

February 22, 2011

Nancy Leppink
Acting Administrator
Wage and Hour Division
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 Ms. Leppink;

Section 4207 of the Patient Protection and Affordable Care Act gives covered women workers the right to reasonable break times and a private location to express milk at work. We applaud the Department of Labor's action to provide more guidance to employers and employees about this new right. 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 is intended to ensure that all working mothers covered by the provision have workplace protections that allow them to continue to provide breast milk for their babies for the first year of life, the period recommended by healthcare experts. On behalf of the National Partnership for Women & Families and the broad coalition of undersigned groups, we offer the following comments in response to the Request for Information regarding the Department's intent to issue guidance on this provision.

The guidance should explain which employees are covered under the law and encourage employers to provide pumping breaks regardless of official coverage. Due to the myriad health and economic benefits of breastfeeding, the Department should encourage *all* employers to give pumping breaks to *all* nursing employees, regardless of official coverage. To dispel unfounded concerns about this provision, the guidance should specify that employers with no nursing employees are not required to provide lactation rooms.

The guidance should permit flexibility in the frequency and duration of breaks. The language of the provision states that "employers 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 for pumping must reflect the basic fact that nursing mothers have different needs, and these needs may change over time. The Department's guidance must make clear that a "reasonable break time" is the amount of time necessary for a woman to not only express milk, but also go to the lactation space, wash her hands, set up the pump, dismantle the pump, clean the pump, store the milk, and return from the lactation area.

The guidance should provide specifications about the lactation space. The statute requires “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.” 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. The guidance should also make clear that there should be a seat and a clean surface where the woman can place her equipment. Ventilation, lighting, climate control, cleanliness, and freedom from mold, bacteria, and chemical contaminants are critical in any lactation space. The provision of electricity is also recommended. The woman must be able to wash her hands in fresh water before expressing milk and wash her pump parts afterwards. Consistent with the Department’s preliminary interpretation, the guidance should state that an employee’s right to express milk includes a secure storage place for her milk and her equipment.

The guidance should address the interaction of this provision with paid break times. 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. The guidance should specify that the existing regulations on paid break time, for example time spent on-call, still apply.

The guidance should specify that employers must extend benefits that accrue during paid or unpaid break time. It is important that new mothers not be penalized for taking break time—for example, employees should not lose eligibility for benefits because of unpaid break time. The guidance should state that paid or unpaid break time taken to express milk should be treated in the same manner as other paid or unpaid breaks for the purposes of determining accrual or eligibility for benefits and leave, such as sick leave, personal leave, vacation leave, or other paid time off, and benefits such as health insurance, life insurance, retirement benefits, profit sharing, etc. Employers should consult with federal, state, and local laws to ensure compliance with provisions governing employee benefits. 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 address proper communication and publication of these rights. 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 postings and notifications required by other statutes.

The guidance should address enforcement of § 4207. 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. 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.

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).

The guidance should note that nondiscrimination laws at the federal, state, and local level prohibit discrimination, harassment, and retaliation. Employers must comply with their legal obligations to ensure that such conversations are carried out in an appropriate and professional manner. 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, in addition to reporting these problems to the Department of Labor, can also contact the Equal Employment Opportunity Commission to obtain further information about their legal rights or file a charge. The guidance should provide contact info for the EEOC, including the EEOC’s website, which provides relevant information about these equal employment opportunity rights.

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. We support an interpretation consistent with interpretations of the Americans with Disabilities Act’s undue hardship provision. Employers should qualify for this exemption in only very limited circumstances. 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.

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. 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.

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 Sarah Crawford, Director of Workplace Fairness at the National Partnership for Women & Families, at scrawford@nationalpartnership.org or 202-986-2600 if you have any questions regarding these recommendations.

Sincerely,

National Partnership for Women & Families
9to5, National Association of Working Women
A Better Balance
American Association of People with Disabilities
American Association of University Women (AAUW)
American Dietetic Association
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
American Public Health Association
AnotherLook
Coalition for Improving Maternity Services (CIMS)
Family Equality Council
Family Violence Prevention Fund
Iowa Breastfeeding Coalition
Iowa Commission on the Status of Women
Lamaze International
Legal Aid Society-Employment Law Center
National Council of Jewish Women
National Employment Lawyers Association
National Women's Law Center
National Workrights Institute
New York State Paid Leave Coalition
Pathways PA
Women Employed

cc: Montaniel Navarro