February 22, 2011

Attn: Montaniel Navarro
FLSA Branch Chief
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-3502
Washington, D.C. 20210

RE: Comments of the Society for Human Resource Management Regarding
Wage and Hour Division’s Request for Information from the Public on
Reasonable Break Time for Nursing Mothers, RIN 1235-ZA00

The Society for Human Resource Management (SHRM) welcomes the opportunity to submit comments in response to the December 21, 2010, Request for Information from the public (RFI) on the U.S. Department of Labor (“DOL” or “agency”) guidance and interpretations to assist employees and employers understand the provisions of Section 4207 of the Patient Protection and Affordable Care Act, Public Law 111-148.

SHRM is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

Many of SHRM’s members have had experience working with employees who are nursing to create arrangements that enable the employee to both work and express breast milk when needed. In preparation for the implementation of this provision, SHRM surveyed its members on their experiences with nursing mothers in the workplace and the types of locations provided employees for this purpose. SHRM received over 1,000 responses from members who work in a variety of industries and organization sizes. The survey responses were shared with the DOL and helped inform these comments.
SHRM appreciates the careful approach the agency has taken to identify effective practices already in use by employers and to work with stakeholders to identify issues requiring further clarification. SHRM agrees with the DOL that any guidance that the DOL provides should take into account “the wide variety of workplace environments, work schedules, and individual factors” related to the implementation of the law. It is in this spirit that SHRM has identified specific areas for clarification and offers the following comments:

1. **Concurrence with Pre-existing Breaks**

   The RFI provides that “Where an employer already provides paid breaks, an employee who uses that break time to express milk must be paid in the same way that other employees are compensated for break time.” In addition, the RFI provides, “Depending on the nursing mother’s work schedule, it may be that the frequency of breaks needed tracks regular breaks and lunch periods, but this will not always be the case.” Implicit in both statements is that employers can run concurrently breast milk expression breaks required by federal law with any breaks which employers already offer. SHRM respectfully requests that the DOL make this implication explicit.

2. **State Laws**

   The federal law provides that it does not preempt a “State law that provides greater protections to employees” than the protections under the federal law. There are two types of state laws that employers must consider in complying with this statutory requirement.

   a. **Breast Milk Expression Break Laws**

      Approximately 17 states have laws that require employers to provide employees with time to express breast milk. Some of these laws provide greater protection than does the federal law, for example, by requiring that employers offer breaks for longer than one year after the birth of a child. See Colo. Rev. Stat. § 8-13.5-104(1) (2 years); Me. Rev. Stat. Ann., tit. 21 § 604 (3 years); Vt. Stat. Ann. Tit. 21, § 305(a) (3 years). In other cases, the state law expressly requires that the break be a minimum of a certain number of minutes; for example, Or. Rev. Stat. § 653.077(c) (30-minute period during each four-hour work period).

      However, to clarify the interaction of federal and state law, we respectfully request that the DOL make clear that federal and state requirements run concurrently to the extent both apply. In making this request, SHRM recognizes that, if an employee needs more breaks than is required by the applicable state law, then the employer is required to provide additional breaks under federal law. SHRM also recognizes that, if the state law does not include some of the requirements as set forth in the federal law, the employer must comply with the additional requirements under the federal law when complying with the state law.

   b. **Wage and Hour Laws**

      The federal law makes clear that the breast milk expression breaks may be without pay. However, this general statement is subject to the caveat that “[n]othing in [the federal law] shall preempt a State law that provides greater protections.” If a state specifically were to require that breaks to express breast milk be paid, then obviously an employer would have to pay for such
breaks. But what if the state does not have a law on breaks to express breast milk? What if the state does not mandate any breaks whatsoever?

By way of example only, Pennsylvania does not have a law that requires that employers provide breaks to express breast milk. Further, Pennsylvania’s statutes and regulations do not require any breaks for non-minors. The question then becomes whether and when a break which an employer voluntarily offers must be paid.

