NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

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Submitted Via Federal Rulemaking Portal

Nancy J. Leppink
Acting Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-3502
Washington, DC 20210

Re: Comments on *Request for Information to interpret Section 4207 of the Patient Protection and Affordable Care Act, providing reasonable break time for nursing mothers*, RIN 1235-ZA00.

Dear Ms. Leppink:

The National Women's Law Center (the Center) appreciates the opportunity to comment on the Department's Request for Information (RIN) regarding the interpretation of the Patient Protection and Affordable Care Act's Section 4207 (the nursing mothers provision), which requires employers to provide reasonable break time and a place for nursing mothers to express breast milk for one year after their child's birth.[1] The Center is a nonprofit organization that has worked since 1972 to expand the possibilities for women and girls in the areas of education and employment, family economic security, and health. Most relevant to this proceeding, the Center has long worked to remove barriers to women's participation in the workplace, and it actively advocated for health care reform that would ensure access to comprehensive, affordable health care for all women and their families.

The Center offers the following comments for the Department's consideration:

I. The guidance should further clarify which workers are covered by the nursing mothers provision.

The proposed guidance recognizes that the provision applies to any employee who is covered by the Fair Labor Standards Act (FLSA) and not exempt from its overtime provisions.[2] It also

[1] *See* Pub. L. No. 111-148, *codified at* 29 U.S.C. § 207(r).
[2] *See* Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80,073, 80,074 (request for information Dec. 21, 2010).

describes individual and enterprise coverage under the FLSA.[3] However, the Center anticipates that many employees and their advocates, some of whom are not familiar with the intricacies of the FLSA, will rely on this guidance. Therefore, the Center encourages the Department to make the guidance more explicit with regard to the types of workers specifically exempt under the FLSA overtime provisions.

The Center also encourages the Department to state explicitly that the nursing mothers provision applies to *any* mother who is nursing her child within one year of the child's birth, whether the mother gave birth to the child or not. Adoptive mothers and mothers using a surrogate may choose to breastfeed with the assistance of drugs that induce lactation.[4] The language of the nursing mothers provision is clearly broad enough to cover these employees.

The Center strongly endorses the Department's decision to "encourage[ ] employers to provide break time for all nursing mothers including those who may not be covered under the FLSA or who are exempt from [the overtime provision]."[5] Research indicates that providing space and time for nursing mothers to express breast milk not only contributes to child health, but also makes sound business sense by increasing employee morale, reducing expenditures under employer-sponsored health plans, and encouraging nursing mothers as valuable employees to stay in the workforce.[6]

II. The guidance should clarify how the nursing mothers provision treats paid and unpaid break time.

The proposed guidance appropriately highlights the longstanding FLSA principle that an employer permitting breaks of short duration, usually of five to twenty minutes, must count those breaks as hours worked for the purpose of FLSA's minimum wage and/or overtime provisions.[7] The Department should also consider adding to the guidance that employer policies, collective bargaining agreements, or state laws may independently require paid break time.

The Center also supports proposed language that "an employee who uses . . . break time to express milk must be paid in the same way that other employees are compensated for break time,"[8] and that Title VII independently requires that a nursing employee be treated like all other "employees who take breaks for other personal reasons."[9] Thus, an employee who opts to use her paid break time to pump must be paid for the amount of time that is covered by the applicable paid break provision. However, it is critical for the Department to stress that an employer should

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[3] *Id.*
[4] *See, e.g.*, American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, 115 PEDIATRICS 496, 501 (2005) (encouraging health care professionals to "[p]rovide counsel to adoptive mothers who decide to breastfeed through induced lactation").
[5] 75 Fed. Reg. at 80,074.
[6] *See* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, HEALTH RESOURCES AND SERVICES ADMINISTRATION, MATERNAL AND CHILD HEALTH BUREAU, THE BUSINESS CASE FOR BREASTFEEDING (2008), *available at* http://www.womenshealth.gov/breastfeeding/government-programs/business-case-for-breastfeeding/breastfeeding-businesscase-for-managers.pdf.
[7] *See* 75 Fed. Reg. at 80,074-80,075; *see also* 29 C.F.R. § 785.16 (noting that such short breaks are "common in industry" and "must be counted as hours worked").
[8] 75 Fed. Reg. at 80,075.
[9] *Id.* at 80,078.

not force an employee to take her paid break time to express milk if she would prefer to use paid break time for other purposes and take additional unpaid break time to express milk.

