

# Executive Compensation, Benefits and Employment Law Focus

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## Section 457A Eliminates the Ability of US Taxpayers to Defer Compensation in Offshore Tax Havens

On October 3, 2008, Section 457A was added to the Internal Revenue Code (the "Code") pursuant to the enactment of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008. In January 2009, the US Department of the Treasury provided interim guidance through its issuance of Notice 2009-8 (the "Notice"), as summarized below.

### Background

Based on its legislative history, Section 457A is intended to promote parity among taxpayers. US companies that grant nonqualified deferred compensation to their employees are unable to receive a tax deduction for the deferred compensation until the amount is paid to the employee. By contrast, offshore employers located in non-tax jurisdictions, can provide deferred compensation to their US employees, and suffer no economic loss, since the timing of the deduction for the related compensation is not relevant when the employer does not have any tax liability. Accordingly, there was a preference in the Code for US taxpayers to defer compensation in certain offshore jurisdictions. The Code, prior to the enactment of Section 457A, provided a significant tax benefit to such employees, without any corresponding tax disadvantage to the offshore employer. Notably, the same tax preference was available with respect to domestic tax-exempt employers (although such entities were not the intended target of the legislation). Section 457A eliminates the tax benefit (i.e., the deferral opportunity) provided to US employees by such "tax-indifferent parties."

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## Notice 2009-8

*Section 457A Mandate.* Very generally, Section 457A imposes federal income tax on compensation deferred under a **nonqualified deferred compensation plan** sponsored by a **nonqualified entity** when the **service provider's** right to the compensation is no longer subject to a **substantial risk of forfeiture**. If, however, the amount of deferred compensation is not determinable at the time when there is no longer a substantial risk of forfeiture, taxes are imposed when the amount becomes determinable, although subject at that time, to the **Section 457A additional taxes** for late income inclusion.

*Section 457A Covered Plans.* Section 457A borrows terms from Section 409A of the Code, which also governs the taxation of nonqualified deferred compensation. For purposes of Sections 409A and 457A, a "nonqualified deferred compensation plan" includes any arrangement under which a service provider obtains a legally binding right to compensation during a taxable year, which is payable in a later taxable year. Generally, the same types of nonqualified deferred compensation plans covered under or exempt from Section 409A are also covered under or exempt from Section 457A. As exceptions to this general rule, certain stock appreciation rights ("SARs") and plans that provide for short-term deferrals are treated differently.

- Section 409A generally exempts SARs with an exercise price not less than the value of the underlying stock at the time of grant, whether settled in cash or the service recipient's stock; whereas, Section 457A only exempts SARs that must be settled in service recipient stock (and otherwise meets the requirements for an exemption from Section 409A), while subjecting all other SARs, such as those that may be settled in cash, to its rules.
- For purposes of Section 409A, compensation paid within 2½ months following the end of the service recipient's taxable year (or the end of the service provider's taxable year, if later) in which the payment is no longer subject to a substantial risk of forfeiture is exempt; whereas, compensation paid within 12 months after the end of the service recipient's taxable year in which the payment is no longer subject to a substantial risk of forfeiture is exempt from Section 457A. Thus, Section 457A's short-term deferral exemption can be more liberal than that of Section 409A.

## Example 1

Assume the following: Employee E and Company XYZ are both calendar year taxpayers; on January 1, 2009 XYZ grants E a right to compensation, which is conditioned upon the continuation of E's services for 18 months (i.e., the substantial risk of forfeiture lapses and E becomes vested on June 30, 2010). If the plan requires payment by March 15, 2011 (the 2½ month period following the end of the taxable year in which the payment vests) such amount is exempt from Section 409A. If the plan requires payment by December 31, 2011 (the 12-month period following the end of the taxable year in which the payment vests) such amount is exempt from Section 457A. In this instance, Section 457A provides for a longer short-term deferral period than Section 409A.

