there is a toilet and/or shower within the locker room that is not separated by a closed wall, then the employer must treat the room as an adjoining bathroom. Locker rooms that function as changing rooms (i.e., for changing in and out of uniforms) may be adequate as long as there is a separate space designated within the room for expressing milk that is shielded from view and free from intrusion. The Department does not believe, however, that a locker room where there is not sufficient differentiation between the toilet or shower area and the space reserved for expressing breast milk would meet the requirements of the law because it presents similar health and sanitation concerns as a bathroom.

Space: Number of Mothers Using, Location

Recommendation 11: As detailed in the Request for Information on Break Time for Nursing Mothers, some workplaces may employ a large number of breastfeeding employees at any single time. We recommend clarifying that because the statute requires employers to provide break time each time such employee has need to express the milk, employers should consider the number of nursing mothers employed and their work schedules to determine the location and number of spaces to designate or create. If more than one employee uses the room at one time, privacy screens or curtains would be necessary to meet the threshold of “shielded from view”.

Recommended Language for Added FAQ:

Q: What if there are several breastfeeding employees at the worksite?

A: Because the statute requires employers to provide break time “each time such employee has need to express the milk,” employers should consider the number of nursing mothers employed and their work schedules to determine the location and number of spaces to designate or create. Employers may provide a large room with privacy screens so that the room may be used simultaneously by several nursing employees. Where the designated space is so far from the employee’s work area as to make it impractical for the employee to take breaks to express milk, or where the number of nursing employees needing to use the space either prevents an employee from taking breaks to express milk or necessitates prolonged waiting time, the Department will not consider the employer to be in compliance with the requirement to provide reasonable break time.

Recommendation 12: Some employees wish to breastfeed directly during the workday, either by visiting an on-site child care center, a caregiver bringing the child to the worksite, or by leaving the worksite to visit the child in a nearby location. Some mothers are unable to express milk with a pump, some babies are unable to drink from a bottle, and still others find that direct breastfeeding is more efficient than milk expression through a pump. These conditions, and others, are leading to questions from the field, and even some emerging conflict between employers and employees who need or desire accommodations to directly breastfeed their babies. This is resulting in a push from some individuals to include milk extracted through direct breastfeeding of the baby in the definition of milk expression, however some employers have expressed concern that they would not be able to allow babies into the worksite and still meet safety regulations. There is concern that requiring employers to allow direct breastfeeding would qualify a majority of employers for an undue hardship exemption. We recommend the Department encourages, but does not require, employers to allow mothers direct access to their babies where the worksite can safely accommodate it. This is in alignment with the Surgeon General’s Call to Action 15 to: “Expand the use of programs in the workplace that allow lactating mothers to have direct access to their babies.”

Space Functionality

Recommendation 13: Employers continually request additional guidance on space requirements under the “Break Time for Nursing Mothers” law. We recommend including additional information from the Request for Information on Break Time for Nursing Mothers, including to further define the term “functional” from the FAQ and provide more information on the provision of sinks and refrigerators. Additionally, we recommend the Department add language clarifying that the space should require proper ventilation, lighting, climate control, cleanliness, and freedom from mold, bacteria, and chemical contaminants in any lactation space. To respond to questions regarding breast milk storage, we recommend the Department add language stating that while employers are not required to provide refrigeration options for nursing mothers for the purpose of storing

expressed milk, they must allow a nursing mother to bring a pump and insulated food container to work for expressing and storing the milk and ensure there is a place where she can store the pump and insulated food container while she is at work. Additionally, we recommend highlighting the Occupational Safety and Health Administration statement that expressed breast milk is not a biohazard.

Recommended Language for Added FAQ:

Q: What must an employer provide to workers who need to express breast milk in the workplace?

A: The space should have proper ventilation, lighting, climate control, cleanliness, and freedom from mold, bacteria, and chemical contaminants. To be considered functional, at a minimum, the space must contain a place for the nursing mother to sit, and a flat surface, other than the floor, on which to place the pump. Ideally, the space will have access to electricity, so that a nursing mother can plug in an electric pump rather than use a pump with battery power. There are a range of additional features that some employers have included when providing spaces for their employees to use to express breast milk, such as sinks within or nearby the room for washing hands and cleaning pump attachments, and refrigerators within or nearby the room for storing expressed milk. While such additional features are not required, the Department notes that their provision may decrease the amount of break time needed by nursing employees to express milk.

