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## BREAK TIME for *Nursing* MOTHERS

**On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (PPACA) into law.** The Break Time for Nursing Mothers provision went into effect immediately.

In general, Break Time for Nursing Mothers requires an employer to provide reasonable break time for an employee to express breast milk for her nursing child. This break time is available to a nursing mother for one year after the child's birth and each time the employee has the need to express milk.

Employers are also required to provide a place (other than a bathroom) that is shielded from view and free from intrusion for the employee to express breast milk.

### WHICH EMPLOYERS ARE COVERED?

Employers with 50 or more employees are always covered, no exceptions.

Employers with fewer than 50 employees are also covered unless complying would impose an "undue hardship."

In determining if there are 50 or more employees, the Department of Labor (DOL) will look at the employer's entire workforce. Unlike the Family and Medical Leave Act (FMLA), which defines the employee threshold for coverage within a certain "worksite," the DOL will include all employees regardless of location. This means that an employer with a small number of employees in multiple locations could be covered.

The DOL will not grant undue hardship exemptions unless an employer can prove that granting the breaks would create an undue hardship. Furthermore, the DOL believes undue hardship is a very stringent standard and that few employers will be exempt from providing breaks for nursing mothers.

### WHAT IS A REASONABLE BREAK TIME?

The specific requirement applies only to non-exempt employees. While employers are not required to provide pay for this break time, an employee who uses an otherwise allowed break time for this purpose must be compensated

in the same way that other employees are compensated for their break time. For example, if a nursing mother uses her regular break of 20 minutes to express milk, she must be paid – just as non-nursing mothers are paid. If she requires additional time, that additional time may be unpaid.

### WHAT SPACE MUST BE PROVIDED?

While the statute indicates only that the employer must provide a place other than a bathroom that is shielded from view and free from intrusion in order to express breast milk, the request for information issued by the DOL envisions much broader requirements. The DOL has indicated – at a minimum – a space must contain a place to sit and a flat surface, other than the floor, on which to place the pump. Ideally, the space should have electricity, a sink with running water nearby, and a refrigerator or someplace appropriate for storing expressed milk. The employer must also provide a space for storing the pump used by the mother.

### WHAT ARE THE PENALTIES FOR NONCOMPLIANCE?

- Injunction
- Reinstatement
- Lost Wages

There are no new or additional penalties imposed under the Nursing Mothers Break Statute. The penalties are those available under The Fair Labor Standards Act. However, the DOL may seek injunctive relief and may obtain reinstatement and lost wages for an employee. Furthermore, if an employer treats employees who take breaks to express breast milk differently than employees who take breaks for other personal reasons, the nursing employee may have a claim for disparate treatment under Title VII of the Civil Rights Act.

If you haven't instituted a break policy or are uncertain if you are in compliance, please give us a call.



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# Michigan Medical Marijuana Act

## DOESN'T APPLY to Private Employers

Michigan voters passed the Michigan Medical Marijuana Act (MMMA) in 2008, making medical marijuana legal for registered patients. **Since the law was passed, many employers have sought guidance as to how the MMMA would affect an employer's drug use policies and employment decisions.**

The U.S. District Court, Western District of Michigan recently issued a much anticipated opinion and order dismissing a Wal-Mart employee's wrongful discharge suit filed pursuant to the MMMA.

The Court determined that while the MMMA was meant to provide some limited protection for medical marijuana users from state actions, primarily arrest and prosecution, it does not regulate private employers or employment decisions.

### THE FACTS

Wal-Mart fired Mr. Casias, an at-will employee, under its drug use policy when he tested positive for marijuana after he was injured at work. During the drug testing process, he admitted using marijuana for medical purposes after he qualified for and received a registry card under the MMMA. Mr. Casias used medical marijuana after work, not during work hours.

After his termination for violating Wal-Mart's drug use policy, Mr. Casias filed a lawsuit contesting his termination.

### What the plaintiff charged

- MMMA provides an implied right of action
- Wal-Mart's actions violated the public policy of Michigan

### What the defense argued

- MMMA is preempted by federal law
- MMMA does not create a private right of action under these circumstances
- MMMA does not confer any employment protections on medical marijuana users

### What the Court said

- The Court determined that none of the MMMA's declarations indicated that it was meant to address employment decisions or discipline.
- The Court also decided that the MMMA does not indicate a general policy on behalf of Michigan to create a special class of civil protections for medical marijuana users.

### THE DECISION

The Court ruled that plaintiff could not establish that the MMMA contains either statutory right without a remedy or an implied private cause of action. The Court also determined that the impact of any private employment regulation in the MMMA would be broadly felt and would extend the statute's protections much further than the MMMA meant to do. The Court agreed with Wal-Mart that the MMMA does not bestow the employment protections which plaintiff sought but declined to reach the issue of the MMMA's preemption by federal statutes.

### GUIDANCE FOR EMPLOYERS

This decision, which is consistent with rulings in other states with similar medical marijuana laws, supports an employer's decision to refuse to accommodate an employee's use of medical marijuana and to continue to enforce the employer's policies prohibiting the use of marijuana, including medical marijuana.

Employers should recognize, however, that this decision provides limited precedential effect. Other courts in Michigan, including state courts, are not legally bound to follow this Federal Court Opinion. Moreover, the decision is likely to be appealed.

Employers should review their policies to ensure they are clear, up to date, and adequately state the employer's drug policy concerning medical marijuana.