*Substantial Risk of Forfeiture—Service-Based Condition.* A service provider's right to compensation is treated as subject to a "substantial risk of forfeiture" under Section 457A only if such person's rights to that compensation are conditioned upon the future performance of substantial services (i.e., a service-based condition). A service provider's compensation is not subject to a substantial risk of forfeiture for purposes of Section 457A if such person's right to compensation is subject to the occurrence of a condition, other than the future performance of substantial services (i.e., a performance-based condition). This is another difference from Section 409A, which treats compensation as being subject to a substantial risk of forfeiture if conditioned upon the satisfaction of either a service-based or a performance-based condition.

## Example 2

Assume the same facts in Example 1, except Employee E's vesting on June 30, 2010 was conditioned on E's satisfaction of a specified performance goal. For purposes of Section 409A, E's performance-based compensation is deemed vested on June 30, 2010, and a payment by March 15, 2011 (the 2½ month period following the end of the taxable year in which the payment vests) is exempt from Section 409A. Under Section 457A, E's performance-based compensation is deemed vested on January 1, 2009 (the grant date), and a payment by December 31, 2010 (the 12-month period following the end of the taxable year in which the payment vests) is exempt from Section 457A. In this instance, Section 457A's short-term deferral period expires before the Section 409A short-term deferral period.

*Substantial Risk of Forfeiture—Investment Asset Rule.* To the extent provided in regulations to be issued by the Treasury Department, if compensation is based solely on the amount of gain recognized on the disposition of an “investment asset,” such compensation is treated as subject to a substantial risk of forfeiture until the date of disposition. An “investment asset” includes any single asset acquired directly by an investment fund, in which such fund or a related entity does not participate in the active management of such asset, and substantially all of any gain on the disposition of the asset is allocated to the investors in the fund.

Based on the legislative history, the investment asset rule is very narrow in application and is intended to apply solely to compensation arrangements relating to passive investments by an investment fund in a **single asset**.

### Example 3

If an investment fund acquires XYZ operating corporation, the investment asset rule is intended to apply to an arrangement that the fund manager receive 20 percent of the gain from the disposition of XYZ, provided that the fund manager does not actively participate in the management of the daily activities of XYZ. Accordingly, the fund manager’s compensation will be treated as subject to a substantial risk of forfeiture until the investment fund’s disposition of XYZ. In contrast, the rule does not apply if the investment fund holds two or more operating corporations and the fund manager’s compensation is based on the net gain resulting from the disposition of the operating corporations.

Notably, the short-term deferral period, by which compensation may be paid within 12 months after the close of the taxable year in which the right to payment is no longer subject to a substantial risk of forfeiture, does not apply to deferred compensation treated as subject to a substantial risk of forfeiture under the investment asset rule. As such, payment must be made by the end of the year of the asset’s disposition.

*Section 457A Covered Persons.* A service provider subject to Section 457A may include an individual, corporation, partnership or other legal entity. However, an independent contractor is not a service provider subject to Section 457A if that service provider (i) is actively engaged in the trade or business of providing services and (ii) provides significant services to two or more service recipients to which the service provider is not related and that are not related to each other. Even where both conditions described above have been satisfied, independent contractors that provide “management services” are still subject to Section 457A. Accordingly, a person or entity directing or controlling the financial or operational aspects of

a service recipient (or providing investment management or advisory services to a service recipient in the financial industry) will not qualify for the independent contractor exemption; whereas, an audit firm, law firm, technology specialist or other outside service provider may qualify.

*Nonqualified Entity.* Section 457A and the Notice introduce new terminology and a complex body of rules for determining whether a sponsor of a nonqualified deferred compensation plan is a “nonqualified entity” for a given period. However, the overall concept is rather straightforward: an employer with no tax liability for substantially all (at least 80 percent) of its gross income for the taxable year is indifferent with respect to the timing that a deduction for its employees’ wages becomes available. Such an employer is a “nonqualified entity.” The table at the end of this article summarizes the rules for determining whether a plan sponsor is a nonqualified entity.