The final guidance should continue to "encourage[ ] employers to provide flexible scheduling for those employees who choose to make up for any unpaid break time."[10] Depending on the nature of an employee's work and the employer, extended workdays should be encouraged where feasible for the employer and desirable to the employee. Employers who extend their workdays for employees to make up unpaid break time spent expressing milk could reap the benefits of a full-day of work from the employee, and the employee would not have to forego a portion of her wages because she would be permitted to work her otherwise allotted number of hours. However, the Department must make clear that extension of the workday, where permitted by the employer, should remain at the election of each nursing employee.

III. The guidance should address what constitutes "reasonable" break time.

The Center supports the Department's preliminary decision to define "reasonable" break time by "consider[ing] all the steps reasonably necessary to express breast milk, not merely the time required to express the milk itself."[11] As the preliminary guidance recognizes, an employee must have time to go to and from the designated lactation space; retrieve the pump, if necessary; wash her hands; set up, dismantle, and clean the pump, depending on the type of pump used; and store her milk. The right to break time and space to express milk at work would be meaningless without time for such attendant activities.

The Center further supports the Department's preliminary decision to stress that the reasonableness standard is a flexible one, which will vary by woman. The final guidance should emphasize that the nursing mothers provision gives a nursing employee the right to break time "each time such employee *has need* to express the milk."[12] Thus, even where a woman's need is greater than "two to three times during an eight-hour shift" or the equivalent for her work period,[13] an employer will be responsible for providing such additional time as necessary to comply with the plain language of the statute.

The Center supports the Department's preliminary interpretation that an employer will not be in compliance with the law if it designates a space "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."[14] However, the Center encourages the Department to make clear that other factors within the employer's control, such as the location where a woman must store her milk or pump, will be considered when determining whether an employer provides a "reasonable" break time. As the Department recognized in the proposed guidance, the proximity of a sink, a room for washing hands, or the proximity of a refrigerator

[10] *Id.* at 80,075.
[11] *Id.*
[12] 29 U.S.C. § 207(r)(1)(A) (emphasis added).
[13] 75 Fed. Reg. at 80,075.
[14] *Id.* at 80,076.

"may decrease the amount of break time needed by nursing employees to express milk."[15] The necessary corollary is that lack of proximity of such things may increase the time needed to express milk, making the break time provided to express milk unreasonable in light of practical considerations for the employee, including her resulting loss of pay during unpaid break time.

IV. The Department should provide additional guidance regarding the provision of break time and space for employees working off-site.

The Center supports the Department's preliminary position that an employer retains the obligation of providing space for expressing milk, "regardless of where the employee is located," including when the employee is working at a client's site.[16] The final guidance should continue to use this standard and encourage employers and employees to work collaboratively and think creatively to find space for nursing mothers to express milk. The Center encourages the Department to provide examples of ways in which an employer can ensure that an employee will be able to express milk at a client's site. For example, employers, when entering contracts for the placement of employees at client sites, could require clients to make their own nursing space available to visiting employees.

The Department should clarify that "joint employment" as identified in the proposed guidance is a concept broadly construed under the FLSA.[17] This clarification is necessary because many employees relying on this guidance might not otherwise be familiar with the FLSA. The Department should also note that one indicator of employment is control of where, how, and how long an employee may take a rest break; thus, where a client in fact controls an employee's periods of rest, he or she may also be an employer, and so jointly responsible with the "lending" employer for ensuring the employee has access to the breaks provided under the law.[18]

V. The Department should interpret the undue hardship exemption narrowly and clarify when it is available.

A. Interpreting "undue hardship" consistent with the Americans with Disabilities Act

The Department should continue to rely on the interpretation of similar language under the Americans with Disabilities Act (ADA) to guide its interpretation of the undue hardship exemption in the nursing mothers provision. The Center agrees, given the nursing mothers provision's language and in light of the way that similar language under the ADA has been interpreted, that the undue hardship exemption will be available only in "limited

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[15] *Id.*
[16] *Id.* at 80,077.
[17] *See* 29 C.F.R. § 791.2; *see also Lambert v. Ackerley*, 180 F.3d 997, 1011-12 (9th Cir. 1999) (en banc) (noting that "the definition of 'employer' under the FLSA . . . is to be given an expansive interpretation in order to effectuate the FLSA's broad remedial purposes" (internal quotation marks omitted)).
[18] *See, e.g.*, *Hale v. Arizona*, 967 F.2d 1356, 1364 (9th Cir. 1992) (recognizing that the ability to "supervise[ ] and control[ ] employee work schedules or conditions of employment" is a factor relevant to determining whether an employment relationship exists).

circumstances."[19] The Center also agrees that the "significant" difficulty or expense required under the nursing mothers provision sets a "stringent standard."[20] The Center encourages the Department to rely on the EEOC's guidance and regulation regarding the similar standard under the ADA.[21]

B. "Undue hardship" as an affirmative defense

The Center supports the Department's decision to fashion the "undue hardship" exemption as an affirmative defense that must be raised and proved by the employer.[22] It should be the responsibility of the employer, who is seeking an exception to the rule, to prove an exception is necessary. And an employer will be far more familiar than an employee with business structure and finances and whether the employer has 50 or more employees, so the employer is in a better position than a nursing employee to demonstrate that providing break time and space would pose an undue hardship.

