INTRODUCTION:

Among the myriad of provisions contained in the Patient Protection and Affordable Care Act ("PPACA") [1] is an amendment to the Fair Labor Standards Act ("FLSA") [2] requiring employers to grant reasonable breaks for an employee to express breast milk for up to one year after giving birth, and to provide a private location (other than a bathroom) for the employee to do so. Presumably, the underlying rationale for the law is the scientific evidence supporting the beneficial effect of breast milk on baby health [3].

While some sections of the PPACA have prospective effective dates, this amendment took effect immediately upon President Obama's signature on March 23, 2010, meaning compliance with the new provisions is now mandatory. Accordingly, this NACUANOTE aims to assist institutions by addressing the relevant challenges that colleges and universities may encounter when implementing the new law, in light of the U.S. Department of Labor’s Fact Sheet [4] and recent Request for Information ("RFI") [5] on this subject.

DISCUSSION:

Section 4207 of the PPACA on its face imposes upon employers two basic requirements for new mothers to express breast milk: time and location. More specifically, the law amends 29 U.S.C. §207 of the FLSA, by requiring that covered employers:

1) Provide a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

2) Provide 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.

Technically, an employer is not required to pay an employee during these breaks. Moreover, an employer that employs fewer than 50 people is not subject to the new requirements if these requirements would impose an undue hardship. Finally, nothing in the amendment preempts any state law that provides greater protections to employees than these new protections. Like many issues with wage and hour law, however, what seems clear is often not upon closer examination. Because the U.S. Department of Labor (“DOL”) has stated it will not draft regulations in the near future, employers must use the limited DOL guidance published to date to ascertain their obligations [6].
Covered Employees

One threshold issue is which employees are covered by the new law. The plain text and the lack of a corresponding amendment to FLSA Section 13(a) indicate that the amendment does not apply to employees who are exempt from FLSA minimum wage and maximum hour requirements [7]. Thus, groups traditionally considered “exempt employees” (including those employed in executive, administrative or professional capacities) are not covered by the amendment – a position recently confirmed by the DOL [8]. While this gap seems odd given the overarching purpose of the law, it comports with the drafting of the statute, in that the “no-pay” statutory language of PPACA Section 4207 does not contain a provision (as does the Family and Medical Leave Act, which applies to exempt employees) specifically allowing for pay docking without jeopardizing exempt status [9].

While exempt employees are not covered by the amendment, the DOL is encouraging employers to provide the same benefit [10]. Colleges and universities therefore should consider, from a policy perspective, whether they wish to segment their employee population along this line. For example, if a new faculty member who recently gave birth seeks to use one of the private designated facilities the college or university has set aside for expressing breast milk, will the institution actually decline? Will the institution’s policies and literature exclude this group, or simply be silent on the issue?

Employers with Fewer than 50 Employees

All employers covered by the FLSA are covered by the amendment. As noted above in the statutory text, an employer with fewer than 50 employees may be exempt if the employer can show that the requirement would pose an “undue hardship.” [11] According to the DOL, all employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply [12]. The definition of undue hardship is similar to the definitions in other anti-discrimination laws, meaning undue hardship determinations are based on significant difficulty or expense when considered in relation to factors such as the size of the business, the financial resources of the business, or the nature and structure of its operation. Some state statutes provide an exemption if breaks to express milk would “disrupt” the employer’s operations [13], but employers must remember that a state exemption for anything less than “undue hardship” does not excuse compliance with federal law.

Pay Issues

By statute, employers are not required under the FLSA to compensate nursing mothers for breaks taken to express milk. The DOL has clarified this by stating that where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time [14]. In addition, the FLSA’s general requirement that the employee must be completely relieved from duty or else the time must be compensated as work time applies [15].

The current DOL regulation on rest periods is generally viewed as requiring breaks between five and twenty minutes to be treated as hours worked and thus typically paid [16]. The DOL has also clarified that when time for expressing milk is needed beyond any compensated break period, the additional time does not need to be compensated [17]. Thus, for example, where an employer provides a twenty-minute paid break but the employee takes twenty-five minutes to express milk during the break, the extra five minutes does not need to be paid. The DOL has further clarified that an employer is not obligated to extend a scheduled shift (that is, allow an employee to start earlier or stay later) to make up for unpaid break time used for expressing milk, but encourages employers to
provide flexible scheduling for employees who choose to make up the time [18].