*Income Inclusion.* Section 457A imposes federal income tax on compensation deferred under a nonqualified deferred compensation plan sponsored by a nonqualified entity when the service provider’s right to the compensation is no longer subject to a substantial risk of forfeiture. Section 457A applies to both cash method and accrual method taxpayers. Thus, Section 457A may result in income inclusion prior to the time otherwise required under the service provider’s method of accounting.

### Note

A cash method taxpayer includes an item of income upon receipt. Whereas, income for an accrual method taxpayer is generally includible in gross income when all events have occurred that fix the taxpayer’s right to receive the income, which is the earliest of (i) the date on which the required performance takes place; (ii) the date on which the payment is due; or (iii) the date on which the payment is received by the taxpayer.

A deferred amount that has been included in income under Section 457A, but not yet paid to the service provider, is not includible in income when it is actually paid to the service provider. If an amount that was previously included in income under Section 457A is forfeited or otherwise permanently lost prior to payment, the service provider may claim a loss deduction for the taxable year in which the right to the deferred compensation is forfeited or otherwise permanently lost. In addition, the right to earnings attributable to deferred compensation (whether actual or notional) that are credited on at least an annual basis is includible in gross income under Section 457A when such right is no longer subject to a substantial risk of forfeiture.

## Side Pockets

Hedge funds may hold investments that are difficult to value until they are sold (e.g., distressed securities, accounts receivable, or securities not traded on an established market). Hedge funds may segregate these illiquid investments from the rest of the portfolio in a separate account, referred to as a "side pocket." Fund managers receive performance fees (typically 20 percent of profits) on these investments only when profits are realized upon the disposition of the side pocket. If a side pocket is monetized years after the fund manager's right to compensation with respect to these investments vests, the fund manager's fees attributable to these side pockets will be subject to additional taxes under Section 457A.

Section 457A authorizes the Treasury Department to provide rules that would allow assets in side pockets to be treated as subject to a substantial risk of forfeiture until disposition (under the "investment asset" rule), thereby allowing the deferral of taxation on side pockets without penalties. However, due to the rule's "single asset" requirement, this relief may not be available in many cases, if a hedge fund nets side pocket gains upon realization with the fund's other investment income for purposes of determining a fund manager's incentive compensation. Further, this relief is not available until the Treasury Department adopts regulations implementing the investment asset rule. The Notice does not address side pockets and the investment asset rule. Pending further guidance, side pockets remain subject to Section 457A.

Until the IRS issues guidance on the use of the "investment asset" rule, taxpayers must look at other means of addressing the Section 457A additional taxes that will apply to side pockets. The Notice's treatment of a profits interest in a partnership may provide some relief. A partner that receives a profits interest will not be considered to be deferring income for purposes of Section 457A. If a hedge fund holds a side pocket investment through a partnership and the partnership grants a profits interest in such partnership to the fund manager, then any income to the fund manager resulting from the profits interest will not be considered deferred compensation for purposes of 457A. Upon the disposition of the side pocket investment, the fund manager will receive income corresponding to the fund manager's profits interest in the partnership. This income will not be subject to the additional 20 percent tax imposed by Section 457A on income that is not determinable at the time it becomes no longer subject to a substantial risk of forfeiture.

*Section 457A Additional Taxes.* In general, Section 457A will tax a nonqualified deferred compensation plan offered by a nonqualified entity when the deferred compensation is no longer subject to a substantial risk of forfeiture. If the amount of deferred compensation is not determinable at the time when there is no longer a substantial risk of forfeiture (e.g., as in the case of "side pockets"), the Section 457A additional taxes are imposed when the amount becomes determinable. At that time, the amount required to be included in the employee's income, whether or not then payable, is subject to an additional 20 percent tax, together with a premium interest charge, at the underpayment rate plus one percent, pursuant to Section 457A. The additional taxes are calculated under the same regime as Section 409A, for which the Treasury Department and Internal Revenue Service recently issued proposed regulations.