C. The appropriate time to count employees

The Department should continue to interpret the undue hardship exemption as applicable only when an employer has fewer than 50 employees, where "employees" is broadly defined to include part-time workers and workers not covered by the FLSA's overtime provision.[23] The Center agrees that such an interpretation is required by the plain language of the FLSA, which elsewhere defines the term "employee" broadly.[24] Furthermore, the Department should continue to consider employees that work across worksites and geographic regions towards the 50 employee threshold.

The Department solicited comments as to the appropriate point at which to determine the number of an employer's employees for purposes of coverage by the nursing mothers provision. The Center's position is that an employer is covered if, at the time a woman requests space and time to express milk or at any time thereafter but within a year of the child's birth, the employer has 50 employees. So, if a woman in her seventh month of pregnancy requests space and break time for anticipated expression of milk, an employer with more than 50 employees at that time will automatically be a covered employer for the ensuing first year of the child's life. On the other hand, if an employer is short of 50 employees at the time a woman gives notice that she intends to nurse her child *and* qualifies for the undue hardship exemption, but later meets the 50-employee threshold, the obligations under the nursing mothers provision would attach when the fiftieth employee is added. The employer would then be covered by the nursing mothers provision for the first year of the child's life.

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[19] 75 Fed. Reg. at 80,078.
[20] *Id.*
[21] *See* 29 C.F.R. § 1630.2(p)(2) (defining factors to consider with regard to undue hardship under the ADA); U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915-002 (2002), *available at* http://www.eeoc.gov/policy/docs/accommodation.html#undue.
[22] 75 Fed. Reg. at 80,078.
[23] *Id.* at 80,077.
[24] *See* 29 U.S.C. § 203(e) (defining "employee" for Title 29).

Under the standard identified above, an employer that is eligible for the "undue hardship" exemption thus becomes ineligible if at any point, from the time a nursing mother gives notice until the end of the one-year period after the child's birth, the employer meets or exceeds the 50 employee threshold. This standard is appropriate because the statutory language clearly limits the undue hardship exemption *only* to those employers with fewer than 50 employees.[25] At the time a fiftieth worker is added, it should be the employer's burden to notify the woman of its new obligation to provide a reasonable break time and space for her to express milk. An employer is in a better position than an employee to know the size of its workforce; after they have made their desire for break time and space to express milk known, individual employees should not be tasked with constantly reevaluating whether their employer is newly covered by the nursing mothers provision.

The Center agrees with the Department that a nursing mother must be able rely on the availability of breaks, as her child depends on them for such a basic need as sustenance. As a result, a covered employer whose number of employees falls below 50 at some point while the mother is nursing should not be permitted to use undue hardship as a defense. This is important not only because it would permit nursing mothers to predict that breaks will be available throughout the first year of a child's life, but also because it makes sense from a business perspective. A company that has already set up a lactation room and the policies and practices necessary to facilitate breaks for nursing mothers would be hard-pressed to show that the *continuation* of such breaks for the remainder of the first year of the employee's child's life would be an undue hardship.

VI. The Department should clarify the applicable notice standards.

The Department's proposed guidance encourages employees "to give employers advance notice of their intent to take breaks at work to express milk," and it states that "a simple conversation between an employee and a supervisor, manager, or human resources representative . . . would facilitate an employer's ability to make arrangements to comply with the law before the nursing mother returns to work."[26] The Department solicited further comments on how "best to address notice issues," and the Center offers the following recommendations.[27]

To begin with, the Center agrees with the Department that advance notice by an employee to an employer that she intends to exercise her rights under the law is ideal. For that reason, the Center recommends that the Department encourage employees to contact employers well before they have need to express milk at work and to remain in contact about the adequacy of the lactation space and any changes in break schedule, including reduced need to take breaks as their child ages. However, the Center strongly opposes any bright line rule requiring notice to the employer at a particular time before or after a child's birth. Mothers do not always decide in advance whether they intend to breastfeed, and other mothers who intend to breastfeed may not be fully aware of their rights under the nursing mothers provision until after their child's birth. A requirement for such advance notice would thwart the statute's purpose and effect.

