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Eleventh Circuit Rules on FLSA "Nursing Mothers" Provision

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On December 26, 2012, the Court of Appeals for the Eleventh Circuit issued the first decision by a federal Court of Appeals concerning the provisions of the Fair Labor Standards Act ("FLSA") that require employers to provide new mothers with reasonable break time to express breast milk for a nursing child, and a private place to do so, other than a bathroom. 29 U.S.C. § 207(r)(1). As amended under the Patient Protection and Affordable Care Act, the FLSA extends these requirements to employers with fifty or more employees, both exempt and non-exempt. In construing these new provisions, the Eleventh Circuit held that the employer, who provided reasonable breaks and facilities for an employee to express breast milk, did not violate the FLSA, and that the employer did not illegally retaliate against the employee for requesting time and a place to express. *Miller v. Roche Surety & Casualty Co., Inc.*, No. 12-cv-10259 (11th Cir. Dec. 26, 2012).

The plaintiff, Danielle Miller, was free to take breaks as needed to express her breast milk. Her breaks were neither counted nor timed, and she was not criticized for taking them. Miller was given access to nearby vacant offices where she could express; however, she preferred to use her own office and taped folders to the windows for privacy. She did not inform anyone at the office that she would be expressing breast milk in her office, and she did not ask for an alternate location.

At one point, when Miller was scheduled to work at another office, she emailed her employer to inform her that while there, she would need a place to express breast milk twice, and would also need coverage while she was doing so. Concurrently, Miller also emailed family and friends voicing her discontentment with her employer and specifically referencing the FLSA's nursing mothers provision.

Based on the foregoing facts, the court found that the employer had in fact satisfied the FLSA's requirements that it provide Miller with reasonable time and a private place to express.

Also of significance, the court rejected Miller's allegation that her subsequent termination by her employer was in violation of a separate provision of the FLSA that prohibits employers from discharging employees who file a complaint under the Act. The court found that Miller's email to her employer did not satisfy the levels of formality or clarity required to put the employer on notice that she was filing a complaint and, therefore, the employer could not be deemed to have discriminated against her on that account. The email never alleged or even intimated that the employer had violated the law, but rather was a prospective request for compliance. Miller's emails to her friends also did not constitute a complaint under the FLSA, even though her employer could have monitored them and theoretically read them.

Employers should be mindful that in addition to the new requirements set forth under the FLSA, many state and local laws likewise require reasonable accommodations for nursing mothers. If you have any questions or concerns regarding compliance with these laws or related developments, please contact your Proskauer lawyer or any co-chair of the Employment Law Counseling Practice Group.