**Number and Length of Breaks**

Under the new law, employers must provide a “reasonable break time” for nursing mothers “each time the employee has need to express the milk.” [19] Based on consultation with public health officials, the DOL has explained that the frequency of breaks needed to express milk will vary depending on factors such as the age of the baby, the number of breast feedings in the baby’s normal schedule, and whether the baby is eating solid food [20]. In a baby’s early months, he or she may have as many as eight to twelve feedings per day, meaning nursing mothers may need breaks every two to three hours to express milk. Thus, while accepting that some variation will occur, the DOL expects that nursing mothers will typically need breaks two to three times during an eight-hour shift, with longer shifts requiring additional breaks [21].

The break length may also vary, and while it may coincide with regular breaks and lunch periods, that may not happen in all cases. While the act of expressing milk alone typically takes fifteen to twenty minutes, other factors must be considered in arriving at what constitutes a reasonable break, including:

- The time it takes to walk to and from the lactation space and the wait, if any, to use the space;
- Whether the employee has to retrieve her pump and other supplies from another location;
- Whether the employee will need to unpack and set up her own pump or if a pump is provided for her;
- The efficiency of the pump used to express milk (employees using different pumps may require more or less time);
- 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;
- The time it takes for the employee to store her milk either in a refrigerator or personal cooler [22].

**Break Location Issues**

The statute requires that the location for expressing breast milk must be private and must not be a bathroom. The DOL is soliciting comments, however, on anterooms or lounges connected to bathrooms, suggesting that these may be sufficient to meet the requirement if a wall and door separate the anteroom or lounge from the bathroom, and if the space is shielded from view to meet the privacy requirement [23]. Locker rooms that function as changing rooms might also be acceptable so long as a separate space is designated that is shielded from view and free from intrusion, but the DOL has expressed reservations regarding locker room sanitary conditions and is seeking comments [24].

While some commentators have suggested that a locked space be required, the DOL has not taken that position, instead stating that “employers where practicable” must “make a room (either private or with partitions for use by multiple nursing mothers) available for use by employees taking breaks to express milk.” [25] When an employer cannot provide a separate locked room, the DOL has suggested the employer may create a space using partitions or curtains so long as the area is private and shielded from view [26]. This is consistent with the U.S. Department of Health and
Human Services’ more expansive array of suggestions for space options, not all of which require a locking space. These include:

- A clean, little-used office space, closet, small storage area or other room;
- Sectioning off a small corner of a room with either permanent walls or portable partitions; and
- A walled-off corner of a lounge adjacent to the women’s restroom [27].

The number of rooms needed would depend on several factors including the size of the institution, the number of female employees of childbearing age, and the number of buildings at the employer’s location [28]. The DOL has stated that an employee’s ability to take advantage of the new law in part depends on her ability to access a suitable space. Thus, the DOL has suggested that “some large employers [with significant numbers of nursing mothers] may choose to include nursing mothers’ rooms in their floor plans and provide a room on multiple floors of their facility or in an on-site health facility,” while others “may provide a large room with privacy screens so that the room may be used simultaneously by several nursing employees.” Significantly, the DOL has taken the position that “[w]here 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 employer is not in compliance with the requirement to provide reasonable break time [29].

Whatever space is provided “must be functional as a space for expressing breast milk,” but that phrase is undefined. At a minimum, the DOL states that 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.” [30] Based on DOL comments and literature surrounding breast feeding, one can speculate that full functionality might warrant, at a minimum, electrical outlets (for automatic electric breast pumps), access to water for clean up before and after expressing milk, a comfortable chair, a table (including space for a cooler if a refrigeration option is not offered), and cleaning supplies, but these are not legally required by the new federal law [31]. The DOL interprets this new law as encompassing the ability to safely store milk and equipment where it will not be disturbed or contaminated, but does not require the employer to provide refrigeration [32]. Employers should also consider whether the space is accessible to persons with disabilities.

If the college or university elects to use space that is not dedicated to the nursing mother’s use, it must be available when needed in order to meet the statutory requirement. Therefore, a “space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view, and free from any intrusion from co-workers and the public.” [33] More challenging will be accommodating those without a fixed work location, such as bus drivers and law enforcement personnel. The DOL is seeking comments on this issue [34].

