



February 22, 2011

Montaniel Navarro
U.S. Department of Labor
Wage and Hour Division
200 Constitution Avenue, NW., Rm. S3502
Washington, DC 20210

Submitted Via eRulemaking Portal: <http://www.regulations.gov>

Re: RIN # 1235-ZA00, Reasonable Break Time for Nursing Mothers

Dear Mr. Navarro,

The ACLU, on behalf of its more than half a million members, fifty-three affiliates nationwide, and countless additional supporters and activists, is pleased to submit the following comments in response to the Request for Information entitled “Reasonable Break Time for Nursing Mothers” (hereinafter “RFI”).¹

These comments are rooted in the ACLU’s strong belief that in order to ensure full equality for women, workplace policies and practices must appropriately reflect the realities of pregnancy, childbirth, and breastfeeding in many women’s lives. Numerous barriers remain to women’s continued workforce participation and advancement once they have children, with both short- and long-term consequences for women’s earning potential and economic security.² Insufficient support for breastfeeding for women who

¹ United States Department of Labor, Wage and Hour Division, Request for Information from the Public, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073 (Dec. 21, 2010).

² See generally Pamela Stone, *Opting Out? Why Women Really Quit Careers and Head Back Home* (2007) (discussing structural barriers to professional women’s continued advancement in the workplace after having children); Sylvia Ann Hewlett, *On-Ramps and Off-Ramps: Keeping Women on the Road to Success* (2007) (documenting that women who took a 2.2 to 3 year break from the workforce lost 18% to 37% of their earning power, and that only 40% were then able to return to paid full-time work despite a desire to do so); Marianne Bertrand *et al.*, *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 Am. Econ. J.: Applied Econ. 229, 252 (2010) (documenting increasing gap in career progress for female as compared to male M.B.A.s following graduation, and concluding that “[t]he presence of children is the main contributor to the lesser job experience, greater career discontinuity, and shorter work hours for female MBAs”).

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return to the paid workforce after the arrival of a baby is among these barriers. These were among the concerns that animated the enactment of the amendment to the Patient Protection and Affordable Care Act, Public Law 111-148 (“Affordable Care Act”). Citing the growing percentage of women who return to work within three to six weeks of giving birth, Senator Merkley characterized the provision as “simply an act of human decency to protect their right to continue [to] breastfeed after they return to work. . . [t]o help meet their basic needs with [] regard to the care and nourishment of their children.”³ He also cited health benefits for infants and nursing mothers, and savings in health care costs that could be expected as a result of the provision.⁴

Moreover, this provision of the Affordable Care Act reflects a strong policy on the part of the federal government, stretching back at least a quarter of a century, of promoting breastfeeding, including women’s ability to continue breastfeeding upon return to the paid workforce.⁵ From the first federal summit on breastfeeding in 1984 to the signing of the World Health Organization *Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding* in 1990,⁶ to as recently as this year, when the Surgeon General issued a “Call to Action to Support Breastfeeding” outlining steps that various sectors might take to improve breastfeeding rates, promotion of breastfeeding has been a “key public health issue in the United States.”⁷

In light of the legislative concerns motivating this provision of the Fair Labor Standards Act (FLSA), and the strong federal public policy in favor of breastfeeding promotion, it is essential that the provision be interpreted as broadly as possible in order to give full effect to the law. We commend the Department for the robust interpretation of the law contained in the RFI, and offer the following suggestions for how to strengthen any future guidance that may be issued. Our recommendations are outlined in detail below, with specific recommendations highlighted in bold.

³ Markup Hearing on H.R. 3590 Before the S. Comm. on Health, Education, Labor, & Pensions, 111th Cong., 1st Sess. (Jun. 23, 2009) (comments of Senator Markley, Senate Sponsor).

⁴ *Id.*

⁵ See United States Department of Health and Human Services, Office of the Surgeon General, *The Surgeon General’s Call to Action to Support Breastfeeding* at 5 (2011) [hereinafter “Surgeon General’s Call to Action”] (discussing Federal Policy on Breastfeeding”).