If you would like more information on MMMA or other cases addressing employer's rights and obligations, give us a call.



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# Social Media + Protections

## Under the National Labor Relations Act

**The National Labor Relations Board (NLRB)** is the agency charged with the enforcement of federal law protecting employee rights to join unions and to engage in other concerted action for mutual aid and protection.

Recently the (NLRB) issued a complaint against an ambulance company after it discharged one of its employees for posting mocking and disparaging comments about her supervisor on her Facebook page.

### WHAT HAPPENED

The ambulance company had received complaints from hospital personnel and a patient regarding the employee's rude and unprofessional behavior. When the employee was instructed to prepare an incident report addressing the customer complaint, she requested the assistance of her Teamsters' representative. After her supervisor allegedly denied this request, the employee commented on Facebook "Love how the company allows a 17 to become a supervisor." "17" was the company's code for a psychiatric patient. The Facebook posting also referred to the supervisor as a "scumbag."

### THE NLRB COMPLAINT

The complaint alleged that the employee "engaged in concerted activities with other employees by criticizing Respondent's supervisor... on her Facebook page" and that her discharge was unlawful.

The NLRB also alleged that the company unlawfully denied the employee union representation during an investigatory interview and that the company was maintaining and enforcing an overly broad internet use policy.

The policy prohibited employees from making disparaging or discriminatory comments when discussing the company, supervision or coworkers, and from posting pictures of themselves on the internet "which depicts the Company in any way."

The NLRB maintained that the policy unlawfully interfered with and restrained employees in the exercise of rights guaranteed by the National Labor Relations Act.

The case was reported to be the first instance where the NLRB alleged that an employee's use of a social networking site to criticize management constituted protected concerted activity. The NLRB's General Counsel, however, characterized the complaint as a fairly straightforward case under the Act and that the employee's comments were protected regardless of whether they took place near the water cooler or on a social media site.

### THE SETTLEMENT

Shortly before the case went to hearing, the NLRB announced a settlement. Under the agreement, the employer committed to revising its union representation procedures and its internet policy to allow employees to discuss wages, hours, and working conditions with co-workers outside of the workplace. The discharged employee and the company entered into a private agreement to resolve the allegations surrounding her termination.

Even though the dispute settled before a formal decision, the case illustrates the current NLRB General Counsel's expansive view of Section 7 rights. The case also demonstrates that employer internet use policies will be scrutinized by NLRB Regional Offices to determine whether such policies are overly broad and chill employee rights.

In addition, policy statements which are very general, vague, or ambiguous can result in unfair labor practice litigation.

Give us a call if you need some help drafting and enforcing your internet and social media policies.



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# Local Government + School District

## FISCAL ACCOUNTABILITY ACT

**Governor Snyder recently signed into law a package of bills to address the operations of Michigan's local governments and school districts experiencing financial distress. The reforms are meant to identify and solve fiscal problems early if possible and also contain provisions for the appointment of emergency managers when necessary.**

### THE MAIN BILL: PUBLIC ACT 4 OF 2011

Act 4 replaces Public Act 72 of 1990, under which emergency financial managers can be appointed to oversee the financial operations of distressed municipalities and school districts.

The act retains many of the provisions of Public Act 72, while introducing consent agreements **prior to** reaching a financial emergency and providing significant new powers for the newly titled "Emergency Manager" once a financial emergency is declared.

Part of the legislation amends the governing public sector union relations law – the Public Employment Relations Act (PERA) – and enhances the authority of Emergency Managers to modify existing collective bargaining agreements.

### FOUR STAGES OF FINANCIAL DISTRESS

After review by an appointed team, a public entity would be determined to be in one of four stages of financial distress

- (1) Not in financial distress or in a condition of mild distress
- (2) In a condition of severe financial distress and a consent agreement containing a plan to resolve the problem has been adopted
- (3) In a condition of severe financial distress and a consent agreement has not been adopted
- (4) A financial emergency exists and no satisfactory plan exists to solve it

### CONSENT AGREEMENTS

Under the new law, when a municipality or school district is found to be in financial distress, it may enter into a consent agreement with the state that sets forth a plan to resolve the financial stress

**before** receivership is invoked and an Emergency Manager is appointed.

Unless the state treasurer decides otherwise, the municipality or school district board is exempt from collective bargaining requirements under PERA for the term of the consent agreement.

In cases where the entity is in deep financial distress that rises to the level of a financial emergency, it may be placed into receivership and an Emergency Manager appointed.

### EMERGENCY MANAGER COLLECTIVE BARGAINING POWERS

The Emergency Manager will have broad power to operate and restructure all aspects of the municipality or school district; including the power to modify, terminate, or negotiate existing collective bargaining agreements.

The municipality or school district is exempt from collective bargaining requirements under PERA for a period of five years or until the receivership has ended.

### CHANGES TO PERA

Another portion of the package includes specific amendments to section 15 of PERA. Every collective bargaining agreement entered into after March 17, 2011, must contain a provision which allows an Emergency Manager to reject, modify, or terminate the collective bargaining

agreement as provided by Act 4. Further, the amendment codifies the provision exempting a municipality or school district from its collective bargaining obligations while under a consent agreement or an Emergency Manager.

The utilization of Act 4 by local municipalities and school districts and its impact on public sector bargaining in Michigan will evolve in the coming months. Miller Canfield will remain on top of any legal developments as well as continue to track companion legislation introduced in Lansing that may also impact public sector labor relations.



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