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Work & Family

Employers Reap Rewards From Supporting Nursing Mothers

Employers are developing innovative programs to comply with federal and state statutes requiring accommodations for nursing mothers who need time and private spaces to express breast milk.

At a minimum, most employers are providing flexible break times for nursing mothers and adapting their work environments so mothers have private and sanitary spaces for expressing breast milk, as required under federal and state laws.

But a growing number of employers, including tech giants Microsoft Corp. and Netflix Inc., have aimed their policies beyond mere compliance. They and other proactive employers have hired consultants to support new mothers reintegrating to the workplace after the birth of a child. Others have installed portable lactation rooms with features such as hospital-grade breast pumps and videoconferencing services that can connect mothers with credentialed lactation consultants.

“Initially there was a fair amount of confusion,” said Julie Trester, a partner in the labor and employment practice of Cozen O’Connor in Chicago. “But I think employers more and more are providing a reasonable space. Many of our clients are going above and beyond the basic requirements. So they are providing a refrigerator and a sink and a clean lactation room. People are acclimating to the law and compliance is the norm.”

Many large employers see supporting new mothers as an “opportunity” rather than an obligation, Sarah Andrews, an associate in the Pittsburgh office of Morgan, Lewis & Bockius LLP, said.

“They see it as a ‘taking-care-of-our-people’ moment,” Andrews told Bloomberg Law. “Fortunately, studies around this show employers largely benefit from offering these types of accommodations. And what you need to do to accommodate nursing mothers is very doable.”

Return on Investment Research by the Families and Work Institute suggests employer support for nursing mothers provides significant dividends to the overall business.

The institute recently estimated that employers enjoy a \$3 return for every \$1 invested in breastfeeding support activities, equipment, and facilities. Such investments reduce absenteeism and health-care costs. Moreover, it said, support for breastfeeding employees “is an effective strategy to recruit, retain and engage mothers

with infants—one of the largest and fastest growing segments in the U.S. workforce, especially in the retail, service and other lower-wage industries.”

Lactation Products and Services San Francisco-based DayOne Baby provides employers with a wide range of workplace lactation products and services. DayOne Baby recently introduced its Julia line of “Portable Mother’s Rooms,” which range in price from \$1,139 to \$4,249. The easy-to-assemble rooms are compliant with various requirements for private and sanitary spaces for expressing breast milk.

In addition, DayOne Baby offers clients hospital-grade breast pumps; one-on-one support with board certified lactation counselors; equipment and supplies for breast milk storage and refrigeration; and a range of comfort, hygiene, and nutritional products designed for lactating mothers. In addition to Microsoft and Netflix, the company’s clients include Salesforce.com Inc., Fit-bit Inc., Airbnb, Pinterest, and the Golden State Warriors.

“Our objective is to support companies and their human resource, benefits, and legal departments as they adjust to new legislative requirements and strive to make their workplaces comfortable and inclusive to lactating employees,” DayOne Baby CEO Esther Kestenbaum said.

It’s the Law Accommodating nursing employees is the law in every jurisdiction in the country.

The Affordable Care Act imposed a series of federal requirements on employers in March 2010. The law amended Section 7 of the Fair Labor Standards Act, requiring employers to provide “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.”

In addition, employers are required to 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.”

The requirements apply to all employers unless they have fewer than 50 employees and can demonstrate that compliance would impose an undue hardship.

Employers may also be subject to obligations under state law and local ordinances. The District of Columbia and 28 states have laws pertaining to breastfeeding in the workplace, according to the National Conference of State Legislatures. States with such requirements include Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Minnesota, Mississippi, Montana, New Mexico, New Hampshire, New York, North Dakota, Oklahoma,

Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming.

Moreover, 49 states and the District of Columbia have enacted laws permitting women to breastfeed in public, and 29 states and the District of Columbia exempt breastfeeding from public indecency laws.

Compliance Duties Some state laws permit longer periods of accommodation beyond one year. Other laws create requirements for the physical spaces set aside for expressing breast milk. In addition, some states require workplace accommodations for mothers nursing their infant children.

“It makes sense for employers to review their policies to make sure that they are compliant with federal, state and local law,” Andrews said.

Employers with operations in Illinois should pay close attention to House Bill 1595, amending the Nursing Mothers in the Workplace Act, Trester said. H.B. 1595 enjoyed unanimous support in the Senate and the House earlier this year and now awaits the signature of Gov. Bruce Rauner (R).

The measure would require paid break time, multiple breaks during a work shift, and break time not only for expressing milk but also for “nursing a baby,” Trester said.

The Illinois proposal is significant because it requires break time on an “as-needed basis” and bars employers from withholding wages from employees using break time to express breast milk, Trester said. H.B. 1595 accomplishes the latter goal by striking the word “unpaid” from current law and adding a provision stating employers “may not reduce an employee’s compensa-

tion for time used for the purposes of expressing breast milk or nursing a baby.”

“The new law clarifies that this isn’t once a day,” she said. “You have to give people break time to express breast milk when they need it. And, the legislature is being very clear that it cannot be unpaid break time. You can’t reduce their compensation. So this is significant.”

Enforcement and Litigation There has been minimal enforcement of nursing mother accommodation laws by federal and state agencies and only a handful of cases alleging an employer violated its obligations, Andrews said. The federal requirements create a confusing landscape for enforcement because the remedies available in the FLSA relate to back wages, not loss of break time.

On a separate legal front, Andrews noted that several district and circuit courts have examined lactation breaks as a medical issue related to pregnancy. These cases have established a cause of action under Title VII of the 1964 Civil Rights Act that was never previously acknowledged.

The nursing mothers amendment to the FLSA “brought attention to state laws that were often already in place, but not always on the radar,” Andrews said. “Add this to an increase in states passing pregnancy accommodation laws, some of which expressly include mention of breastfeeding or lactation, and there is an entirely new awareness of this as an employment issue.”

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