While employers are not required to provide refrigeration options for nursing mothers for the purpose of storing expressed milk, they must allow a nursing mother to bring a pump and insulated food container to work for expressing and storing the milk and ensure there is a place where she can store the pump and insulated food container while she is at work. Please note that the Occupational Safety & Health Administration states that breast milk can be safely stored in a [shared refrigerator](#) with other food and beverages.

Space: Off Site Locations

Recommendation 14: Travel is required by many employees. We recommend that the Department add clarification that it is the obligation of the employer to provide time and space, regardless of where the employee is located. In situations where the employee is off-site, the Department recommends that the employer arrange with personnel at the alternate location to allow the employee to use a space for the purpose of expressing milk.

Recommended Language for Added FAQ:

Q: What if the employee must travel to another worksite?

A: It is the obligation of the employer to provide time and space, regardless of where the employee is located. In situations where the employee is off-site, the Department recommends that the employer arrange with personnel at the alternate location to allow the employee to use a space for the purpose of expressing milk.

Notice

Recommendation 15: To ensure that women know their rights and employers understand their responsibilities, we recommend including information on § 4207 in Department publications as well as in the posters created for employers to post in their workplaces, specifying that such notice be posted in a conspicuous place in an area readily accessible to employees. The Department should create a model “know your rights” sheet for employers to give workers. Additionally, we 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 notice of this provision to pregnant women who are covered by §4207. 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. In addition to the general notice requirement, the Department should advise employers that it is incumbent upon them to notify each employee who is expecting a new child of her rights under the Act, including the employer's policy with respect to break time and a discussion of the available lactation space(s).

Undue Hardship Exemption: Counting Employees

Recommendation 16: Some employers' workforces fluctuate, for myriad reasons. A nursing mother necessarily relies on the availability of the breaks, and fluctuation in the ability to express breast milk at work may cause the woman to lose the ability to produce sufficient milk for her child, frustrating the purpose of the law. Because businesses with fewer than 50 employees are eligible to claim undue hardship from the nursing mothers break time requirements, we recommend including language to clarify how/when this number will be calculated. The USBC also recommends highlighting that an employer that has previously claimed the undue hardship exemption will no longer be eligible for the exemption if the number of employees rises to 50 or more. Additionally, we recommend that the Department clarify that once accommodations have been made for a breastfeeding employee, they cannot be taken away because of a decreased workforce.

Undue Hardship Exemption: Burden of Proof, No Prospective Exemption, just Affirmative Defense

Recommendation 17: By far, the most common misunderstanding about the "Break Time for Nursing Mothers" law is related to the undue hardship exemption for small businesses. The media, employers, and employees often report that small businesses with fewer than 50 employees are not required to meet the obligations of the "Break Time for Nursing Mothers" law. We recommend adding clarification from the Request for Information on Break Time for Nursing Mothers that the undue hardship exemption will operate as an affirmative defense raised by an employer that seeks to demonstrate to the Department why it is unable to accommodate a particular nursing employee under the law.

Recommended Language for Added FAQ:

Q: How can my business receive an undue hardship exemption?

A: Because the factors that would cause the employer "significant difficulty or expense in relation to the size, financial resources, or structure of the employers business" and the number of employees employed by a particular employer will vary depending on the circumstances at the time the request for break time is made, the Department will not grant prospective undue hardship exemptions to employers. The undue hardship exemption will operate as an affirmative defense raised by an employer that seeks to demonstrate to the Department why it is unable to accommodate a particular nursing employee under the law.

If the Department were investigating a complaint made by a nursing mother who claims her employer is not complying with the law, the employer would have an opportunity at that time to demonstrate to the Department why it qualifies in that instance for an undue hardship exemption based on the statutory factors. Employers with 50 or more employees must comply with the law without exception.