## Coordination with Section 409A

In some instances, Sections 457A and 409A, which both govern nonqualified deferred compensation plans, may both apply to the same nonqualified deferred compensation plan.

- *Exempt under Section 409A, but subject to Section 457A.* An amount includible in income under Section 457A is treated as a payment satisfying the short-term deferral rule under Section 409A.

## Example 4

Assume the following: On January 1, 2009, XYZ grants E a right to receive a US\$10,000 bonus, which will be paid on March 15, 2011 if E satisfies a performance goal by 2010. On June 30, 2010, E satisfies this goal. XYZ was determined to be a "nonqualified entity" that is subject to Section 457A during 2009.

The bonus is exempt from Section 409A since the amount must be paid out by March 15, 2011 (within the Section 409A short-term deferral period). Under Section 457A, E's performance-based bonus is deemed vested on January 1, 2009 (the grant date). Such amount will be subject to Section 457A, since payment is scheduled after December 31, 2010 (the Section 457A short-term deferral period). The bonus will be included in E's income in 2009 under Section 457A, but will be treated as a payment satisfying the short-term deferral rule under Section 409A.

- *Exempt under Section 457A, but subject to Section 409A.* Amounts exempt from Section 457A under the 12-month short-term deferral rule will still be subject to Section 409A (unless the arrangement also qualifies for Section 409A's 2 ½-month short-term deferral exception).

### Example 5

Assume the following: On January 1, 2009, XYZ grants E a right to receive a US\$10,000 retention bonus, which will be paid on April 1, 2011 if E continues to work for XYZ until December 31, 2010. E satisfies this condition. XYZ was determined to be a "nonqualified entity" that is subject to Section 457A during 2009.

For purposes of Sections 409A and 457A, E's right to the service-based bonus vests on December 31, 2010. The bonus is subject to Section 409A since the payment occurs after March 15, 2011 (outside the Section 409A short-term deferral period). However, the bonus is exempt from Section 457A since the payment occurs prior to December 31, 2011 (within the Section 457A short-term deferral period).

- *Subject to both Sections.* Payment issues under Section 409A may arise if deferred compensation becomes subject to Section 457A in a future year (e.g., the plan sponsor becomes a nonqualified entity) and the plan requires payment at the time the deferred amount is included in income, which may be treated as an accelerated payment of deferred compensation in violation of Section 409A. Until further guidance is issued, such payment will not constitute an impermissible acceleration of deferred compensation under Section 409A.

### Example 6

Assume the following: On January 1, 2009, XYZ grants E a right to receive a retention bonus, which will be paid on March 1, 2011 if E continues to work for XYZ until December 31, 2009. E satisfies this condition. XYZ was not a "nonqualified entity" during 2009, but attained such status in 2010.

For purposes of Sections 409A and 457A, E's right to the service-based bonus vests on December 31, 2009. The bonus is subject to both Sections 409A and 457A since the scheduled payment date occurs after both short-term deferral periods. Accordingly, the bonus will be included in E's income in 2010 and a corresponding payment in 2010 would be treated as an impermissible acceleration of deferred compensation in violation of Section 409A, but for the exception allowed by the Notice.

- *Plan Amendments.* If nonqualified deferred compensation is attributable to services performed before January 1, 2009, a change in the time and form of payment of such amount solely to conform to the date that payment is required to be included in income under Section 457A will not be treated as an impermissible acceleration under Section 409A, provided that such change in time and form of payment is established in writing on or before December 31, 2011. Further, such a change will not be treated as a material modification to a plan that is grandfathered under Section 409A.