The Pennsylvania DOL includes the following on its website:

Employers are not required to give breaks for employees 18 and over. If your employer allows breaks, and they last less than 20 minutes, you must be paid for the break. If your employer allows meal periods, the employer is not required to pay you for your meal period if you do not work during your meal period and it lasts more than 20 minutes. A collective bargaining agreement may also govern this issue.

http://www.portal.state.pa.us/portal/server.pt?open=514&objID=563209&mode=2

It is possible that the above language could be interpreted to require that the employer pay for federal breast milk expression breaks which are 20 minutes or less, but not for such breaks which are 22 minutes? This could have the perverse result of encouraging employees to rush to get paid. This could lead to health problems for the employee or the child if the employee does not take the time to wash her hands, clean the pump attachments, etc.

We respectfully request that the DOL make clear that an employer must pay for breaks to express breast milk under federal law only if there is a specific state law addressing the expression of breast milk that mandates that such breaks be paid (in whole or in part). Conversely, SHRM respectfully requests that the DOL clarify that an employer does not have to pay for breaks to express breast milk unless there is a specific state law that provides that employees must be paid for breast milk expression breaks.

3. **Number of Breaks**

The DOL states that nursing mothers will need breaks to express breast milk typically two to three times during an 8-hour shift. While SHRM believes that most employees will seek only the breaks that they need, it is possible that some employees will try to take advantage of the law to take extra breaks.

Of course, employers cannot determine whether employees are really expressing breast milk because to do so would be inconsistent with the employees’ privacy rights under the federal law (among other laws). SHRM respectfully requests that the DOL make clear that an employer has a right to request certification from a doctor for the need for more than 3 breaks per 8 hour shift (adjusted proportionately for shorter or longer shifts).

Moreover, to the extent that an employer learns (in an manner consistent with the employees’ privacy rights) that employees are not actually taking breaks to express breast milk (and therefore have misrepresented themselves to the employer), SHRM respectfully requests
that the DOL make clear that employers have a right to take disciplinary action against employees in accordance with their generally applicable practices related to employee misrepresentations.

4. **Length of Breaks**

   SHRM recognizes that the length of time needed to express breast milk can vary significantly from woman to woman. While the DOL states that the act of expressing breast milk alone typically takes about 15 to 20 minutes, there are many other factors that will determine a reasonable break time, such as the location of the breast milk expression area, whether the employee will need to set up her own pump, etc.

   Again, SHRM believes that most employees will seek only to take as much time as they need. However, it is possible that some employees will try to take advantage of the law by extending breaks beyond the time necessary.

   SHRM respectfully requests that the DOL make clear that an employer has a right to request from a doctor the need for breaks that extend beyond 40 minutes (twice the typical time period identified by the DOL), where the employer, looking at all relevant factors as identified by the DOL in the Federal Register, has reason to question whether the employee may be taking more time than is necessary.

   For example, what if an employee claims that it takes 60 minutes for her to express breast milk on each occasion? This may be true but an employer should have the right to seek some confirmation from the employee’s doctor.

   Moreover, to the extent that an employer learns (in an manner consistent with the employees’ privacy rights) that employees are not actually taking the full length of their breaks to express breast milk (and the related activities of walking to and from the breast milk expression area, rinsing pump parts in the sink, etc.), SHRM respectfully requests that the DOL make clear that employers have a right to take disciplinary action against employees in accordance with their generally applicable practices related to employee misrepresentations.

5. **Private Space**

   The DOL interprets the requirement that an employer provide space that is “shielded from view and free from intrusion” to require that a room be made available only where “practicable.” SHRM respectfully requests that the DOL clarify that an employer is not required to take a room that is being used for another legitimate purpose and convert that room solely to a breast milk expression room.

   Of course, SHRM recognizes that a room that is used for one purpose (e.g., storage) may be a viable option as a secure place for an employee to express breast milk. But employers should not be required to remove the content of any room so long as the room meets the minimum requirements as set forth by the DOL: “at a minimum, a space must contain a place for the nursing mother to sit, and a flat surface, other than the floor, on which to place the pump.”
6. **Other Features of the Space**

   The DOL provides that “[i]deally, the space will have access to electricity, so that a nursing mother can plug in an electric pump rather than use a pump with battery power.” SHRM respectfully requests that the DOL clarify that, while provision of electricity, as well as the “range of additional features that some employers have included . . . such as sinks within or nearby the room for washing hands and cleaning pump attachments,” is preferred, that such additional features are not required.