⁶ See Department of Health and Human Services, Office of Women’s Health, *HHS Blueprint for Action on Breastfeeding* (2000), <http://www.womenshealth.gov/archive/breastfeeding/programs/blueprints/bluprntbk2.pdf>; United Nations Children’s Fund, World Health Organization, *Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding* (1990) (Adopted by U.S. at WHO/UNICEF policymakers’ meeting *Breastfeeding in the 1990s: A Global Initiative*, co-sponsored by the United States Agency for International Development and the Swedish International Development Authority (SIDA), in Florence, Italy), <http://www.unicef.org/programme/breastfeeding/innocenti.htm>.

⁷ *Surgeon General’s Call to Action*, *supra*, at v.

I. DISCUSSION

A. General Comments

Although the break time provision represents a major advance for both public health and women's equality at work, the law is not as comprehensive as we would have wished. The provision does not cover employees who are exempt under FLSA, does not require paid break time, and only requires the benefits under its terms to be extended for one year after the child's birth. While we recognize that the Department is limited to the law's terms in what it may require of employers, it may, consistent with the legislative purpose of the break time provision, encourage employers to extend these benefits as broadly as possible. The interests served by this provision apply to all workers, not just those covered by FLSA, and the benefits of continued breastfeeding extend beyond one year from the birth of a child. Employers also have an interest in consistent treatment of employees, regardless of their status under the FLSA or the age of their children. **We therefore urge the Department to include language encouraging employers to extend the benefits available under the break time provision to FLSA exempt as well as non-exempt employees, and to afford employees break time beyond the one year time limit specified in the Act.**

Moreover, although the provision applies to all "nursing mothers," we are concerned that the break time provision may be inappropriately limited in practice to women who have just given birth. Women who have ceased breastfeeding for whatever reason (such as illness or nursing difficulties) may subsequently successfully reinstitute breastfeeding (a process called "relactation").⁸ Moreover, many non-birth mothers such as mothers in same-sex relationships, adoptive mothers, and mothers who use a surrogate are able to breastfeed with the assistance of lactation-inducing drugs.⁹ However, employers may be unaware of these possibilities. **In order to give full effect to the law's intended purpose, the Department should therefore make clear in any final guidance that an employee need not have recently given birth or be the biological parent of a child in order to request break time as provided for under this provision of the Affordable Care Act.**

B. Paid versus Unpaid Break Time:

The statute unfortunately does not require employers to provide paid breaks for purposes of pumping, or even to grant permission for employees to extend their work day in order to "make up" for unpaid breaks taken under the statute. The ACLU is concerned that this will result in a reduction not only in pay, but also in eligibility for or accrual of fringe benefits and seniority, and may put the benefits of this provision out of reach altogether for some women in low-wage jobs. In order to help mitigate the impact of this limitation, the RFI currently encourages employers "to provide flexible scheduling for those employees who choose to make up for any unpaid break time." **This language should remain in any further guidance issued.**

⁸ See, e.g., Seema, Patwari AK, *Relactation: an effective intervention to promote exclusive breastfeeding*, 43 J. Tropical Pediatrics 213 (1997).

⁹ See American Academy of Pediatrics, Breastfeeding Section, *Policy Statement: Breastfeeding and the Use of Human Milk*, 115 Pediatrics 496, 501 (2005) (recommending counseling of adoptive mothers on the possibility of inducing lactation).

The RFI also makes clear that employers are required to compensate employees who use paid break time to express milk on the same terms as other employees who are provided paid breaks. **Any further guidance issued should similarly emphasize this point, and should make clear that the requirement of equal compensation extends to accruals of fringe benefits, bonuses, and seniority.¹⁰ The Department should further emphasize here, as well as in the enforcement section, that employers who treat paid or unpaid breaks requested under this provision differently than paid or unpaid breaks requested or used for any other reason (including for routine breaks such as lunch, coffee or cigarettes, or breaks necessary due to an employee’s disability) may be in violation of the law, including of 29 U.S.C. 216(b) and Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000-e(5).**

