

Time Is Money: A Quick Wage-Hour Tip on ... FLSA Protections for Nursing Mothers

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With more than 24 million mothers with children under the age of 18 in the U.S. workforce, many of whom breastfeed their children, it is important for employers to understand the break time and pumping space protections afforded to nursing mothers by the Fair Labor Standards Act (FLSA).

Reasonable Break Time to Pump

Under the FLSA, nursing employees are entitled to reasonable break time during the workday to express breast milk for their nursing child for one year following the child's birth. The employee must be entitled to a break "each time such employee has need to express milk." The frequency, duration, and timing of the breaks an employee may need will likely vary depending on the employee and child.

Employers are not required to pay non-exempt employees for break time to pump unless otherwise required by applicable law, or if the employees are not completely relieved of their duties while pumping. Under the Department of Labor (DOL) regulations implementing the FLSA, breaks of 20 minutes or less must be paid, and if an employer provides such breaks to its employees generally, nursing employees may use such paid breaks to pump. Additionally, if an employer provides paid breaks to all employees, the employer must pay employees who choose to pump during their paid breaks.

Private Space to Pump

The FLSA also requires employers to provide nursing employees with a location to express breast milk that is shielded from view and free from intrusion from the public and coworkers, including any coworkers who are also pumping. DOL explains that to ensure privacy, employers could provide a space with locked door or sign that designates when the space is in use and off limit to others or create a temporary space for pumping by providing privacy screens between nursing employees and signs in a portion of a vacant office or storage room. Employees who work remotely must also be free from observation by any employer-provided or required video system, including computer cameras, security cameras, and web conferencing platforms.

Importantly, the space may not be a bathroom (even if private) and must be functional to use for expressing breast milk. DOL has explained that having a place for the nursing employee to sit, a

surface on which to place the pump (other than the floor), access to electricity, and a sink near the space provided to pump increases the functionality of the space. Additionally, an employee must be able to safely store breast milk. While employers are not required to provide a refrigerator, they must allow a nursing employee to bring an insulated container or personal cooler to work and ensure there is a place for the employee to store these items while working.

Although the space does not need to be solely dedicated to the nursing employee's use and can be temporary, the space must be readily available when a nursing employee needs it. While the FLSA does not specify how close the space must be to the employee's workstation, the DOL has stated that the designated space should not be so far from the employee's work area as to make it impractical for the employee to take breaks to pump throughout the workday. Employers must also ensure that the number of nursing employees needing to use the space does not prevent an employee from taking pump breaks or result in prolonged waiting time.

Covered Employees

The FLSA's nursing employee protections apply to nearly all employees covered by the FLSA, regardless of whether they are exempt or non-exempt from minimum wage or overtime requirements, with the exception of certain employees of airlines, railroads, and motorcoach carriers. It's important to remember, however, that employees who are not subject to these requirements under the FLSA may still be entitled to breaks or space protections under state or local laws.

Small Business Exemption

Employers with fewer than 50 employees are not subject to the FLSA's break time and space requirements if compliance would impose an undue hardship on the employer. Whether compliance would be an undue hardship is determined on an individual employee basis by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer's business. DOL explains that the employer's burden to prove an undue hardship is a "stringent standard" and warns that employers will only be exempt in "limited circumstances."

DOL's Answers to Frequently Asked Questions

Q: Can employers require an employee to submit a doctor's note before allowing an employee to take pump breaks?

A: No. Employers may not require an employee to provide a doctor's note before allowing an employee to take pump breaks.

Q: Can employers require employees to make up time that nursing employees spend on pump breaks to meet productivity measures?

A: No. Employers cannot hold the time that employees take for pump breaks against them when determining whether they met a productivity measure or quota. Employers also cannot require employees to make up the time they took for pump breaks.

Q: Can employers require employees to limit breaks to certain times of the day, such as during lunch or slower periods?

A: No. While an employee and employer can agree to a certain schedule based on the nursing employee's need to pump, an employer cannot require an employee to adhere to a fixed schedule that does not meet the employee's need to pump. Additionally, any agreed-upon schedule may need to be adjusted over time if the nursing employee's pumping needs change.

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