



**National  
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*Creative Health Benefits Solutions for Today, Strong Policy for Tomorrow*

February 22, 2011

Mr. Montaniel Navarro  
Attention: **RIN 1235-ZA00**  
U.S. Department of Labor  
Wage and Hour Division  
200 Constitution Avenue, N.W.  
Room S-3502  
Washington, DC 20210

Dear Mr. Navarro:

The National Business Group on Health appreciates the opportunity to provide comments in response to the U.S. Department of Labor's (DoL) Request for Information (RFI) as you formulate final guidance on the Patient Protection and Affordable Care Act's (Affordable Care Act) requirement to provide "reasonable" break time (no requirement to pay for breaks) for "non-exempt" employee mothers to nurse children/express breast milk for 1 year after birth in private places, other than bathrooms. Employers appreciate that DoL understands that the wide variety of workplace environments, work schedules, and individual factors will impact the number and length of breaks required by nursing mothers. Many employers voluntarily offer additional benefits to their pregnant and nursing employees including prenatal support, access to certified lactation consultants, enhanced break rooms and discounts or free hospital grade breast pumps. Employers need flexibility to implement this provision and to continue offering innovative approaches to meet the specific needs of their breastfeeding employees.

The National Business Group on Health (Business Group) represents 316 companies, including many of America's largest employers (66 of the Fortune 100) who voluntarily provide health benefits and other health programs to over 55 million American employees, retirees, and their families.

Working mothers represent the fastest-growing segment of the U.S. workforce and a major pool of talent which no employer wants to lose. Accordingly, the Business Group was pleased to work with the U.S. Department of Health and Human Services' (HHS) Office on Women's Health and the Health Resources and Services Administration's (HRSA) Maternal and Child Health Bureau to draft *Investing in Workplace Breastfeeding*

*Programs and Policies: An Employer's Toolkit.*<sup>1</sup> The toolkit covers the essential information employers need to understand the components of breastfeeding programs, getting started and measuring success. Valuable resources include breastfeeding program options, employer case studies and additional materials for employees.

Employers would like additional clarification or guidance from the DoL on a number of issues:

- Whether or not employers need to comply at locations with only men and/or no women of child bearing age;
- Sample language (poster) for required employee notices;
- Clear examples of what qualifies as “reasonable” break time and the flexibility granted to employers in meeting this definition;
- Guidance on employers’ ability to review employees’ use of nursing time for other reasons; and
- An updated Frequently Asked Questions (FAQ) list including any new information or guidance and “best practices” for employers to reference in designing their breastfeeding rooms and programs.

The Business Group respectfully offers the following recommendations in the specific areas identified by DoL’s RFI for comment addressing two main issues:

1. Providing the breaks themselves (recommended frequency, addressing the break times); and
2. Meeting the space requirements.

### **“Reasonable” Break Time**

The Business Group believes that 60 minutes per work day of total unpaid break time is sufficient for nursing mothers to express milk and that it should run concurrently with employees’ regular meal and break times where possible. The Business Group believes a good starting point to determine the best “reasonable” solution to meet their employees’ needs begins with involving their mothers in establishing their nursing policies. Employers should work with their nursing employees to schedule break times that best meet the needs of their employees and to ensure that they have space available to express milk. It can take up to 30 minutes to express milk (set up, expressing, cleaning the equipment, the distance to the lactation, space, etc.), but actual times will vary from woman to woman. For those who need more time to nurse, employees should also consider using approved-flex time.

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<sup>1</sup> Slavitt, Wendy. Et al. *Investing in Workplace Breastfeeding Programs and Policies: An Employer's Toolkit*. The National Business Group on Health. 2009. Available at: [http://businessgrouphealth.org/healthtopics/breastfeeding/docs/BF\\_entire\\_toolkit\\_FINAL.pdf](http://businessgrouphealth.org/healthtopics/breastfeeding/docs/BF_entire_toolkit_FINAL.pdf)

It is critical to allow employees to match break times/duration to their babies' feeding patterns during the first month back from work, which would require more frequent sessions (3 or more). Continuing breastfeeding the first month back provides several benefits to employers including a reduction in the amount of time missed from work to care for infants' ear infections and additional ailments (which are less likely in babies that are breastfed for 4 months).

