UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

December 22, 2010

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: **JOHN BERRY**
DIRECTOR

Subject: **Nursing Mothers in Federal Employment**

As the Nation's largest employer, the Federal Government strives to be a leader in the promotion of wellness programs and progressive workforce policies. On December 20, 2010, President Obama delegated authority to the U.S. Office of Personnel Management (OPM) to provide guidance to executive branch civilian employees on workplace accomodations for employees who are nursing mothers. This delegation is in support of Section 4207 of the Patient Protection and Affordable Care Act (Act), Pub. L. 111-148, which added a new subsection (r) to section 7 of the Fair Labor Standards Act of 1938 (FLSA) (codified as amended at 29 U.S.C. 207). This new section requires an employer to provide employees with (1) a reasonable break time to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express milk; and (2) 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 the employee to express breast milk.

While subsection (r) applies only to employees who are subject to section 7, which sets forth the FLSA overtime pay provisions, the rationale for the policy contained in that section applies to all executive branch employees. In accordance with the authority delegated to OPM by the President on December 20, 2010, and in order to ensure consistent treatment of nursing mothers within the Federal workforce, agencies should also apply the requirements of subsection 7(r) of the FLSA to Executive branch civilian employees who are exempt from section 7 of the FLSA. I am providing guidance to agencies to assist them with implementation.

Reasonable Amount of Break Time to Express Milk

Consistent with the requirements of section 4207 of the Act, Federal agencies should provide a reasonable break time for a civilian employee, in the executive branch, to express breast milk for her nursing child for 1 year after the child's birth each time the employee has a need to express milk. Section 7(r) does not require agencies to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, many agencies already provide compensated breaks (e.g., 15 minutes in morning and 15 minutes in the afternoon) that employees can use for any purpose. Where agencies already provide such 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 such break time.

Agencies should provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks to express milk as well as the duration of each break will likely vary, according to the needs of the individual mother. Federal agencies

are also instructed to develop an agency policy to use current workforce flexibilities to provide reasonable breaks for this purpose. Agencies should review any applicable regulations or policies and collective bargaining agreements before making determinations on these matters. Workforce flexibilities include adjustments to the employee's work schedule and use of accumulated credit hours under flexible work schedules. In addition, an employee may also be granted annual leave, leave without pay (LWOP), or compensatory time off to express milk. For additional information, please see attached fact sheet on break times for nursing mothers.

Place for Mothers to Express Milk

Federal agencies should take immediate action to make arrangements to provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, for employees to express breast milk. Agencies are instructed to consult with the General Services Administration and internal collective bargaining agreements for establishing procedures for implementing this portion of the law.

Additional Information

In addition to the fact sheet referenced above, we are issuing frequently asked questions to assist agencies in the implementation of this new law. See
Frequently Asked Questions: Break Time for Nursing Mothers.

For additional information, agency Chief Human Capital Officers and/or Human Resources Directors should contact their assigned OPM Human Capital Officer. Employees should contact their agency human resources offices for assistance.

cc: Chief Human Capital Officers
Human Resources Directors

Attachments

Frequently Asked Questions: Break Time and Space for Nursing Mothers

Q. Who is entitled to reasonable break time and a space for expressing breast milk at work?

A. Section 4207 of the Patient Protection and Affordable Care Act, Pub. L. 111-148, added a new subsection (r) in section 7 of the Fair Labor Standards Act (FLSA) (codified at 29 U.S.C. 207(r)). Section 7(r) provides nursing mothers who are not exempt from the requirements of section 7 of the FLSA, which sets forth the FLSA's overtime pay requirements, with entitlement to reasonable break time and a space for expressing breast milk at work. In accordance with the authority delegated to the U.S. Office of Personnel Management (OPM) by the President on December 20, 2010, and in order to ensure consistent treatment of all civilian employees who are nursing mothers within the Federal workforce, agencies should apply the same benefits to all executive branch civilian employees who are exempt from section 7 of the FLSA, so that all nursing mothers who are civilian employees working in executive branch agencies receive these benefits.