While these clarifications will strengthen protections for employees, the emphasis on permitting women to use their paid break time for pumping or to extend their work day to make up for unpaid break time should not be interpreted as permitting employers to *require* employees to take either of these steps. Unlike in other provisions of law, such as the FMLA,¹¹ the Act does not contain language specifying that employers may *require* employees to use their paid break time to express breast milk. Similarly, the Act nowhere authorizes employers to force women to work longer hours to make up for any unpaid breaks taken under its terms. **The Department should therefore clarify that employers may not require employees to use their paid break time, if any, for expressing breast milk, or to work an extended work day to make up for unpaid break time taken under the Act; it should further specify that employees who elect to use their paid breaks (if any) for other purposes must still be afforded the unpaid breaks to which they are entitled under the Act.**

C. “Reasonable” Break Time:

The RFI appropriately seeks to educate employers about the physiological mechanisms of breast milk production and the necessity for a pumping schedule that mirrors as closely as possible the baby’s feeding schedule. The RFI emphasizes that the frequency and length of time necessary to express breast milk “varies from woman to woman,” depending on numerous factors including “the age of the baby, the number of breast feedings in the baby’s normal daily schedule, [and] whether the baby is eating solid food.” Inclusion of this information is necessary and commendable.

It should be noted at the outset, however, that the statute requires “reasonable break time” to be provided, but specifies that such break time must be provided “*each time* such employee has need to express the milk” (emphasis added). The word “reasonable” modifies the phrase “break time.” We therefore interpret the term “reasonable” as referring to the *duration* of such break time; however, with respect to the *frequency* of breaks needed, the statute’s terms make clear that the employer is obligated to grant the employee’s request based on her individual,

¹⁰ See, e.g., 29 C.F.R. 825.209(h) (regulation implementing the Family and Medical Leave Act specifying that “[a]n employee’s entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employer’s established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).”).

¹¹ See 29 U.S.C. §2612(d)(2)(A) (providing that “[a]n eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under [the Family and Medical Leave Act] for any part of the 12-week period of such leave”).

actual need to express milk “each time [she] has need to express the milk,” and *not* on an objective standard of what would be a typical or “reasonable” frequency necessary for breast milk expression. Thus, while the guideline that “nursing mothers typically will need breaks to express milk two to three times during an eight hour shift” appears sound as a general matter, that is not relevant to the employer’s obligation under the statute to grant the individual employee’s request to express milk “*each time*” it is needed. **The Department should therefore specify that due to the variation in women’s and infants’ individual physiological needs and schedules, a woman’s request as to the necessary frequency of breaks must be granted, even if it falls outside of the range of frequency deemed “typical.”**

Moreover, while it is important to educate employers on the factors that contribute to individual women’s need for periodic breaks, it is equally important that employers understand the need to respond to employees’ requests in a manner that respects their privacy. We are concerned that without further clarification, the list of factors that contribute to the number and duration of breaks needed may invite intrusive questioning into personal matters, such as the baby’s feeding schedule or the amount of solid food that her baby is eating. Indeed, the ACLU and its affiliates have heard anecdotal reports of employers who have made critical comments to nursing women regarding the requested frequency or duration of breaks. If this type of inquiry is permitted, it will likely result in the imposition of an arbitrary schedule that may not be appropriate for the needs of the woman or her child. Employers should not feel empowered to second-guess a decision that is best made in consultation between a woman and her doctor and/or pediatrician. **We therefore urge the Department to clarify that the law does not authorize employers to require women to provide justification or documentation for the frequency of the breaks they have requested.**

In addressing the issue of the duration of breaks that may be requested, the RFI appropriately emphasizes that the length of time necessary varies from woman to woman, that it encompasses several steps prior to and subsequent to pumping, and that it depends on external factors such as the “location of the space and amenities nearby (e.g., proximity to employee’s work area, availability of sink for washing, location of refrigerator or personal storage for the milk, etc.).” The RFI further reminds employers that the convenience and availability of amenities will likely cut down on the amount of break time needed to express milk. **Because it is critical that employers take into account all the steps necessary to express milk, and not merely the time required to pump, these guiding principles should remain in any final guidance.**

D. Space:

The ACLU recognizes that identifying a suitable space may pose challenges for some employers. However, the statute makes clear that the duty to provide such a space is absolute, absent undue hardship for employers of fewer than 50 employees. The RFI appropriately recognizes the necessity that the space be suitably private and sanitary, and that it include basic amenities such as a place to sit down and a flat surface other than the floor. In addition, it seeks to educate employers regarding the necessity of amenities required for pumping, such as a sink, electrical outlet, and location to store breast milk securely. **These clarifications should remain in any final guidance.**

