



Labor and Employment Law Information Memo

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COMMISSIONER OF LABOR ISSUES GUIDELINES INTERPRETING “BLOOD DONATION LEAVE” AND “RIGHTS OF NURSING MOTHERS” LEGISLATION

The New York Commissioner of Labor has recently issued guidelines for the implementation of two new provisions of the New York Labor Law. These guidelines deal with: (1) the provision of blood donation leave to employees; and (2) the right of nursing mothers to express breast milk at their place of employment. The guidelines address many of the concerns facing employers under these new laws, and provide several benchmarks for compliance.

Blood Donation Leave

Section 202-j of the Labor Law mandates that employers provide leave time to employees for the purpose of donating blood. Private and public sector employers that employ 20 or more employees are covered by Section 202-j. Under Section 202-j, a covered employer must, at its option, either:

- (a) grant at least one leave of absence (up to 3 hours) in any calendar year to an employee who seeks to donate blood; or
- (b) allow its employees without use of accumulated leave time to donate blood during work hours at least two times per year at a convenient time and place set by the employer, including allowing an employee to participate in a blood drive at the employee's place of employment.

According to the Commissioner's Guidelines, leave granted to employees for off-premises blood donation is not required to be paid leave. Leave taken by employees at a company-designated donation alternative (such as an employer-sponsored blood drive at the workplace) must be paid leave that is provided without requiring the employee to use accumulated vacation, personal, sick, or other leave time.

Employers must notify employees of their right to take blood donation leave by July 7, 2008 and by January 15th each year thereafter. Such notification must be made in a manner that will ensure employees are aware of their right, such as by posting the notice in a prominent location where employees congregate, inclusion of the notice with employees' paychecks, mailings, notices in employee handbooks, or other comparable method.

Employers must also provide employees with notice of any blood donation leave alternative, which notice must be prominently posted in the workplace at least two weeks in advance. To count towards the two blood donation leave alternatives in a calendar year, notice of the final leave alternative must be provided prior to December 1 of that year. Under the regulations, no blood leave alternative may be scheduled during a time when a significant number of employees are out of the office, such as during the last week of December or around other significant holidays. To meet the requirements of Section 202-j, the blood donation leave alternatives must be scheduled at least 60 days apart.

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Further, employers may require that employees give “reasonable notice” of their intent to take leave to give blood. If leave is for off-premises blood donation, at least three (3) working days notice is required. If, however, the employee is in a position that is essential to the employer’s operations, and three (3) days notice is an insufficient amount of time for the employer to fill the employee’s position, the employer can require more than three (3) days prior notice. Such advance notice for employees occupying “essential positions” is limited to no longer than is necessary to feasibly fill the position and cannot exceed ten (10) working days.

An employer also may require employees who take leave for off-premises blood donations to show proof of their donation activity in the form of a notice of blood donation or a good faith effort at blood donation from the blood bank, or other comparable proof.

Employers with a unionized workforce may negotiate the terms and conditions of employee blood donation leave as a matter of collective bargaining, as long as any collectively-bargained agreement does not diminish the minimum requirements set forth in Section 202-j.

Right of Nursing Mothers to Express Breast Milk

Section 206-c of the New York State Labor Law provides:

An employer shall provide reasonable unpaid break time or permit an employee to use paid break time or meal time each day to allow an employee to express breast milk for her nursing child for up to three years following child birth. The employer shall make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express milk in privacy. No employer shall discriminate in any way against an employee who chooses to express breast milk in the workplace.

This law is applicable to all public and private employers in New York State, regardless of the size or nature of their business. Employers are required to provide written notification of the provisions of Labor Law Section 206-c to employees who are returning to work after the birth of a child. An employee wishing to avail herself of this benefit is required to give her employer advance notice, preferably prior to the employee’s return to work following the birth of her child, to allow the employer an opportunity to establish a location and to schedule leave time among multiple employees, if needed.

The Commissioner announced that “reasonable unpaid break time” is “sufficient time to allow the employee to express breast milk,” and shall generally be no less than twenty (20) minutes, and generally no more than thirty (30) minutes depending on the proximity of the designated location for expressing breast milk. In most situations, employers are required to provide unpaid break time for the expressing of breast milk at least once every three (3) hours if requested by the employee. At the

employee’s option, the employer must allow her to work before or after her normal shift (during the employer’s normal work hours) to make up for the unpaid break time.

Employers are required to make reasonable efforts to provide a private room or location for the purpose of expressing breast milk. The designated room or location must be within walking distance of the employee’s work space, and cannot be a restroom or toilet stall. The room must at least contain a chair and a desk, table or other flat surface. Access to clean water and refrigeration are encouraged but not required. According to the Commissioner’s Guidelines, “reasonable efforts” require that a room or other location must be provided for the use of employees expressing breast milk, unless it is significantly impracticable, inconvenient, or expensive for the employer to do so. Relevant factors that will be used in determining whether it is “significantly impracticable, inconvenient, or expensive” for the employer include (but are not limited to): the nature of the work; the size and physical layout of the business; the type of facility where the business is housed; the size of the workforce; the general hours of operation; and the relative cost of providing such a room or other location. Employers located in shared work areas (*i.e.*, office buildings, malls, etc.) may cooperate with each other and establish a centrally-located designated lactation room for all employees.

While the Commissioner’s Guidelines address many of the issues raised by these two new Labor Law provisions, the law with respect to both blood donation leave and the rights of nursing mothers is in a formative, dynamic state. As a result, employers will have to make critical judgments, and should proceed cautiously when dealing with employees’ requests under either of these new provisions, and, if in doubt, seek further legal guidance.

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