Q. What must an agency provide to employees who want to express breast milk in the workplace?

A. Consistent with the requirements of section 7(r) of the FLSA, Federal agencies should provide a reasonable amount of break time and a space to express milk as frequently as needed by the nursing mother, for up to 1 year following the birth of the employee's child. The frequency of breaks needed to express breast milk as well as the duration of each break will likely vary. The space provided by the agency cannot be a bathroom, and it must be shielded from view and free from intrusion by coworkers or the public.

Q. How long must an agency allow a nursing mother to be granted break times for expressing milk?

A. An agency should provide a nursing mother employee reasonable break time and a space to express milk for 1 year following the birth of the employee's child. An agency can also extend the time beyond 1 year based on internal agency policy and collective bargaining agreements, or in accordance with relevant state laws that provide the right for greater than 1 year after the child's birth.

Q. How often can a mother be permitted to express milk?

A. Agencies should provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk as well as the duration of each break will likely vary depending on the individual mother's needs. Managers will be required to use their best judgment on what is considered reasonable.

Q. Is the break time for nursing mothers paid or unpaid time?

A. Section 7(r) of the FLSA (29 U.S.C. 207(r)) and OPM guidance does not require agencies to compensate employees who are granted reasonable break time for expressing milk. However, many agencies already provide employees with compensated breaks (for example, 15 minutes in the morning and 15 minutes in the afternoon) that may be used for any purpose. If an agency already provides such 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.

Q. What workplace flexibilities are available for Federal employees?

A. Federal agencies should provide a reasonable break time for a civilian employee to express breast milk for her nursing child for 1 year after the child's birth each time the employee has a need to express the milk. Section 7(r) of the FLSA (29 U.S.C. 207(r)) does not require agencies to compensate the employee who is granted the reasonable break time for the specific reason of expressing milk. As a result, Federal agencies are encouraged to develop policies for the use of current workplace flexibilities to provide reasonable breaks. Agencies should review any applicable regulations or policies and collective bargaining agreements before making determinations on these matters. The following workplace flexibilities should be considered when developing your agency's policy: Alternative Work Schedule (AWS) flexibilities, annual leave, leave without pay, compensatory time off, and credit hours.

Q. Do agencies need to create a permanent, dedicated space for use by nursing mother employees?

A. No. 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. The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mother's use, it must be available when needed in order to meet the requirement in the law and OPM guidance. Of course, agencies may choose to create permanent, dedicated space if they determine that is the best way to meet this requirement.

Q. Do agencies have to provide a lactation space even if they don't have any nursing mother employees?

A. No. The statute requires agencies to provide a space for a nursing employee "each time such employee has a need to express the milk." If there is no employee with a need to express breast milk, then the agency would not have an obligation to provide a space.

Q. If the only space available at a work site is a bathroom, can agencies require employees to express breast milk there?

A. No. A bathroom, even if private, is not permissible under the section 7(r) of the FLSA (29 U.S.C. 207(r)).

Fact Sheet: Break Time for Nursing Mothers

Description

Consistent with the requirements of section 4207 of the Patient Protection and Affordable Care Act, Pub. L. 111-148, which added a new subsection (r) in section 7 of the Fair Labor Standards Act (FLSA) (codified in 29 U.S.C. 207(r)), Federal agencies are required to (1) provide a reasonable break time for a civilian 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) make arrangements to provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, for a civilian employee to express breast milk. This provision is an entitlement for employees who are not exempt from the requirements of section 7 of the FLSA which includes the FLSA's overtime pay requirements.

Coverage

The entitlement to nursing mother breaks was established in section 7(r) of the FLSA. Section 7(r) applies only to employees who are not exempt from the requirements of section 7 of the FLSA which includes the FLSA's overtime pay requirements. In accordance with the authority delegated to the U.S. Office of Personnel Management (OPM) by the President on December 20, 2010, and in order to ensure consistent treatment of all civilian employees who are nursing mothers within the Federal workforce, agencies should apply the same benefits to executive branch employees who are exempt from the requirements of section 7 of the FLSA.