The Department has sought input on whether spaces such as storage closets, locker rooms, rooms adjoining bathrooms, and utility closets would be appropriate to designate for this purpose. Although we recognize that it will likely be a fact-specific inquiry into whether a particular space would be suitable, designation of the spaces listed above as lactation areas raises practical as well as dignity concerns. On a practical level, requiring a woman to pump breast milk in a location that is used, for example, for storage of cleaning supplies may be unsanitary or even toxic, and thus pose risks to the health and safety of the woman and her baby. Unsuitable spaces may also prevent efficient expression of breast milk, which requires that the woman be minimally relaxed and comfortable.¹² We have heard, for example, one report of a woman having to pump breast milk in a room used for storage of a company's computer servers that was kept so cold (in order to keep the machinery from overheating) that the employee had to wear a winter coat, scarf, and gloves while pumping. In addition to these practical concerns, requiring women to pump in spaces that are otherwise considered unsuitable for employees' work or leisure activities poses harm to women's basic human dignity.

We urge the Department's guidelines to take these practical and dignity concerns into account in assessing employers' compliance with this provision. In assessing whether a particular space is suitable, the Department should consider factors such as the size, layout, level of sanitation and maintenance of the room, its current use, and any actual or proposed modifications that might make it suitable for the purposes of expressing milk. **In addition to specifying steps necessary to ensure privacy and security and emphasizing the need for basic amenities such as a place to sit and a flat surface other than the floor, the Department should specify that at a minimum, any designated space should conform to and be maintained in generally accepted standards of cleanliness and sanitation,¹³ and meet all applicable OSHA and state and local guidelines for workplace health and safety, including adequate heating/cooling, lighting, and ventilation.¹⁴**

E. Notice:

Time is of the essence for women who return to the paid workforce and wish to continue breastfeeding their babies. As the RFI recognizes, interruptions in the schedule of expression of

¹² See, e.g., United States Department of Health and Human Services, Office for Women's Health, *Your Guide to Breastfeeding* 37-38 (2011), <http://womenshealth.gov/pub/BF.General.pdf> (promoting relaxation to improve effectiveness of pumping); La Leche League Int'l, *I'm pumping my milk to feed my baby, but my supply is going down. What can I do?*, <http://www.llli.org/FAQ/pumpwork.html> ("Stress and tension, as well as cool body temperature, can inhibit the milk ejection reflex and make pumping less productive.").

¹³ See International Labor Organization, *Maternity Protection Recommendation, 2000*, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R191> (recommending that "provision should be made for the establishment of facilities for nursing under adequate hygienic conditions at or near the workplace").

¹⁴ See, e.g., United States Department of Labor, Occupational Safety and Health Administration, *OSHA Technical Manual, Chapter III: Ventilation Investigation* (1999), http://www.osha.gov/dts/osta/otm/otm_iii/otm_iii_3.html (listing applicable "industry consensus" standards for investigations of inadequate workplace ventilation, including standards set by inter alia the Air Movement and Control Association (AMCA), the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE), the American National Standards Institute (ANSI), and the American Conference of Governmental Industrial Hygienists (ACGIH)).

milk can lead to decreased milk supply, as well as physical symptoms including discomfort, pain, and infection; these, in turn, are associated with discontinuation of breastfeeding.¹⁵ Ensuring a prompt response by employers to employees' requests for break time under the Act is therefore essential to fulfilling the purposes of the Act.

The RFI correctly notes that employees are not obligated under the Act to provide notice to employers, but encourages communication between employees and employers regarding the need for break time and space. While encouraging such communication is laudable, the current proposed language raises three concerns.