### Effective Date

Section 457A applies to deferred amounts that are attributable to services performed after December 31, 2008. If, under the terms of a plan in effect on December 31, 2008, a service provider's right to compensation is subject to a substantial risk of forfeiture in the form of a requirement to continue to perform substantial future services after December 31, 2008, the deferred compensation is generally allocated to the post-2008 period on a pro-rata basis. The Notice provides detailed rules for allocating the compensation deferred to one or more years in which services are performed.

### Grandfathering Clause

Deferred amounts attributable to services performed before 2009 will eventually be taxed in 2017 or, if earlier, the first taxable year the amounts are no longer subject to a substantial risk of forfeiture. The Notice provides transition relief by allowing the plan sponsor to amend its plan to retroactively waive the substantial risk of forfeiture effective prior to January 1, 2009, thereby allowing the service provider to continue to defer the compensation up through 2017. However, the plan sponsor must adopt this amendment in writing by June 30, 2009 and must apply it consistently to every service provider participating in the plan or a substantially similar plan.

### Conclusion

Notice 2009-8 provides complex guidance with respect to the application of Section 457A. For additional information regarding Section 457A or Notice 2009-8, please contact a lawyer at White & Case.

## Determining Nonqualified Entity Status

	Foreign Corporation	Partnership
<b>Requirements</b>	Any foreign corporation sponsoring a nonqualified deferred compensation plan unless substantially all of its income is (a) effectively connected with the conduct of a trade or business in the US, or (b) subject to a comprehensive foreign income tax.	Any partnership sponsoring a nonqualified deferred compensation plan unless substantially all of its income is allocated to (a) foreign persons with respect to whom such income is subject to a comprehensive foreign income tax (under the principal that apply to corporations), or (b) organizations that are not exempt from US taxation ("Eligible Persons").
<b>Timing for Determination of Nonqualified Entity Status</b>	<p>Whether a foreign corporation is a nonqualified entity is determined on the last day of each of the service provider's taxable years in which the deferred compensation is no longer subject to a substantial risk of forfeiture and remains deferred.</p> <p>The determination is based on the foreign corporation's taxable year ending with or within the service provider's relevant taxable year (the "Corporate Measuring Period" for purposes herein).</p>	<p>Whether a partnership is a nonqualified entity is determined on the last day of the service provider's taxable year in which the deferred compensation is no longer subject to a substantial risk of forfeiture and remains deferred.</p> <p>The determination is based on the allocations (or deemed allocations) of gross income by the partnership for the partnership's taxable year ending with or within the service provider's taxable year (the "Partnership Measuring Period").</p>
	<p><i>If a plan sponsor becomes a nonqualified entity during the service provider's taxable year and maintains such status as of the last day of the service provider's taxable year, amounts deferred under the plan are includible in the service provider's income for that taxable year under § 457A (unless subject to a substantial risk of forfeiture or previously taxed).</i></p> <p><i>If the plan sponsor ceases to be a nonqualified entity during a service provider's taxable year and maintains such status as of the last day of the service provider's taxable year, amounts deferred under the plan are not includible in the service provider's income under Section 457A (even if no longer subject to a substantial risk of forfeiture).</i></p>	
<b>Tests for Determination of Nonqualified Entity Status Effectively Connected</b>	<p><b>Effectively Connected</b></p> <p>The "effectively connected" standard is satisfied if, for the applicable Corporate Measuring Period, substantially all (at least 80 percent) of the gross income of a foreign corporation is effectively connected with the conduct of a trade or business in the US that is not exempt from US federal income tax pursuant to a treaty.</p>	

## Tests for Determination of Nonqualified Entity Status Effectively Connected (cont'd)

### Comprehensive Foreign Income Tax

The “comprehensive foreign income tax” standard is met if, for the Corporate Measuring Period, either: (a) the foreign corporation is eligible for the benefits of a comprehensive income tax treaty between its country of residence and the US, or (b) the foreign corporation demonstrates that it is resident for tax purposes in a foreign country that has a comprehensive income tax; and the foreign corporation is not taxed by the foreign corporation’s country of residence under any regime or arrangement that is materially more favorable than the corporate income tax otherwise generally imposed by such country. Notably, a corporation satisfying either condition would not be subject to a comprehensive foreign income tax if the conditions below apply.