Reasonable Amount of Time Off

Although employing agencies are not required to compensate civilian employees who are nursing mothers for breaks taken for the purpose of expressing milk, agencies may already provide compensated breaks (for example, 15 minutes in the morning and 15 minutes in the afternoon) that employees can use for any purpose. Where agencies already provide such 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.

Consistent with the requirements of section 7(r) of the FLSA, Federal agencies should provide a reasonable amount of break time to express milk as frequently as needed by the nursing mother. The frequency of breaks needed to express milk as well as the duration of each break will likely vary according to the needs of the individual mother.

Available Workforce Flexibilities

In addition to permitting the use of existing compensated breaks as discussed above, Federal agencies should develop an agency policy which permits employees to use current workforce flexibilities. To the extent possible, agencies are encouraged to permit nursing mothers to choose from among the workforce flexibilities listed below. Agencies should review any applicable regulations or policies and collective bargaining agreements and revise their policies, as appropriate. The following workforce flexibilities should be considered when developing your agency's policy.

Alternative Work Schedules (AWS) -- Flexible or compressed work schedules may be established for a nursing mother who needs time off to express milk during normal working hours. Agencies should review their internal AWS policies and practices and collective bargaining agreements to determine how additional AWS flexibilities may be implemented for this purpose. Departments and agencies should also consult subchapter II of chapter 61 of title 5, United States Code; the regulations in 5 CFR, part 610, subpart D, Flexible and Compressed Work Schedules; and the Handbook on Alternative Work Schedules (http://www.opm.gov/oca/aws/index.htm) and OPM's Labor-Management Relations Guidance Bulletin: Negotiating Flexible and Compressed Work Schedules (http://www.opm.gov/cplmr/html/flexible.asp).

Leave and Other Paid Time Off –An employee may also be allowed to use annual leave, leave without pay, compensatory time off, or credit hours, as discussed below.

- **Annual Leave** – When an employee requests annual leave to express milk, agencies should be as accommodating as possible in reviewing and approving such requests, consistent with the regulations in 5 CFR part 630, subpart C, Annual Leave, and applicable collective bargaining agreements.

- **Leave Without Pay** -- At the discretion of the agency, leave without pay (LWOP) may be granted to an employee who requests breaks to express milk during normal working hours. As with annual leave, OPM encourages agencies, whenever possible, to act favorably upon requests by employees for LWOP to express milk. Agencies should review their internal policies on LWOP and applicable collective bargaining agreements.

- **Compensatory Time Off** -- Agencies may approve requests to use compensatory time off that an employee has earned in exchange for performing an equal amount of time in irregular or occasional overtime work. For employees under flexible work schedules, agencies may approve employee requests to earn compensatory time off for both regularly scheduled and irregular or occasional overtime work.

- **Credit Hours** -- Credit hours are those hours within a flexible work schedule that an employee elects to work in excess of his or her basic work requirement (e.g., 80 hours in a pay period for a full-time employee) so as to vary the length of a workweek or workday. A nursing mother may be allowed to use accumulated credit hours to fulfill her basic work requirement, thereby gaining time off from work to express milk. If an agency authorizes credit hours under its flexible work schedules program, the maximum amount of credit hours that may be carried over from one pay period to another is 24 hours.

Place for Mothers to Express Milk

Consistent with the requirements of section 7(r) of the FLSA, Federal agencies should make arrangements to provide a place, other than a bathroom, that is shielded from view and free from

intrusion from coworkers and the public, for mothers to express breast milk. Agencies are instructed to consult with the General Services Administration and internal collective bargaining agreements for establishing procedures for this portion of the law.

References

29 U.S.C. 207 (amended by P.L.111-148)

Questions and Answers on Break time for Nursing Mothers