First, while the RFI advises that employers "may ask an expectant mother if she intends to take breaks to express milk while at work," it does not specify any particular steps *employers* should take to notify *employees* of their rights under the Act. Employees who are made aware of their rights are more likely to be able to communicate their needs to employers in a timely fashion. Employers should be required to notify employees generally of their rights under the Act. Federal regulations promulgated pursuant to the FLSA already require, in relevant part, 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 so as to permit them to observe readily a copy."¹⁶ We are not aware of any reason that a short summary of the break time provision should not be included in the notice "explaining the Act." Because employers are already required to post this notice, and the applicable notice is available for free download on the website of the Department's Wage and Hour Division, at <http://www.dol.gov/whd/regs/compliance/posters/minwagebwP.pdf>, the cost to employers of posting information regarding the break time provision in this notice would be negligible. **We therefore urge the Department to develop such language and include it in the notice made available by the Wage and Hour Division. In the alternative, we urge the Department to include guidelines for employers to otherwise provide employees notice of their rights under this provision, specifying at a minimum that such notice be posted in a conspicuous place "so as to permit employees to observe readily a copy."**

In addition to the general notice requirement, the Department should advise employers that it is incumbent upon them to notify each employee who is expecting a new child of her rights under the Act, including the employer's policy with respect to break time and a discussion of the available lactation space(s). This conversation may take place at the same time as the employer and employee discuss plans for maternity or family leave generally. Moreover, while we recognize the interest in promoting such communication, we are concerned about the potential for inappropriate intrusion, pressure, or harassment that could result from inquiries into women's plans regarding break time. **The Department should therefore emphasize that any inquiry an employer makes along these lines should be conducted in such a manner that respects employees' privacy.**

The Department reminds employers to "bear[] in mind" that they "must provide the break time and lactation space 'each time such employee has need to express the milk.'" While we are

¹⁵ See *Surgeon General's Call to Action*, *supra* note 5, at 13.

¹⁶ 29 C.F.R. § 516.4.

cognizant that employers generally may need some time to prepare for compliance and finalize arrangements for a suitable location, we are concerned that this language does not make sufficiently clear that employers are obligated to provide the break time and private space requested, whether or not the employee has provided advance notice of the specifics of the time schedule requested. This is particularly important because women may not be able to predict with certainty their scheduling needs with respect to the frequency or duration of breaks prior to their return to work, and the necessary schedule may vary over time. **The Department should make clearer that the employer’s obligation to provide reasonable break time and lactation space “each time” such employee has need to express the milk applies regardless of whether the employee has provided advance notice prior to her return to work, and should therefore encourage employers who need time to finalize compliance plans to implement interim solutions as necessary, in order to meet employees’ immediate needs.**

F. Undue Hardship exemption

1) Definition

The Department has sought guidance specifically on the question of whether the undue hardship exemption should be interpreted in line with the analogous term under the Americans with Disabilities Act. That term is defined as:

[A]n action requiring significant difficulty or expense, when considered in light of [factors including]:

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.¹⁷

In addition, the EEOC has promulgated regulations pursuant to the ADA that largely mirror this statutory definition,¹⁸ as well as an interpretation in its Enforcement Guidance offering practical examples of how this term would be applied to various factual scenarios.¹⁹ We believe that if the undue hardship exemption in this provision of the Affordable Care Act is interpreted in a manner

¹⁷ 42 U.S.C. 12111(10).

¹⁸ 29 CFR § 1630.2(p).

¹⁹ See Equal Employment Opportunity Commission, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* (2002), <http://www.eeoc.gov/policy/docs/accommodation.html#undue>.

consistent with the EEOC regulations and the Enforcement Guidance on the analogous term in the ADA, the standard that employers will be required to meet will be sufficiently stringent to fulfill the purposes of the break time provision.

However, it is important to make clear that the fact that the exemption has been held to apply in the case of one employee does not mean that it would automatically apply with respect to a different employee. **The Department should therefore specify that determining whether the undue hardship exemption would apply in a particular instance will necessitate an individualized and fact-specific inquiry into whether a specific request for break time “would cause significant difficulty or expense” to that company’s business operations based on the factors outlined above.** Ensuring these guidelines are in place would increase the likelihood that the exception will be applied in an appropriately narrow fashion.