7. **Policy/Posting**

   The DOL states that “[e]mployers are encouraged to discuss with nursing employees the location and availability of space for expressing milk as that will affect the time required for the breaks.” While SHRM believes it would be a best practice for employers to have a policy addressing breast milk expression breaks, SHRM requests that the DOL clarify whether a policy is required.

   In this regard, to the extent the DOL requires a posting or electronic notification, SHRM respectfully suggests that the content of the posting reflect the collaborative approach between employees and employers encouraged by the DOL’s comments in the Federal Register. For example: “You may be eligible for unpaid breaks to express breast milk….Please contact your human resources department or the manager of your location if you wish to express breast milk while at work so that your employer can work with you to provide you with the appropriate time and location to do so.” In the alternative, DOL should explore whether employers could include information on reasonable break time to express breast milk in the Family and Medical Leave Act notice that is required for any employee using this benefit for child birth.

8. **Signage**

   The federal law provides that the space provided for expressing breast milk must be shielded from view to ensure the employee’s privacy. The DOL provides two examples of ways employers must ensure the employee’s privacy: a lock on the door of the room being used to express breast milk or a sign that designates when the space is in use for expression of breast milk.

   Some employees will use their own office to express breast milk. SHRM respectfully requests that the DOL confirm that, if the employer provides an employee with a sign, the burden is on the employee to post the sign whenever she is using her office or other multi-use space that is identified for use to express breast milk.

   There is also a question as to what the sign should say. If the sign says “private breast milk expressions—do not enter,” the message is clear but an employee later may claim that her private information was publicly disclosed. If the signs says only “private—do not enter,” a 3rd party may disregard and enter, not realizing how private the act is.

   Clearly, employers currently have rooms, such as nap rooms or similar rooms, which include signs indicating they are in use. Given the unique privacy concerns raised by this rule, however, SHRM requests guidance from the DOL on the content of the sign.
9. **Anteroom or Lounge Connected to a Bathroom**

The DOL has requested comments on when an anteroom or lounge area connected to a bathroom may be sufficient to meet the requirements of the law. SHRM agrees with the DOL that “if there is a wall with a door separating the lounge area from the bathroom, and if there is a space for nursing mothers within the lounge that is ‘ shielded from view’ and ‘free from intrusion,’” this would meet the requirements of the Act.

SHRM believes that, to meet the requirements of the federal law, a door would not always be necessary. A curtain or other divider may be adequate and SHRM respectfully suggests that the DOL make that explicit.

10. **Locker Room**

The DOL has requested comments on whether and under what circumstances locker rooms could be compliant. The DOL notes that “[t]here is concern that locker rooms may not be appropriate because such wet environments are at risk of being contaminated with pathogenic bacteria that have been linked to outbreaks of methicillin-resistant *Staphylococcus aureus* (MRSA).” SHRM respectfully recommends that the DOL seek information from medical experts on MRSA for guidance on this precise issue. When medical issues are involved, SHRM encourages its members to seek advice from medical experts and SHRM recommends the same to the DOL.

11. **Non-Traditional Office Settings Including Retail Stores, Restaurants and other Establishments**

The DOL recognizes that “there are many work settings that are not in office buildings, and that this can pose unique challenges to providing an adequate space for nursing mothers to express milk.” The DOL cites as examples some retail stores, restaurants and other establishments, where it recognizes it may not be possible to provide a secure location other than a bathroom because there is no secure area other than a bathroom. This would not be the case, for example, if there were a private office, such as the manager’s office, that could temporarily be used to express breast milk.