*Not a comprehensive foreign income tax if:* (a) the foreign corporation’s taxable income determined under the laws of its country of residence excludes, in whole or in part, nonresidence source income realized by the foreign corporation; and (b) the aggregate amount of **nonresidence source income** of the foreign corporation that is excluded for the taxable year (the **“Excluded Amount”**) exceeds 20 percent of the gross income of the foreign corporation. Under the Notice, even a foreign corporation that is a resident in a country with a tax treaty with the US would be subject to 457A if that country has a territorial tax regime, only taxing income derived within their borders regardless of the residence of the taxpayer.

*Excluded Amount* is income that is not included in taxable income, or is excluded from taxable income by means of an exemption, exclusion, deduction, taxation of such income at less than 50 percent of the generally accepted applicable rate, or by other means.

*Nonresidence source income* refers to items of income from sources outside the foreign corporation’s country of residence that would be included in the foreign corporation’s taxable gross income under general US income tax principals as if the foreign corporation were subject to US tax.

### Allocation to Eligible Persons

The “allocation to Eligible Persons” standard is met if, for the applicable Partnership Measuring Period, substantially all (at least 80 percent) of the gross income of the partnership is allocated to Eligible Persons (as provided below).

The Notice provides detailed guidance for determining whether substantially all the income is allocated to eligible persons, including determining: (i) the gross income of such partnership (including foreign partnerships, domestic partnerships, and tiered partnerships); (ii) which persons may be treated as receiving allocations of such gross income; and (iii) which allocations of gross income will be treated as made to eligible persons.

An item or portion of an item of gross income may be treated as allocated to any one (and only one) of the following: (i) a partnership, if such partnership is the sponsor of the nonqualified deferred compensation plan and is itself subject to a comprehensive foreign income tax with respect to such income; (ii) a partner of such partnership, or (iii) any direct or indirect owner of such partner.

## New York State Employment Laws May Require Action

Employers in New York may need to take certain actions because of guidelines issued by the New York State Department of Labor (“NYSDOL”) regarding blood donation leave and rights of nursing mothers. The guidelines and any required action related to both issues are described in this Update.

### Blood Donation Leave

Pursuant to the New York Labor Law, employers in New York with 20 or more employees at at least one site must provide certain employees—those who work for an average of 20 or more hours per week—with time off to donate blood. At the employers’ option, they must either: (i) grant three (3) hours of leave in any 12-month period for employees seeking to donate blood (“Off-Premises Donation”); or (ii) allow such employees to donate blood during work hours, without the use of accumulated leave time, at least two (2) times a year at a “convenient time and place set by the employer,” including blood drives at the employees’ place of employment (“Donation Leave Alternatives”). Employers may not retaliate against employees for requesting or taking such leave.

The NYSDOL recently issued “[Guidelines for Implementation of Employee Blood Donation Leave](#)” that contain specific notice and recordkeeping requirements. As such, **employers must now notify employees in writing of their right to take blood donation leave, in a manner that “will ensure that employees see [the notice]”**—such as by postings in prominent areas, notices in employee handbooks, mailings or other comparable methods. If employers choose to provide such notice directly to their employees (as opposed to, for example, providing notice in their employee handbooks), they must (i) provide such notice at the time of hire to new employees and thereafter (ii) issue notice to all employees on an annual basis no later than January 15 of the applicable calendar year.

The Guidelines clarify that leave for Off-Premises Donation is unpaid, employers must provide such leave at least once per calendar year during the employees’ regular working hours and such leave need not accrue (i.e., carry-over) if not used during the calendar year.