### **Employee Notification of Employers**

Most employers do not support a mandatory notification requirement for employees every time they need to nurse and do not want to measure the exact time periods when nursing employees take breaks to track utilization. However, employers should be able to require scheduling (electronic and paper) if it aids employers to schedule space. The Business Group also believes DoL should allow them to require "non-exempt" employees to clock out and back in on timekeeping systems for breaks lasting longer than 30 minutes. Scheduling helps ensure that existing lactation spaces are available to nursing mothers and provides a mechanism to assist employers in preventing unauthorized use of the rooms. For example, some employers use electronic scheduling; require employees to mark paper schedules outside of lactation rooms; or use electronic cipher locks with combination codes to ensure only authorized employees use the rooms. If employees use the rooms for other purposes or share their access code they may lose their code and access to rooms.

### **Space for Accommodations**

The Business Group believes that any space that is separate and sanitary with privacy screens or locks for privacy should be in compliance (rooms adjoining bathrooms, locker rooms, shared spaces, large rooms, etc.). Employers may need to use rooms adjoining bathrooms and locker rooms because they may be the only venues available with access to running water and sinks for clean up. In addition, multi-use or shared spaces with privacy screens, while lacking the privacy of locked rooms, should also suffice for employers who may not have the resources that other employers have to establish separate lactation rooms for their employees. Using managers' offices should be a last resort, unless no other space is available, because nursing mothers would likely find it uncomfortable to ask their managers to leave their offices so they could express milk.

DoL should also tailor break time materials targeted towards nursing mothers teleworking from home.

### **Non-Fixed Locations**

DoL needs to permit the greatest flexibility for employers whose employees are not in fixed places during work shifts. Providing break times is not the issue – rather providing private, secure places is the issue. Some positions cannot accommodate a reasonable break time (i.e. an EMT in the middle of a call) and any guidance should allow

employers' some discretion regarding exactly what "reasonable" measures they can take in these cases to comply. For other employees such as pilots, flight attendants, truck drivers or train engineers the federal government should grant additional flexibility for creative solutions. For example, the DoL should allow employers and employees to schedule breaks after short trips (2 hour trips or less) and to work with different destinations, customer sites and airports to provide workable solutions. In some cases, employers may be limited in the locations they can provide to employees who travel or work off-site depending on the size of the off-site locations (e.g. regional managers who have to travel to gas stations/convenience stores or fast food/retail locations). Employers do not typically pay traveling employees hourly, so while most employers would want to help them from an employee-comfort standpoint, the Fair Labor Standards Act (FLSA) does not require them to do so.

### **Notice**

The Business Group believes that notifying employees with the standard "break room" posting requirement (similar to OSHA, FMLA, etc. posters) is sufficient along with verbal and written notification (either paper or electronic with reasonable verification of receipt) from employers' human resources departments, occupational medicine departments, certified lactation consultants, wellness programs or third party vendors in any employee communications regarding pregnancy and employee benefits (new hire benefit notifications, maternity leave packets, short-term disability/maternity leave approval notifications or when women return to work).

### **Storage**

The Business Group also recommends that nursing mothers use coolers or other storage mechanisms over shared refrigeration with other employees to prevent possible health and contamination issues for employers and employees that may arise due to close proximity between expressed milk (a bodily fluid) and employee lunches. While a few employers have considered providing small refrigerators in nursing rooms, the rooms may be used by multiple employees throughout the day for other purposes and may pose the same health and contamination issues.

### **Compliance Assistance**

In addition to the specific information requested above, employers' most needed resource is latitude and flexibility to design and provide "reasonable" break times and accommodations to nursing mothers.

One specific area the Business Group identified is guidance from the DoL regarding coordinating the implementation of this new federal law with state laws allowing for more than 1 year following birth to express milk, which is contrary to the current recommendations of the American Academy of Pediatrics (AAP) and the American Association of Family Physicians (AAFP).

Again, thank you for the opportunity to provide comments and recommendations as you work to develop guidance on the Affordable Care Act's requirement to provide "reasonable" break time for "non-exempt" employee mothers to nurse children/express breast milk for 1 year after birth. Please contact me or Steven Wojcik, the National Business Group on Health's Vice President of Public Policy, at (202) 558-3012, if you would like to discuss our comments in more detail.

Sincerely,

A handwritten signature in cursive script that reads "Helen Darling".

Helen Darling  
President

cc: The Honorable Hilda Solis, Secretary, U.S. Secretary of Labor  
Nancy J. Leppink, Deputy Administrator, Wage and Hour Division