



EMPLOYMENT ALERT: May 12, 2010

[MEDICAL MARIJUANA UPDATE/NEW HEALTH CARE REFORM LAW PROVIDES BREAK TIME FOR NURSING MOTHERS](#)

Employers Need Not Accommodate Medical Marijuana Users

Oregon State Supreme Court rules federal Controlled Substances Act preempts state law

On April 15, 2010, the Oregon Supreme Court issued a decision in *Emerald Steel Fabricators v. Oregon Bureau of Labor & Industries*, 346 Or 157 (2010), declaring that employers are not required to accommodate an employee's use of medical marijuana. In *Emerald*, the employer discharged an employee for non-work use of marijuana prescribed by a physician under the Oregon Medical Marijuana Act. BOLI issued an order that the termination violated the State of Oregon disability discrimination statute, ORS 659A.112, because the employer failed to engage in the "interactive process" to determine a reasonable accommodation for the employee's disability.

The Court reversed BOLI's order, and held that the federal Controlled Substances Act, which prohibits the manufacture, distribution, dispensation, or possession of marijuana, even when state law authorizes its use to treat medical conditions, trumped the voter-enacted Oregon Medical Marijuana Act, which allows medical marijuana users a defense against state criminal charges. Under the Supremacy Clause of the US Constitution, federal laws enacted by Congress supersede state law when state law conflicts with federal statutes.

The immediate impact of the Supreme Court's decision is to remove the employment protection that medical marijuana users arguably had previously under Oregon's disability law. Under the *Emerald* decision, Oregon employers now have no obligation to accommodate an employee's disability through the use of medical marijuana and BOLI will no longer be able to enforce employment protection under State of Oregon disability law for medical marijuana users.

The *Emerald* decision supports an employer's right to establish drug-free workplaces, administer drug tests, and to make employment

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decisions (such as hiring, discipline and discharge decisions) due an employee's medical marijuana use without violating the State of Oregon's disability discrimination laws. However, employers should be mindful of other discrimination laws that may apply, including state and federal laws which provide employment protections for those individuals who are in recovery from substance abuse, which could include recovery from marijuana substance abuse.

Health Care Reform Law Requires Employers to Provide Nursing Mothers With Extra Break Time and a Location to Express Milk

Section 4207 of the Patient Protection and Affordable Care Act ("the Act"), signed by President Obama on March 23, 2010, amends the Fair Labor Standards Act ("FLSA") to add a new section requiring employers to provide "reasonable" break time for employees who are nursing mothers to express milk. The new law is effective as of March 23, 2010.

"Reasonable Unpaid Breaks" Requirement

Employers can determine what constitutes a "reasonable" amount of time to express milk, but the frequency of required breaks is subjective and based on the employee's "need" to express milk. The U.S. Department of Labor ("DOL") has the authority to draft regulations offering guidance in this area. Until the DOL implements such regulations "reasonable break time" remains undefined. The length and frequency of each employee's lactation breaks could vary based on the needs of each individual employee and the location and logistics of the space provided.

The Act states that employers are not required to compensate employees for "reasonable break time" for purposes of lactation under the federal law. Note that under Oregon law, however, employees must receive a paid rest period of 10 minutes for every four hours work. Thus, if an employee takes a 30-minute break to express breast milk (assuming she hasn't already used all regular paid rest periods during her shift), 10 minutes would be paid time and 20 minutes would be unpaid time. Employers should consult employment counsel for further advice on how to address a particular employee's situation.

A nursing mother is eligible for the break time for up to one year after her child's birth and may take advantage of the breaks anytime she has the need to do so.

Lactation Room Requirement

In addition to the break time requirements, under the new law, employers must provide a private place, other than a bathroom, for the employee to use for expressing breast milk. The room must be shielded from view and free from intrusion by coworkers and the public. The definition of "intrusion" is not defined at this point. For example, it is unclear whether multiple nursing mothers can use the same location to express milk at the same time, and whether an employee's current office can be designated in lieu of some other location. Providing access to a nearby safe water source for washing hands and rinsing out breast-pump equipment and refrigerator storage are not required, but employers may want to consider providing access to these things.

Who must comply with this law?

The new rules apply to all employers with one exception. An employer with fewer than 50 employees may be exempt from the Act's requirements regarding break time for nursing mothers, but only if the employer can demonstrate that complying with the requirements would impose "an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." This means that each employer with less than 50 employees still must make an individualized determination as to whether an undue hardship exception applies.

The DOL will likely issue regulations regarding what constitutes an “undue hardship.” Until then, the Americans with Disabilities Act’s undue hardship exception, 42 U.S.C. § 12111, and its regulations, 29 C.F.R. § 1630.2, provide guidance for employers. The determination of whether there is a qualifying undue hardship is highly fact-specific. It is generally insufficient to only show that the employer will bear some additional cost, expense or inconvenience.

The new requirements do not apply to exempt employees. Keep in mind, however, that exempt employees cannot have their pay reduced for taking breaks to express milk.

Oregon Law

Oregon law already provides break time for nursing mothers. Effective January 1, 2007, ORS 653.077 requires employers to provide nursing mothers a 30-minute break for every four hours worked to express milk. Oregon’s law is substantially similar to the new federal law.

However, unlike the new federal law, Oregon’s statute only applies to employers with 25 or more employees and only requires employers to make “reasonable efforts” to provide a location other than a restroom or toilet stall for expressing milk. Under the new federal law, all employers, absent a showing of undue hardship, must provide reasonable breaks, and must provide a location for expressing milk.

If you would like further information regarding this new law, or how the law may apply to you, please do not hesitate to contact one of our labor and employment attorneys.

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