

## PERSONNEL SERVICES BULLETINS (PSBs)

**440-13**

**Subject:** Leave to Express Breast Milk

**Supersedes:** Personnel Services Bulletin dated December 2, 2009

**Source:** New York State Labor Law, Section 206-c; New York City Human Rights Law, Section 8-107(22)

**Date:** Updated September 24, 2019

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### I. BACKGROUND

New York State Labor Law, Section 206-c and New York City Human Rights Law, § 8-107(22) require employers to accommodate an employee needing to express breast milk in the workplace through the use of reasonable unpaid break time or meal time and the provision of a lactation room.

This Personnel Services Bulletin provides guidance on the application of these provisions of the law.

### II. DEFINITIONS

Lactation room. The term "lactation room" means a sanitary place, other than a restroom, that can be used to express breast milk shielded from view and free from intrusion and that includes at minimum an electrical outlet, a chair, a surface on which to place a breast pump and other personal items, and nearby access to running water.

Cooperative dialogue. The term "cooperative dialogue" means the process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity.

### III. POLICY

#### A. Time to Express Breast Milk

Agencies are required to allow a nursing employee who wishes to express breast milk to use:

1. The Meal period; and/or
2. Reasonable unpaid break time; and /or

3. Charge their annual leave and compensatory time balances during the unpaid breaks.

## **B. Using Existing Meal Periods**

Agencies are required to permit nursing employees to express breast milk during their meal period(s) if the employee elects to utilize meal periods for this purpose. Employees may elect to express breast milk at other reasonable times during the work shift. However, Agencies cannot require an employee to use meal periods for this purpose or to use annual leave and compensatory time balances.

## **C. Using Unpaid Break Time**

Employees may elect to use the unpaid break time instead of, or in combination with, meal periods. Employees must be permitted to charge their annual leave and compensatory time balances during the unpaid breaks.

The laws do not authorize the granting of additional paid break time beyond that which the employer may already have in place if any. Accordingly, if an agency does not provide paid breaks now, there is no obligation to create paid breaks solely to permit an employee to express breast milk.

The statutory benefit is available to employees within their basic workweeks as well as during any additional time worked, including overtime shifts.

## **D. Eligibility to Earn Leave Accruals**

It is critical that agencies advise employees who use unpaid break time and do not charge their leave balances during such unpaid break time, that this may affect their ability to earn monthly annual and sick leave accruals. Agencies must ensure that employees understand the impact on eligibility to earn leave accruals if they elect to utilize unpaid break time and not charge their leave balances.

## **E. Location to Express Breast Milk**

In accordance with Section 206-c and Section 8-107(22), agencies must provide the following to accommodate an employee needing to express breast milk: (1) a lactation room in reasonable proximity to such employee's work area; and (2) a refrigerator suitable for breast milk storage in reasonable proximity to such employee's work area, unless doing so would impose an undue hardship on the agency.

If there is no dedicated lactation room, possible alternative locations might include an office or conference room where steps can be taken to ensure that the employee can express breast milk in privacy, free from intrusion. In many work locations, space is at a premium and is utilized for multiple purposes. In such cases scheduling a nursing employee's access to a particular location may be necessary in order to comply with both the legislation and the agency's space needs.

If a room designated by an employer to serve as a lactation room is also used for another purpose, the sole function of the room shall be as a lactation room while an employee is using the room to express breast milk. When an employee is using the room to express milk, the employer shall provide notice to other employees that the room is given preference for use as a lactation room.

When more than one employee needs to use the designated lactation room, the employer should discuss various options with all parties to determine appropriate accommodations that meet all employees' needs. The employer should use signage and/or a scheduling system so that the room can accommodate employees at different times of the day.

If the provision of a lactation room in accordance with these requirements should pose an undue hardship on the agency, the agency must engage in a "cooperative dialogue" with the employee.

An agency cannot require an employee to use a lactation room to express breast milk. An employee who wishes to express breast milk at their usual workspace shall be permitted to do this so long as it does not create an undue hardship for the employer.

#### **IV. PROCEDURE**

**A.** Employees who seek this accommodation should request it in advance of the need. Optimally, the employee will notify the agency before returning to work from childcare leave. If this is not possible, employees should notify their agencies of their intent to express breast milk as soon as practicable, but no later than five days before they plan to begin. An agency must respond promptly to a request. This request should be reviewed as an accommodation request and both the agency EEO and Personnel Offices should collaborate in providing any necessary information that can facilitate the review and implementation process.

**B.** In the case of an employee who is returning from childcare leave, agencies should already have sufficient documentation in connection with the employee's request for childcare leave to establish eligibility for this benefit. In the case of a new employee, appropriate documentation must be provided.

**C.** If the request for an accommodation poses an undue hardship for the agency, the employee and agency must engage in a cooperative dialogue to identify an accommodation that meets the employee's needs and does not impose an undue hardship on the agency. At the conclusion of the cooperative dialogue, the agency must record the result in writing.

**D.** Employees are not entitled to absent themselves from their work areas for this purpose without prior approval. Prior approval should normally be obtained at the time the initial arrangements are made and a schedule is agreed upon. When an employee needs to change a previously agreed upon schedule, the employee must obtain approval to do so.

**E.** When making a request to utilize this benefit, employees must specify whether they plan to use unpaid break time; or meal time; or a combination. Unpaid break time used to express breast milk is to be charged against annual leave or compensatory time balances. Employees with no accrued annual leave or compensatory time balances may be advanced annual leave to be charged against future annual leave accruals.

**F.** In work settings where coverage is an issue, agencies are obligated to schedule adequate support staff to ensure that the operations of agencies and services to the public are not adversely affected. Immediate supervisors must cooperate in arranging for coverage. Employees are expected to verify that the coverage is in place prior to leaving their work areas to express breast milk.

**G.** Agencies should make every effort to accommodate an employee's schedule when doing so does not pose an undue hardship. (See C. above if an undue hardship arises.) If an undue hardship arises, as part of the cooperative dialogue, the employees may be asked to consider adjusting a scheduled time to express breast milk for a brief period of time if they cannot be spared.

**H.** Time required to express breast milk includes the time required for the nursing employee to reach and return from the location identified by the agency for expressing breast milk.

**I.** The amount of time needed to express breast milk may vary and there is no set limit on the number of breaks provided per day. They must, however, be reasonable and approved by the employer.

**J.** This benefit is available to employees within the basic workweek as well as during any additional time worked, including overtime shifts.

**K.** Agencies cannot use the difficulty in arranging time or location as a means of denying employees access to this statutory benefit.

**L.** Agencies should notify affected employees currently on childcare leave and affected employees who have recently returned to work after childcare leave that they are entitled to this benefit.

## **V. AGENCY LACTATION POLICY**

An agency must implement a written policy regarding the provision of a lactation room, which shall be distributed to all employees upon hiring. The agency's policies must: (1) explain how an employee can submit a request for a lactation room; (2) state that the employer will respond to requests as quickly as possible, and no later than within five (5) business days; (3) explain what to do when two or more employees need to use the lactation room at the same time; (4) state that the employer will provide reasonable break time for an employee to express breast milk; and (5) explain that if providing all aspects of the lactation room normally required by law would create an undue hardship for the employer, the employer will have a cooperative dialogue with the employee to figure out the

best possible accommodation to enable the employee to express breast milk at work.

## **VI. PROHIBITION OF DISCRIMINATION**

An agency must not discriminate in any way against an employee who chooses to express breast milk in the workplace.

Lisette Camilo  
Commissioner

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