2) Determining Eligibility to Claim the Undue Hardship Exemption

The ACLU lauds the Department for emphasizing that the exemption is not available to employers with 50 or more employees, clarifying that it is available to employers under that threshold only as an affirmative defense, and recognizing that the number of employees alone is not sufficient to qualify for the exemption. Moreover, the ACLU believes that the Department’s interpretation of how to calculate the number of employees for purposes of determining whether an employer is eligible for the exemption (i.e. who should be counted as an employee and whether employers with numerous work-sites are covered) is also correct, and is consistent with the purposes of the FLSA and the Act. Creating a default presumption that the law will apply in all covered workplaces will further the goal of permitting employees who wish to nurse to rely on the law’s coverage.

The Department has sought input as to what time period the Department should designate for purposes of calculating whether an employer qualifies to claim the hardship exemption. Unlike in other provisions such as the FMLA and Title VII,²⁰ Congress did not provide guidance on the question of what time period is applicable here. While we recognize that the size of an employer’s workforce can fluctuate over time to varying degrees, we also appreciate the Department’s recognition that uncertainty as to whether employers may claim the undue hardship exemption will “frustrate[e] the purposes of the law.”²¹ In the interests of ensuring that the Department provide maximum coverage with the least potential for uncertainty or disruption, we propose that the Department specify that:

- (a) The exemption will *not* be available if the employer has 50 or more employees at any time that an employee makes a request for reasonable break time and space provided for under the Act;

²⁰ See 42 U.S.C. § 2000e(b) (defining “employer” for purposes of Title VII of the 1964 Civil Rights Act as “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees *for each working day in each of twenty or more calendar weeks in the current or preceding calendar year*, and any agent of such a person”); 29 U.S.C. § 2611(4)(a)(i) (defining “employer” for purposes of the Family and Medical Leave Act as “any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”).

²¹ See RFI, 75 F.R. at 80077.

- (b) An employer that has been granted the exemption should lose eligibility to claim the exemption if the number of employees rises to 50 or more; the burden should then be on the employer to notify any employee who has previously made a request under the Act and/or who would be eligible at that time to make such a request (i.e. all employees who have previously made a request under the act who have children under one year of age, as well as all pregnant employees or other employees who have children under one year of age regardless of whether they have previously made a request under the Act);
- (c) When an employee has already been granted reasonable break time under the Act, the employer should not be considered eligible to raise the exemption as to that employee if the number of employees falls below 50 at any time when that employee is utilizing the space and time provided.

We believe that these recommendations will minimize disruption and maximize women's ability to plan appropriately for the period of nursing.

3) Considerations for Women in Low-Wage or Non-Traditional Fields

The ACLU particularly wishes to call special attention to the challenges faced by women in the lowest-paid sectors of the workforce, as well as women in non-traditional fields, such as construction, policing, or corrections. We urge the Department to use its investigative and enforcement efforts to ensure that the undue hardship exemption does not operate to place the benefits of the break time provision out of reach of women in such fields. The Department should encourage employers in such fields to work with employees and draw upon the numerous resources available to craft creative and mutually beneficial solutions.

G. Harassment and Retaliation

While we do not doubt that the vast majority of employers conduct discussions about personnel matters related to pregnancy, childbirth, maternity or parental leave and breastfeeding in a professional manner, such issues unfortunately too often raise the potential for abuse. As noted above, employers who are ignorant about or uncomfortable with breastfeeding or who resent their obligations under the new law may subject employees requesting break time to inappropriate comments or questioning, pressure, or even harassment or retaliation.

The RFI recognizes that "if an employer treats employees who take breaks to express breast milk differently than employees who take breaks for other personal reasons may have a claim for disparate treatment under Title VII of the Civil Rights Act of 1964," and refers employees to the EEOC website, www.eeoc.gov. **In order to prevent abuse and protect employees' rights, any final guidance should preserve this language, and should further make clear that the prohibition on disparate treatment includes harassment and retaliation. Moreover, any final guidance should note that employees may also be protected against discrimination, harassment and retaliation by nondiscrimination laws at the state and local level, and that those protections may go beyond those afforded by federal law.**

We appreciate the opportunity to provide these comments. If you have any questions regarding our recommendations, please contact Vania Leveille, Senior Legislative Counsel, at vleveille@dcaclu.org or (202) 715-0806.

Sincerely,



Laura W. Murphy
Director



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