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SAN FRANCISCO'S NEW LACTATION ACCOMMODATION ORDINANCE ARRIVES JANUARY 1, 2018

On January 1, 2018, San Francisco's "Lactation in the Workplace" Ordinance will increase protections for nursing mothers in San Francisco. The law is the latest in a series of parent-friendly legislation rolled out by the City over the past few years.

The California Labor Code already requires employers to provide a reasonable amount of break time to an employee desiring to express milk for the employee's infant child and to make reasonable efforts to provide the employee with a private room, other than a toilet stall, in close proximity to the employee's work area. Similarly, the federal Fair Labor Standards Act (50 or more employees) requires employers to provide reasonable break time for an employee to express breast milk for one year following the birth of a child, as well as a private location, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public.

San Francisco's new Ordinance expands lactation accommodation obligations for San Francisco employers and contains detailed policy and record-keeping requirements. Here's an overview of what employers need to know.

Lactation Locations

The Ordinance requires employers to provide a lactation location, other than a bathroom, in close proximity to the employee's work area. The location can even be the employee's regular work area so long as it meets requirements of the Ordinance. The lactation location must be shielded from view and free from intrusion by others. The area must be safe, clean, and free of toxic and hazardous materials. It must have a place to sit, a surface on which to place a breast pump and other personal items, and access to electricity. Also, the employer must provide, in close proximity to the employee's work area, access to a refrigerator and sink.

If an area designated as a lactation location is also used for other purposes, employees must be notified that lactation use takes priority over any other uses for the location. Also, in multi-tenant buildings, an employer that does not have a suitable lactation location within its own workspace can satisfy the Ordinance

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requirements by sharing a location with other employers in that building.

Lactation Accommodation Policy and Process

The Ordinance requires that every employer maintain a written lactation accommodation policy. The policy must be distributed to all new hires and to any employee who asks about or requests pregnancy or parental leave, and it must be included in the employee handbook or written policies.

The policy must include the following:

- A statement of the employee's right to request a lactation accommodation (breaks and lactation location).
- A process for requesting an accommodation, including:
 1. the means by which employees may submit requests;
 2. a statement that the employer will respond to a request within five business days; and
 3. a statement that the employer and employee will engage in an interactive process to determine the appropriate accommodations.
- A statement that if the employer does not provide the requested breaks or lactation location, the employer will provide the employee with a written response identifying the basis for the denial.
- A statement that retaliation in response to a request is prohibited.

Recordkeeping Obligations

Employers must maintain a record of employee requests for lactation accommodations for three years. The record must include the employee's name, the date of the request, and a description of how the employer addressed the request, including written accommodation denials.

Undue Hardship Exemption

An employer may be exempt from the Ordinance if its requirements would impose an undue hardship, meaning that the accommodation would significantly impact the employer's business or bottom line, as opposed to mere inconvenience to the employer. By way of example, the Ordinance suggests that it would be an undue hardship for a restaurant employer to grant a lactation accommodation if it would



require the restaurant to remove seating or would require construction to comply.

Enforcement

The City's Office of Labor Standards Enforcement ("OLSE") will be responsible for enforcing the Ordinance. For the first year the Ordinance is in effect, the OLSE will only issue warnings and Notices to Correct. As of January 1, 2019, however, the OLSE may impose administrative penalties of up to \$500 per violation, and employers who fail to promptly comply with a Notice to Correct may be liable for up to \$50 per day and \$50 per employee affected by such a violation. The Ordinance does not expressly provide employees with a private right to sue for violations (employees may nevertheless file a complaint with the OLSE), and it is unclear whether courts will permit such a private right of action.

Getting Ready

Employers with San Francisco-based employees should prepare to be in compliance with the new Ordinance by the end of 2017. Here are some recommended steps to get ready:

- Identify designated lactation areas.
- Implement, or update, a written lactation accommodation policy. Include it in employee handbooks and distribute it to new hires and to employees who request or inquire about pregnancy or parental leave.
- Train managers and Human Resources staff on the new requirements.
- Implement an internal process to maintain records of employee requests for lactation accommodations.
- Seek advice from counsel before determining that compliance would be an undue hardship.

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