national partnership
for women & families
Because actions speak louder than words.

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. 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. 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 National Partnership for Women & Families offers the following comments in response to the Request for Information regarding the Department's intent to issue guidance on this provision.

(1) The guidance should explain which employees are covered under the law and encourage employers to provide pumping breaks regardless of official coverage.

The Department's guidance should clearly state which employees are covered by § 4207. This provision covers nursing mothers who work for employers with 50 or more employees for one year after the child's birth. Because of the myriad health and economic benefits of breastfeeding, the guidance also should encourage *all* employers to give pumping breaks to *all* nursing employees, regardless of official coverage.

In addition, the Department should encourage employers to allow women pumping breaks for more than one year after the child's birth. The guidance should clearly state that the law also applies to mothers who did not give birth to their child, as adoptive mothers and mothers who use a surrogate may still choose to breastfeed with the assistance of lactation-inducing drugs.

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(2) The guidance should permit flexibility in the frequency 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 standard set by the Department must be flexible so that an individual woman's physiological needs are met.

(3) The guidance should ensure that the breaks are of sufficient duration.

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 time needed for several of these activities will often be under the employer's control and employers can, and should be encouraged to work with employees to help streamline the process, for example by establishing a convenient location with an electrical outlet and a nearby sink and refrigerator.

We support the Department's preliminary interpretation that an employer may not, through its choice of location, make it too burdensome for a woman to actually use the location. If, for example, the employer designates a room that is a significant distance from the woman's work location, so that a woman would lose more than a small amount of pay while on break simply because she has to travel to and from the location, the employer should not be considered in compliance with the law for failure to provide a reasonable break.

(4) 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.

Dual-use or multiple-use spaces such as a manager's office, conference room, storage space, utility closet, or break room may be acceptable if they meet all other requirements. This is an issue that calls for discussion among users of the space. Arrangements that displace or

inconvenience supervisors or coworkers may not be feasible due to the potential for harassment, discrimination, or retaliation. All users should be able to rely on having the room when they need it; thus, a system for scheduling or reserving the room in advance should be agreed upon by all users. The employer should be responsible for ensuring that the discussion takes place.

Employers may designate one lactation room for use by multiple employees, but, if more than one woman is expected to use the room simultaneously, the employer must ensure that that each worker's privacy is protected by, for example, making sure that there are opaque partitions within the room. Women need to feel safe and free from stress when they express milk, and individual variations in comfort level can be anticipated when women share a lactation space. Scheduling and negotiation may be necessary.

The statute does not require that the location provided be on the employer's premises; therefore, particularly in instances where the employer lacks onsite space, the Department should encourage employers to use creative solutions to finding a place for nursing breaks. For example, employers that are located in the same building can designate one shared space for all nursing employees of those employers. Each employer, however, remains responsible for ensuring that its own workers get their break times, that all are able to express milk as needed, and that the provided space meets the requirements of the statute. And while it may be convenient for several businesses to share one lactation room, employers should not require their employees to use a central room if it means they use break time waiting for a turn or to travel for an unduly long time to and from the room.

Some employees are not in a fixed place during a work shift. Workers who follow a fixed route through the day, such as bus drivers, letter carriers, or parcel delivery workers, may be able to identify places along their route where they can schedule a regular lactation break.

When employees work at other sites, their employer is still responsible for their welfare. Thus the employer should take the initiative to arrange milk expression space for an employee when she is off site. Some examples of creative solutions that meet the basic requirements of the law may include malls or airports with designated rooms accessible to all employees; use of facilities at cooperating neighboring businesses; or use of designated space in public buildings by public employees who do not work in a fixed place.

(5) The guidance should address the interaction with paid break times.

Through employer policies, collective bargaining agreements, and existing state laws or federal laws, many employees have an existing right to paid breaks during the work day. However, the statute requires only unpaid time. In light of some employees' existing rights to paid breaks, 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 guidance regarding time spent on-call--still apply. We also encourage the

Department to make clear that employers should consider allowing 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.

(6) 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.

(7) The guidance should address proper communication and publication of these rights.

The existence of this provision is not well known. 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. 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 the Department does for other statutes. 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 all employees notice of this provision.

(8) The guidance should address enforcement of § 4207.

Even a short-term interruption in pumping or nursing can have a significant negative effect on lactation. Thus, 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. Absent such a process, vindication of a woman's rights under this provision will do very little, as she may not be able to resume nursing. 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.

(9) 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). Notice responsibilities should apply in both directions.

Employers must comply with their legal obligations to ensure that such conversations are carried out in an appropriate and professional manner. Employers must remain cognizant of their legal obligations—and inform supervisors and employees of these obligations—to avoid unlawful discrimination, harassment, and retaliation against nursing mothers. To the extent that employers inquire whether expectant mothers intend to take breaks to express milk while at work, employers should provide assurance that the employee will not be subject to discrimination, harassment, or retaliation when exercising this statutory right.

(10) The guidance also should provide information about how to challenge unlawful discrimination, harassment, and retaliation.

Unfortunately, some women may face discrimination, harassment, or retaliation in relation to these new workplace requirements. Bias against nursing women, pregnant women, mothers, or women generally can manifest in the form of personnel decisions, harassment, or retaliatory actions. By the same token, some women may be subjected to sexual harassment by supervisors or coworkers. Inappropriate actions or comments by management officials or coworkers could lead to violations of this provision of the Fair Labor Standards Act as well as equal employment opportunity laws.

