

Federal

First Steps

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At 974 pages, the Patient Protection and Affordable Care Act of 2010 ("Act"), puts into place comprehensive federal health reform measures, many of which will affect localities as employers.[1] The Act will not be implemented all at once; in fact, some portions of the law have already taken effect and other changes won't come into effect until 2014. The sheer number of changes, combined with the staggered roll-out process, presents a daunting task for local government attorneys responsible for ensuring that their entity is in compliance with the Act. Instead of breaking down the entire law at once, this column will from time-to-time focus on just one topic that personnel attorneys should address with their local government client. This month's subject is nursing mothers.

Section 4207 of the Act, titled "Reasonable Break Time for Nursing Mothers," amends the Fair Labor Standards Act and states in part that an employer must provide "a reasonable break time" for an employee to express breast milk each time the employee has a need to express the milk, until the child's first birthday. Under the Act, the employer is not required to pay for such break time, but is required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public." One immediate question that comes to mind is whether or not the breaks are included as part of work hours that must be compensated. The words "reasonable" or "break time" are not defined by the Act, but it is possible that the Department of Labor will clarify in future regulations. Federal law does state that short breaks (usually lasting about 5 to 20 minutes), are considered compensable work hours, but meal periods (typically lasting at least 30 minutes) are not.[2]

While this provision is mandatory for all employers with 50 or more employees, employers with less than 50 employees are subject to the provision *unless* they can show that the requirements would impose an "undue hardship" in relation to size, financial resources, nature, or structure of the employer's business. Once again, definitions for key terms are lacking. The Act does not define "undue hardship," but on first glance the standard appears difficult to meet.

Finally, the law provides that State law is not preempted to the extent that it provides for greater protection to employees than provided under the Act. According to the National Conference of State Legislatures, twenty-four states, the District of Columbia, and Puerto Rico have laws relating to breastfeeding in the workplace. One such example is Colorado, which passed a law in 2008 that requires public and private employers, who have at least one employee, to provide reasonable unpaid break time for up to two years after the child's birth.[3]

Because Section 4207 went into effect immediately after the enactment of the Act, it is crucial that local entities update their policies to conform to the new requirements for nursing mothers. At the very least, this includes: (1) reviewing your state law to determine whether you must follow state law requirements or the new requirements under the Act; (2) identifying proper locations for nursing mothers to express milk; (3) determining if the time taken to express milk will be paid or unpaid; (4) and establish a start date and follow through to make sure the policy goes into effect soon. It will also be well worth your time to update employee handbooks and policy manuals, and to educate and train supervisors about any changes in your entity's policy. There are also other practical issues to consider, while not required by Section 4207, such as whether the local entity as employer will provide refrigeration services to store the milk, a sink to clean breast pumps, and whether to include breastfeeding in your sexual harassment policy. It may even be worth identifying a point person in your office to ensure compliant and consistent implementation of a breastfeeding policy. **ML**

Notes

1. Patient Protection and Affordable Health Care Act of 2010, Pub. L. No. 111-148 (2010). Pub. L. No. 111-148, §4207 (2010). Code of Federal Register Pertaining to U.S. Dept. of Labor,
2. 29 C.F.R. §785.18 (1961). National Conference of State Legislatures, HYPERLINK "http://www.ncsl.org/default.aspx?tabid=14389" http://www.ncsl.org/default.aspx?tabid=14389 (last visited June 23, 2010).
3. Colo. Rev. Stat. 8-13.5-104(1)(2009).

