

**CONFIDENTIAL MEMORANDUM**

**DATE:** November 8, 2018

**TO:** New York City Clients

**FROM:** Kane Kessler, P.C.  
Labor and Employment Law Department

**RE:** New York City Council Passes Lactation Accommodation Legislation

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On October 17, 2018, the New York City Council passed two pieces of legislation that will amend the New York City Human Rights Law (“NYCHRL”) by expanding upon the obligation of a New York City employer with four or more employees to accommodate breast feeding employees. Mayor de Blasio is expected to sign these bills into law, at which point the two bills will go into effect 120 days after the Mayor’s signature.

**Employers Must Provide Access To a Lactation Room And Refrigerator to Store Breast Milk**

The first bill requires covered employers to provide employees needing to express breast milk with access to a lactation room and a refrigerator suitable for breast milk storage. The term “lactation room” is defined as:

[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.

Both the lactation room and the refrigerator must be within a reasonable proximity to the breast feeding employee’s work area. “Reasonable proximity” is not defined in the legislation and it is unclear if the New York City Commission on Human Rights (the “Commission”), which is the governmental agency charged with enforcing these new rules, will implement clarifying regulations. Currently, New York State has a similar law in place, where employers are required to provide a private area to express breast milk within “close proximity” to the individual’s work area. The New York Department of Labor’s (“NYDOL”) definition of “close proximity” is

instructive in the absence of the City's own definition: "[T]he room or location must be in walking distance and the distance to the location should not appreciably lengthen the break time." The NYDOL's guidelines to accommodating employees who need to express breast milk at work can be found here:

<https://www.labor.ny.gov/workerprotection/laborstandards/pdfs/guidelinesexpressionofbreastmilkfinal.pdf> .

The legislation also provides that 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. If the provision of a lactation room poses an undue hardship on an employer, the employer must engage in a cooperative dialogue with the employee to determine what, if any, alternative accommodation is available, and must provide a written final determination to the employee at the conclusion of the cooperative dialogue process.

### **Employers Must Have A Lactation Room Policy**

The second bill requires covered employers to implement a written policy regarding the provision of a lactation room, and must distribute such policy to all employees upon hiring. The policy must include the following information:

- A statement that employees have a right to request a lactation room,
- A process by which employees may request a lactation room. This process shall:
  - Specify the means by which an employee may submit a request for a lactation room;
  - Require that the employer respond to a request for a lactation room within a reasonable amount of time not to exceed five (5) business days;
  - Provide a procedure to follow when two or more individuals need to use the lactation room at the same time, including contact information for any follow up required;
  - State that the employer shall provide reasonable break time for an employee to express breast milk; and
  - State that if the request for a lactation room poses an undue hardship on the employer, the employer shall engage in a cooperative dialogue.

The Commission, in collaboration with the Department of Health and Mental Hygiene, is required to develop a model lactation room accommodation policy that conforms to the requirements identified above as well as a model lactation room request form, which shall be published on the Commission's website.

We will keep you apprised as to when the Commission publishes a model policy and complaint form. Please keep in mind that the penalties under the NYCHRL are severe. Violations of the NYCHRL could result in civil fines and penalties of up to \$125,000 and up to \$225,000 for willful violations.

We recognize that this legislation leaves a number of unanswered issues and fails to fully address its practical application. We are hopeful that these issues and questions will be the subject of clarification from the Commission. Nonetheless, employers should act now in preparing for employee and manager trainings to comply with the laws. Employers should revise their handbook or policies once the model policy is published by the Commission. We are available to answer any questions that you may have. Please do not hesitate to contact David R. Rothfeld, Lois M. Traub, Alexander Soric, Robert L. Sacks, Michael Lydakakis, Jennifer Schmalz, Jaclyn Ruocco or Joseph Tangredi.

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