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## HEALTH CARE REFORM – BREAK TIME FOR NURSING MOTHERS

As the details of the *Patient Protection and Affordable Care Act (PPACA)* emerge, we will update you, through the HR Benefits Authority, on selected provisions that affect employers and employer-sponsored group health plans.

**Specific Topics.** In this issue, we take a closer look at the PPACA amendment to the *Fair Labor Standards Act (FLSA)* that requires break time for nursing mothers. This amendment is effective on March 23, 2010, the date the PPACA was enacted.

**FLSA Amendment.** The PPACA amends the FLSA to require covered employers to provide:

- a reasonable break time for a female employee to express breast milk for her nursing child for up to 1 year after the child's birth;
- in a place other than a bathroom that is "shielded from view and free from intrusion from coworkers and the public."

Employers are not required to compensate an employee receiving "reasonable break time" for any work time the employee uses to express milk. However, the law does not define "break" or what is reasonable.

**Conflicting State Laws.** The FLSA amendment was modeled after Oregon's state statute and added as a part of the PPACA by Oregon Senator Jeff Merkley. Several states, in addition to Oregon, have nursing mother provisions. Importantly, the FLSA amendments do not preempt more onerous state laws. Thus, it is unclear how the federal law will apply in states with conflicting requirements. For example, the federal law provisions do not require employers to compensate employees for break time used to express breast milk. However, this break time may not be exempt under state minimum wage laws.

**Exception for Undue Hardship.** The law exempts any employer with fewer than 50 employees if providing the break would impose an "undue hardship" on the employer. Undue hardship is not defined in the amendment. It is also unclear if the undue hardship rule can be used by employers with more than 50 total employees but that employ less than 50 employees at a location. Based on existing FLSA guidance, the 50 employee threshold would look at the "total" number of employees across all of the employer's locations.

Until further guidance is issued, it does not appear that employers can apply the undue hardship based on employer size by location.

**Action Items.** We recommend that employers with female employees who express milk at work set-up temporary quarters (other than a bathroom) in order to comply with the law. It is questionable as to whether a hard-walled space is required. It also appears that the temporary quarters will only be required during the period an employee who is nursing is at work. However, state statutes may impose additional requirements.

We will continue to follow the legislation and developing interpretations closely to provide you with updates as well as our analysis of what it means to you.

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