Because the law only requires space and time for unpaid breaks for one year after a child's birth, and the employer must be able to demonstrate "significant" difficulty or expense, the Department believes that this is a stringent standard that will result in employers being able to avail themselves of the exemption only in limited circumstances. The break time for nursing mothers statutory provision provides an undue hardship exemption that is only available for employers with fewer than 50 employees that meet certain conditions. Employers with fewer than 50 employees may not presume that having a smaller workforce by itself sufficiently demonstrates that compliance would pose a significant difficulty or expense.

Relationship to the Family Medical Leave Act

Recommendation 18: There is confusion about the relationship between the Family Medical Leave Act and the "Break Time for Nursing Mothers" provision. We recommend including information detailed in the Request for Information on Break Time for Nursing Mothers to clarify this relationship.

Recommended Language for Added FAQ:

Q: What is the relationship between the "Break Time for Nursing Mothers" law and the Family and Medical Leave Act?

A: Breaks to express breast milk cannot be considered to be FMLA leave or counted against an employee's FMLA leave entitlement. While employees are entitled to take FMLA leave to bond with a newborn child, the Department does not consider expressing milk at work to constitute bonding with or caring for a newborn child. See 29 CFR 825.120. Also, while an eligible employee may take FMLA leave due to her own serious health condition, the Department does not believe that expressing milk will typically be associated with a serious health condition under the FMLA. See 29 CFR 825.113-115.

Enforcement

Recommendation 19:

Many mothers report that their employers refuse to comply with the "Break Time for Nursing Mothers" law because of the lack of a clear enforcement provision and the perception that violation will not lead to any consequences for the employer. Furthermore, support from State Departments of Labor in response to complaints from breastfeeding employees has been inconsistent. We recommend including information selected from the Request for Information on Break Time for Nursing Mothers and the Wage and Hour Division webpage on how to file a complaint.

Recommended Language for Added FAQ:

Q: How will the law be enforced?

A: The U.S. Department of Labor Wage and Hour Division (WHD) is responsible for enforcing the "Break Time for Nursing Mothers" law. If your employer refuses to comply with the law, you can [file a complaint](#) by calling the toll-free WHD phone number: 1-800-487-9243. You will then be directed to your nearest WHD office for assistance. All services are free and confidential. Your employer cannot fire or discriminate against you for filing a complaint. To the extent possible, WHD intends to give priority consideration to complaints received by the agency alleging that an employer is failing to provide break time and a space to express milk as required by law to allow expeditious resolution of the matter in order to preserve the employee's ability to continue to breastfeed and express milk for her child.

Limits of penalties:

Section 7(r) of the FLSA does not specify any penalties if an employer is found to have violated the break time for nursing mothers requirement. In most instances, an employee may only bring an action for unpaid minimum wages or unpaid overtime compensation and an additional equal amount in liquidated damages. Because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks.

Injunctive relief and lost wage compensation for untimely dismissal:

If an employer refuses to comply with the requirements of section 7(r), however, the Department may seek injunctive relief in federal district court, and may obtain reinstatement and lost wages for the employee. For example, if an employer terminates a nursing mother employee because she takes breaks to express milk that she is entitled to under the FLSA, or because she has informed her employer that she intends to take breaks to express breast milk, this would be considered a violation of 29 U.S.C. 15(a)(2) (i.e., an unlawful violation of section 7(r)). In such a case, the Department could pursue injunctive relief in federal district court and seek reinstatement and lost wages for the employee.

Additional protections from discrimination:

Additionally, if an employee is “discharged or in any other manner discriminated against” because she has filed a complaint or caused to be instituted any proceeding regarding break time for expressing breast milk, the employee may file a retaliation complaint with the Department or she may file a private cause of action seeking reinstatement, lost wages, and other appropriate remedies. If an employer treats employees who take breaks to express breast milk differently than employees who take breaks for other personal reasons, the nursing employee may have a claim for disparate treatment under Title VII of the Civil Rights Act of 1964.\3\

Tribal Organizations and Government Employees

Recommendation 20:

There is confusion about how the “Break Time for Nursing Mothers” law applies to women working in tribal organizations and working in the government.

Recommended Language for Added FAQ:

The coverage of the law can be complicated by nuances of tribal jurisdiction and whether the Fair Labor Standards Act applies to the business in question. The Department recommends consulting with a lawyer experienced in these issues.