**Notice**

As part of its RFI, the DOL is seeking comments on how best to effectuate communication with employees about this new requirement. On an interim basis, the DOL has encouraged nursing employees to give advance notice of their intent to express milk, and has authorized employers to ask expectant mothers whether they intend to take breaks to express milk at work. In the DOL’s view, this inquiry by the employer informs the employee of her rights and allows the employer the opportunity to make the appropriate arrangements [35].
Damages and Penalties

The amendment does not expressly identify the remedies that may be available or the penalties that may be imposed for violations. FLSA Sections 15 and 16 set out fines and other sanctions for violations of Section 7, so these sections would presumably apply to violations of the amendment [36]. To date, the DOL has simply indicated that minimum wage and overtime claims are unlikely because the breaks do not need to be paid by law [37]. But the DOL has reaffirmed the availability of injunctive relief, lost wages and reinstatement if an employer terminates an employee because she intends to take, or is taking, breaks to express breast milk, or in retaliation for filing a complaint or instituting a proceeding on the issue [38]. Additionally, if the employee is treated differently than employees taking breaks for other personal reasons, she may have rights under Title VII [39].

Interplay with Other Laws and Lack of State Law Preemption

In response to inquiries and as part of its RFI, the DOL has put to rest any speculation that time spent expressing milk at work will count against an employee's FMLA entitlement. This is both because expressing milk at work is not considered by the DOL “to constitute bonding with or caring for a newborn child” and because the DOL does not believe that “expressing milk will typically be associated with a serious health condition under the FMLA.” [40]

Additionally, in accord with FLSA Section 18, more favorable state law protections are not preempted [41]. A number of states already have laws on breastfeeding [42]. Many go beyond the federal requirement and will likely be unaffected. For example, some state laws require that the break accommodation be permitted for two or three years instead of one [43]. Others require available refrigeration and even pay [44]. Still others, in addition to requiring a private location other than a bathroom, call for a location "in close proximity to the work area." [45] Because a number of states have laws on this subject, many policy examples already exist, although they may require updating to take these new requirements into account [46].

Practical Tips

Colleges and universities should review their current practices and policies to determine whether improvements or changes are needed as a result of the amendment. Institutions may wish to:

- Review campus policies governing leave time and breaks, to see if language needs to be added or revised.
- Review current lactation locations. Many campuses already offered lactation locations prior to the amendment, but do those locations satisfy the new requirements?
- Assess need and possibilities for additional lactation locations. While the law does not specify how many lactation locations must be available, the DOL has suggested an employer will not be in compliance if the locations are such that it is wholly impractical for an employee to express milk. It is best that employees do not have to travel too far for their break.
- Review websites and brochures. If your campus already has lactation locations and those are listed in literature or on websites, make sure that information is accurate.
- Review signage and access. Are the directions or signage accurate to direct the person to the room? Is the signage on the room sufficient to ensure privacy if it is a shared room? If the person must make a reservation or obtain a key to unlock the room, are the directions clear how to do so, and do you have enough spaces so that they will be reasonably available for all who need them? And finally, if only some locations are accessible to
CONCLUSION:

The new break law for nursing mothers is in effect, and compliance is mandatory. Difficult questions remain for employers, including deciding whether to exclude or accommodate exempt employees, determining proper locations to designate, attempting to determine what breaks are “reasonable,” and deciding whether to go further than the law requires, for example, by providing refrigeration. A resource page promoting breastfeeding is maintained by the U.S. Department of Health and Human Services to provide employer resources on this issue and it may be helpful as employers examine their new obligations [47]. In addition, some colleges and universities have embraced lactation support as beneficial to their campus and have adopted supportive programs that may offer insight on this issue [48].

FOOTNOTES:

FN1. Pub.L. 111-148. The PPACA was further amended by the Health Care and Education Reconciliation Act of 2010 (Pub.L. 111-152), but those changes did not impact the topic discussed in this article.


FN3. This evidence is chronicled in conjunction with the American Academy of Pediatrics’ Policy Statement on the issue. Moreover, the Healthy People 2010 initiative, co-led by the Centers for Disease Control and Prevention and the Health Resources and Services Administration, listed as one of its objectives a national goal to increase the proportion of mothers who breastfeed their babies. See http://www.cdc.gov/breastfeeding/policy/index.htm.