The guidance should note that nondiscrimination laws at the federal, state, and local level prohibit discrimination, harassment, and retaliation. Further, the guidance should state that individuals who believe they have faced discrimination, harassment, or retaliation can contact the Equal Employment Opportunity Commission to obtain further information about their legal rights and/or to file a charge. The guidance should not only provide contact information for the EEOC, but also list the EEOC's website, which provides guidance on harassment, discrimination, and retaliation.

(11) 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.

The Department seeks comment on the proper interpretation of the statute's undue hardship exemption. The statute clearly states that to avail itself of the undue hardship exemption, an employer must have fewer than 50 employees. This exemption states:

> An employer that employs less than 50 employees shall not be subject to the requirements of this subsection [regarding reasonable break time for nursing

> mothers], if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

29 U.S.C. 207(r)(3). 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.

If the number of employees is 50 or greater at the time that the employee first provides notice of the need for breaks, the employer should not be eligible for the undue hardship exemption for the duration of the time that the employee requires breaks to express milk. Additionally, 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.

As the Department recognized, "a nursing mother necessarily relies on the availability of the breaks, and fluctuation in the ability to express milk at work may cause the woman to lose the ability to produce sufficient milk for her child, frustrating the purpose of the law." It is critical that working mothers can take reasonable breaks for the duration of the time that they intend to nurse, regardless of fluctuations in the size of the workforce.

(12) The undue hardship exemption should be interpreted consistent with the undue hardship standard under the Americans with Disabilities Act.

The undue hardship exemption should be interpreted in the same way that the undue hardship exemption of the Americans with Disabilities Act is interpreted. The ADA requires employers to provide reasonable accommodations to qualified individuals with disabilities who are employees or applicants for employment, unless to do so would cause undue hardship. Using language similar to the Affordable Care Act's undue hardship provision, the ADA states:

> …The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth [as follows]. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—(i) the nature and cost of the accommodation needed under this chapter; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. 12111(10). Due to similarities in the statutory language and intent, the undue hardship exemption in the Affordable Care Act should be interpreted consistent with the undue hardship standard under the Americans with Disabilities Act.

Consistent with interpretations under the ADA, the "undue hardship" language sets out a stringent standard. The legislative history of the ADA has been construed to equate "undue hardship" with "unduly costly" as compared to the benefits to the worker as well as to the employer's resources. *Vande Zande v. Wisconsin Dep't of Admin*., 44 F.3d 538, 543 (7th Cir. 1995). The Supreme Court has held that an undue burden "either imposes undue financial and administrative burdens on [an employer] or requires a fundamental alteration in the nature of the program." *School Bd. Of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987) (citations omitted). The Second Circuit has held that "undue hardship" is a relational term, and as such "it looks not merely to the costs that the employer is asked to assume, but also to the benefits to others that will result." *Borkowski v. Valley Cent. Sch. Dist*., 63 F.3d 131, 139 (2d Cir. 1995).

The Equal Employment Opportunity Commission has issued pertinent guidance on the proper interpretation of the ADA's undue hardship provision that should apply in this context, as well.[1] For example, "an employer [should not be permitted to] claim undue hardship solely because a reasonable accommodation would require it to make changes to property owned by someone else."[2] Additionally, undue hardship should be measured against the entire operations of the employer, rather than just one department.[3]

In short, employers with fewer than 50 employees would have to satisfy a stringent standard to qualify for the exemption. These employers must prove that providing reasonable breaks for nursing mothers would cause an undue hardship, by causing significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business. Employers should qualify for this exemption in only very limited circumstances. The statute imposes minimal time and space requirements to accommodate nursing mothers. Moreover, employers should have existing policies in place regarding breaks for employees. Thus, it should be difficult for employers to demonstrate that providing reasonable breaks for nursing mothers would truly impose an undue hardship. And, as discussed above, there are numerous ways for employers to meet the space requirements, many of which will require very little additional expense for employers.

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[1] *See* "Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act," October 17, 2002, available at http://www.eeoc.gov/policy/docs/accommodation.html#N_16_.

[2] *Id*.

[3] 42 U.S.C. 12111(10); 29 C.F.R. § 1630.2(p)(2)(ii),(iii).

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.

For example, in 2007, Oregon passed a similar statute, "Rest Breaks for Breast Milk Expression."[4] This state statute uses parallel "undue hardship" language. In Oregon, employers can seek an exemption from Oregon Bureau of Labor and Industry if they claim an undue hardship. Although a few Oregon companies originally sought to file for exemptions, these employers ultimately found a way to meet the needs of their breastfeeding mothers. According to recent reports, no company in Oregon has successfully argued that they could not accommodate employees under the state statute.

For the vast majority of employers, these breaks should provide benefits that outweigh any associated costs. For these reasons, the guidance should encourage employers to offer reasonable breaks for nursing mothers regardless of official coverage.

Conclusion

Thank you for this opportunity to provide comments. This guidance will help to ensure a vital right for working women and their families. Providing breaks for nursing employees benefits not only mothers and their babies, but also businesses. We applaud the Department's efforts to provide guidance to employers and employees to ensure that this new right is implemented in a way that meets the goals of the statute.

If you have any questions regarding these recommendations, 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.

Sincerely,

National Partnership for Women & Families

cc: Montaniel Navarro

[4] ORS 653.077.