[25] 29 U.S.C. § 207(r)(3).
[26] 75 Fed. Reg. at 80,077.
[27] *Id.*

Second, the Center supports the Department's preliminary position that employers may ask women employees who are pregnant, planning to adopt, or using a surrogate whether they intend to take breaks to express milk while at work. Such inquiries must, however, be made in the context of assurances that an employer will not retaliate or discriminate against nursing mothers. The Center also urges the Department to clarify that an employee's discussion, either written or verbal, with an agent of her employer, including but not limited to a supervisor, manager, or human resources representative, is sufficient to notify an employer that the employee intends to exercise her rights under the nursing mothers provision.

Third, the guidance should interpret the nursing mothers provision to require necessarily that employers inform covered employees of their rights under the law. Such notice could be provided as part of each employee's human resources package and/or as part of a discussion between an employer and employee about anticipated Family and Medical Leave Act or other child-related leave. Employers could also set forth the general ways in which they intend to comply with the law by incorporating information about the right to break time and space into employee manuals distributed to all employees. The Department should further facilitate such notice by including information about the nursing mothers provision, and the possibility that state laws might provide more generous coverage, in workplace posters that employers covered by the minimum wage provisions must post.[28]

Finally, the Department should interpret the nursing mothers provision to require an employer to respond to an employee's request for break time and space within a reasonable period of time. Whether a time period is reasonable should be assessed based on all the circumstances and with special consideration of the vulnerability of a woman's milk supply after giving birth. Unreasonable delay in responding to a nursing employee's request, like unwarranted denial of her request, must constitute non-compliance with the nursing mothers provision. If an employer maintains that it is not required to provide break time and space, either because the employee is not covered by the nursing mothers provision or because the employer would face an undue hardship, it should provide to the employee in writing its rationale for denying the break time and space.

VII. The guidance should make clear the Department's intent to enforce employees' rights vigorously and to offer compliance assistance to employers.

The Center strongly encourages the Department to make clear its intent to vigorously enforce a nursing mother's rights under the FLSA and prioritize such complaints. In addition to providing information about how nursing employees can file a complaint with the Department of Labor, the guidance should state that employees may also contact the Equal Employment Opportunity Commission to learn more about their rights and to file discrimination complaints.

The guidance should explicitly state that federal, state, and/or local laws prohibit harassment, discrimination, and retaliation, including retaliation based on an employee's decision to exercise

[28] *See* 29 C.F.R. § 516.4 (stating that "[e]very employer employing any employees subject to the Act's minimum wage provisions shall post and keep posted a notice explaining the Act, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed" and noting that employers to whom overtime provisions do not apply may accordingly modify the poster).

her right to take break time to express milk. The final guidance should continue to state that the nursing mothers provision does not preempt state laws that offer more generous protections to employees, and that a variety of remedies are available for violation of the FLSA and Title VII. The Department should further clarify the full range of remedies available, including backpay, liquidated damages, injunctive relief, and attorneys' fees.

The preliminary guidance notes that unpaid wages are not available "in most circumstances" for failure to provide break time but could be available for an employee who experiences retaliation.[29] The Center suggests that the Department make clear that an employee *can* seek unpaid minimum wages and overtime, even for violations of the nursing mothers provision without retaliation, in some cases. When an employer treats periods of a mother's break time as unpaid but pays other employees for break time spent doing other personal things, an employee may pursue not only a disparate treatment claim under Title VII, but also a FLSA claim for wrongfully withheld pay.

Because many employers are now offering break time and space to nursing employees for the first time, it is critical that the Department also provide employers with tools to comply with the law. Because the types of spaces available to an employer and the nature of a nursing employee's duties vary widely, the Department has the opportunity to play a unique role as a repository of best practices. The Department's Job Accommodation Network has played a similar role to help businesses comply with the Americans with Disabilities Act, and the Center urges the Department to use the Job Accommodation Network's activities as a guide to help structure its compliance assistance efforts.

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Thank you for the opportunity to comment on the proposed guidance. We would be happy to discuss our comments further or answer any questions you may have. Please contact Fatima Goss Graves, Vice President for Education and Employment, or Lara Kaufmann, Senior Counsel for Education and Employment, at (202) 588-5180.

Sincerely,

Fatima Goss Graves

Lara Kaufmann

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[29] 75 Fed. Reg. at 80,078.