FN4. See U.S. Department of Labor, Fact Sheet #73: Break Time for Nursing Mothers under the FLSA, July 2010.


FN6. In its recent RFI, the DOL stated that it does not plan to issue regulations due to the wide variety of workplace environments and individual factors impacting the number and length of breaks and the manner in which employers can comply. See RFI, note 5 at 80073.

FN7. More specifically, PPACA Section 4207 amends FLSA Section 7, but the major FLSA exemptions appear in Section 13. Section 13 exempts certain employees from many of the requirements of the FLSA (including, for example, the minimum wage and overtime obligations imposed by Section 7).
FN8. See Fact Sheet, note 4; RFI, note 5 at 80074.

FN9. See FMLA Section 102(c), codified at 29 U.S.C. § 2612(c).

FN10. See RFI, note 5 at 80074.

FN11. See also id. at 80074.

FN12. See Fact Sheet, note 4. But note that DOL in its RFI is soliciting comments on a variety of issues associated with work force fluctuations, whether the exemption is lost if the number of employees reaches 50 while an employee is covered, and how stringently DOL plans to apply the “undue hardship” defense. See RFI, note 5 at 80077-80078.


FN15. Id.


FN17. See RFI, note 5 at 80075.

FN18. Id.


FN20. See RFI, note 5 at 80075.

FN21. Id.

FN22. Id.

FN23. Id. at 80076.

FN24. Id.

FN25. Id. at 80075.

FN26. Id.


FN28. See Health Resources and Services Administration, Easy Steps to Supporting Breastfeeding Employees, note 27.
FN29. See RFI, note 5 at 80076.

FN30. Id.

FN31. Id.; see also CDC website on Proper Handling and Storage of Human Milk; CDC website on Program Development and Support of Breastfeeding; CDC toolkit for developing a Lactation Support Program.

FN32. See RFI, note 5 at 80076.

FN33. See Fact Sheet, note 4.

FN34. See RFI, note 5 at 80076.

FN35. See id. at 80077.

FN36. Section 16 provides for fines of up to $10,000 and six months imprisonment for any person convicted of a willful violation of Section 15. See 29 U.S.C. § 216(a). Section 15 makes it unlawful to violate Section 7 or regulations applicable to Section 7, so it would appear that violations of the amendment could result in these criminal sanctions. See 29 U.S.C. § 215(a)(2). Criminal sanctions are exceedingly rare, though, and imprisonment up to six months for each offense may be imposed only upon a second or subsequent conviction for an offense under the Act. Id. Section 16 also provides that an employer may be liable for “such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3),” which makes it unlawful to retaliate against an employee for asserting rights afforded by Section 7. See 29 U.S.C. § 215(a)(3).

FN37. See RFI, note 5 at 80078.

FN38. Id.

FN39. Id.

FN40. Id. at 80076.


FN42. See, e.g., the National Conference of State Legislatures’ summary on this issue.


FN44. See, e.g., Indiana Code § 5-6-10-2 (covering state and local governments and requiring reasonable paid break time and refrigeration or cold storage if reasonably possible) and Miss. Code Ann. § 43-20-31 (refrigeration in child care facilities).


FN46. See, e.g., Oregon State University; Goucher College Worksite Lactation Policy; University System of New Hampshire Lactation Policy.
FN47. See U.S. Department of Health and Human Services website.

FN48. See, e.g., Penn State University Breastfeeding Services page; Purdue Lactation Support Services; and UC Davis Breastfeeding Support Program.

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RESOURCES:

- The National Women’s Health Information Center web page on breastfeeding
- U.S. Department of Labor Fact Sheet re: Breaks for Nursing Mothers under the FLSA
- Centers for Disease Control web page for breastfeeding and Lactation Support Program Toolkit
- Workplace Lactation Toolkit by Corporate Voices for Working Families
- The Business Case for Breastfeeding – Steps for Creating a Breastfeeding Friendly Workplace
- National Conference of State Legislatures’ summary of state breastfeeding laws
- Iowa Breastfeeding Coalition
- Maternity Care Coalition

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