Where there is no private office, storage closet or other enclosed area, SHRM respectfully recommends that multiple employers be allowed to create a cooperative arrangement whereby they have one secure place that they share among them and that this place could rotate on a monthly or some other basis. This secure place could be a bathroom so long as the ability of an employee in that facility to use the toilet is dismantled or otherwise unusable. Employees in the store with the bathroom converted into a breast milk expression area would use bathrooms in the other stores as part of the multi-employer team.

In order for the bathroom to be considered dismantled or otherwise unusable, it would not be enough for the water to be shut off. Someone could still use it. Either a box would need to be put over the toilet or the toilet lid secured in the closed position so that no one could use the toilet. The existence of a toilet alone should not make a room a bathroom if the toilet is not usable.
12. **Construction and Other Outdoor Locations**

The DOL recognizes that in construction and on other outdoor sites that it may be difficult to provide a secure place at the location to express breast milk. In these circumstances, SHRM respectfully suggests that the employer will satisfy its requirement if it converts one of its portable bathrooms into a breast milk expression area for the entire period in which an employee is expressing breast milk (up to one year under federal law). To meet the purposes of the federal law, the employer would need to dismantle the toilet as set forth in section 11 above.

13. **Bus Drivers and Others Who Operate Vehicles**

The DOL has requested comment on employees who are not in a fixed place, such as bus drivers. The same concern applies to employees who operate their own motor vehicle during the work day as part of their job.

SHRM respectfully requests that, for these employees, in some cases, the only option may be to express breast milk in their vehicle or a public bathroom. An employer should be deemed to have satisfied its obligations in these circumstances if it provides the employee with a screen or tent to use in a public area. If the employee drives a company vehicle, the employer also can and should provide screens for the vehicle’s windows.

14. **Client Sites**

The DOL has requested comment on how employers can meet its obligation to ensure that employees who work at client or other sites are provided space to express breast milk.

Of course, the employee’s employer should communicate with the client and request that the client provide a room that meets the obligations of the law. If the client does not have a room, the employer should be deemed to have met its obligations in these circumstances if it provides the employee with a tent or screen to create a private place in an otherwise public area at the client’s site.

If the client fails to allow the employee to use a room where practicable or to use a tent or screen in a public area where a private room is not practicable, then the employee should have a claim against the client but not against her employer. If the DOL makes this clear, clients of employers will be more likely to comply with requests of employers.

15. **Dialogue between Employers and Employees**

The DOL notes that an employer may ask an expectant mother if she intends to take breaks to express breast milk while at work. SHRM suggests that this is neither necessary nor desirable. Indeed, asking this question may be seen as an invasion of privacy under state law. Further, if adverse action is later taken against the employee, the employee may claim it was because the employer did not want to provide the employee with the breast milk expression breaks required by federal law. In other words, the employer’s attempt to figure out how to accommodate the employee under the new law could be used by employees as evidence that the employer was interfering with the employee’s rights under the law.
SHRM respectfully requests that the DOL retract this provision, discourage employers from asking the question, and place the burden for asking for breast milk expression breaks entirely on employees. This approach is consistent with the Americans with Disabilities Act accommodation process that is successfully used in the workplace today.

16. **Notice**

   The DOL has requested comment on the timing and type of notice that an employee should provide an employer regarding her intent to express breast milk in the workplace. SHRM suggests that the DOL clarify that the employee should provide the employer with notice as early as is reasonably practicable, but in any event, not less than ten (10) business days in advance of a desire to take breast milk expression breaks. This will provide employers with a minimum amount of time to make any modifications required of a space so that it complies with the law.

   SHRM proposes that the DOL cite as guidance for this process the reasonable accommodation process under the Americans with Disabilities Act (ADA). While an employee would not be required to provide notice in writing of a request to express break milk, such a written request would be helpful to put employers on notice. SHRM proposes that, as with the ADA where the specific accommodation requested need not be provided, only a reasonable accommodation, that the employer is not required to provide the specific area requested by the employee to express breast milk. Rather, SHRM respectfully requests that the DOL clarify that an employer is required to provide only “a place” that complies with the law. For example, an employer would not be required to honor an employee’s request to express breast milk in her manager’s office where another alternative location is available.

   SHRM proposes that the request can be made to either the employee’s supervisor or to a representative of Human Resources (to the extent an organization has a Human Resources department).

   As set forth in section 15 above, SHRM respectfully requests that the DOL clarify that the burden to provide notice of an intent to express breast milk triggering an employer’s obligation to comply with the law rests solely on the employee.

17. **Breast Feeding**

   The federal law provides only that employers must provide breaks to express breast milk, not to breast feed a child on site. Yet, some employees may believe that the right to express breast milk includes the right to breast feed a baby at the work site.

   To avoid any confusion, SHRM respectfully requests that the DOL make clear that employers are not required to permit employees to breast feed (as opposed to express breast milk) on site.

18. **Permanency**

   The DOL makes clear that an employer “is not obligated to maintain a permanent, dedicated space for nursing mothers.” SHRM respectfully requests that the DOL also make
explicit what already is implicit in other comments that the space an employee uses may differ from day to day or break to break depending on what space is available.

Ideally, an employee will use the same space. However, there are operational reasons why this may not be possible, for example, if the employee is given a conference room to use. It also may not be practical if there are limited spaces and there are multiple employees using the different spaces to express breast milk.

19. **Voluntary Use of Bathrooms**

The DOL comments make clear that the secure area does not need to have a sink. In discussing sinks within or nearby the room (as well as refrigerators within or nearby the room), the DOL states “While such additional features are not required, the Department notes that their provision may decrease the amount of break time needed.”

In some workplaces, it may not be possible to designate a breast milk expression room in close proximity to a sink. SHRM’s member survey showed that some employees prefer, in these circumstances, to use a bathroom for purposes of expressing milk because of its proximity to a sink.

SHRM believe the guidance should allow for an employer to honor an employee’s wishes to use a bathroom as opposed to another secure area so long as another option is truly available and the election to use the bathroom is truly voluntary. While as a best practice the employer should confirm this in writing to avoid any claims later, SHRM respectfully suggests that a written document as a mandate is inconsistent with the type of dialogue that the DOL’s comments appear to contemplate. DOL should address this issue in its guidance.

20. **Surveillance**

Some employers have video surveillance throughout their workplaces. SHRM respectfully requests that the DOL remind employers that the surveillance must be turned off in the secure area that is used to express breast milk. Otherwise, an employer may miss the issue and unwittingly invade their employees’ privacy. To protect employee privacy, SHRM requests that the DOL remind employers of this issue.

21. **Landlords**

If an employer does not have a secure area that can serve as the area for expressing breast milk, the employer may ask the landlord if it has other facilities available that the employer’s employees may use. The landlord may be concerned about saying “yes” for fear of joint employer liability.

To encourage landlords to cooperate with employers, SHRM suggests that the DOL make clear that it will not consider the landlord a joint employer simply because it helps an employer meet its obligations by providing to the employer space for its employees to express breast milk (for example, an empty office in the building).
22. **Employer Provision of Breast Milk Expression Devices**

The federal law is clear that the employer’s only obligation is to provide an appropriate place for an employee to express breast milk. The employer does not have to provide any devices for the employee to use. However, to avoid any confusion, SHRM respectfully requests that the DOL make explicit that the burden to purchase breast milk expression devices rests solely with the employee.

23. **Undue Hardship**

The federal law is clear that the undue hardship defense applies only to employers who have fewer than 50 employees in total. The defense is not available simply because an employer has fewer than 50 employees at a particular worksite.

However, the number of employees at a worksite may be one factor that determines what is practicable for the employer to do. SHRM requests that the DOL provide guidance on this issue.

In conclusion, SHRM’s experience has been that its HR members and their employees have been successfully addressing this issue in the workplace. We appreciate the agency’s efforts to seek input to make sure employers can continue these successful practices and to help others with practical guidance for the workplace. If you have any questions about SHRM’s submission or the suggestions we have made, please contact Nancy Hammer at **nancy.hammer@shrm.org**.

Thank you for the opportunity to address this important issue.

Respectfully submitted,

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Society for Human Resource Management