With respect to leave for Donation Leave Alternatives, such leave must be paid (without the use of any accumulated leave time of the employees such as sick leave or vacation) and must be provided at least twice per calendar year. Such Donation Leave Alternatives must be provided at “a time that will not require an employee to attend outside [of] normal work hours and shall not require an employee to travel to a location which is not a reasonable travel distance.” Such leave must allow employees enough time to donate blood, recover from such donation (including “partaking nourishment after donating”) and return to work. If a Donation Leave Alternative was scheduled for a time when an employee is on other leave—such that the employee does not have the required two (2) alternatives within a calendar year—the employer must make another alternative available to the employee or instead provide for leave for an Off-Premises Donation. Donation Leave Alternatives cannot be scheduled at a time when “a significant number of employees are out of the office” (such as during the last week of December or around other significant holidays) and notice of such alternatives must be prominently posted in the workplace at least two (2) weeks beforehand. In addition, the two (2) alternatives must be scheduled at least 60 days apart during any calendar year and notice of the second leave alternative for a particular calendar year must be provided prior to December 1 of that year. Even if employers provide for Donation Leave Alternatives, the Guidelines recommend that employers also offer employees up to three (3) hours of leave for the purposes of donating blood platelets, plasma or red blood cells (such donations can only be done at a Red Cross or other medical facility).

Employers may require employees to provide reasonable notice of their intent to take such leave—at least three (3) working days for Off-Premises Donations and two (2) days prior to the use of a Donation Leave Alternative. For employees who fill positions essential to the operation of the employer or necessary to comply with legal requirements, if three (3) days notice is not sufficient, employers may require additional notice not to exceed ten working days (but employers must inform employees of this additional requirement). For emergencies requiring blood donation for an employee’s own surgery or that of a family member, employers must provide reasonable accommodations for shorter notice periods. Employers also may require employees who take leave for Off-Premises Donations to provide a notice of blood donation or good faith effort to donate blood or some other sufficient proof for this purpose.

## Rights of Nursing Mothers

The New York Labor Law requires all employers (i) to permit employees who are nursing mothers to take reasonable unpaid break time to express breast milk each day for up to three (3) years following the birth of a child, and (ii) to make reasonable efforts to provide a room “in close proximity to the work area where an employee can express milk in privacy.” The law also prohibits discrimination against employees who choose to express breast milk in the workplace.

The NYSDOL recently issued “[Guidelines Regarding the Rights of Nursing Mothers to Express Breast Milk in the Work Place](#)” that, among other things, **require employers to provide written notice of the right to express breast milk in the workplace to all employees who are returning to work following the birth of a child.** This notice may be provided individually to such employees or to all employees generally through notice in the employee handbook or the posting of a notice in a central location. Employees must provide notice of their intent to use such breaks to express breast milk and the Guidelines recommend that employees notify their employers prior to their return to work following leave taken after the birth of a child.

The Guidelines clarify that such unpaid breaks must not be less than 20 minutes or not less than 30 minutes if the location in which the employee may express breast milk is not close to the employee’s work area. Employees can elect to take shorter unpaid breaks for this purpose. In most circumstances, employers must provide such unpaid breaks at least once every three (3) hours. Employers may not require employees to postpone their breaks for more than 30 minutes.

Employees may elect to take their unpaid break time concurrently with regularly scheduled paid break or meal periods and/or to work before or after their normal shifts to make up the time used for these unpaid breaks, provided that such time falls “within the employer’s normal work hours.” Notwithstanding the foregoing, pursuant to federal and state wage and hour laws, (i) employers cannot reduce the salaries of “exempt” employees for time spent on such ‘unpaid breaks’ (because such reductions would be inconsistent with their exempt status) and (ii) breaks of 20 minutes or less for “non-exempt” employees must be paid.

Employers must provide a “private” room or other location (“Location”) for employees to express breast milk so long as it is neither “significantly impracticable, inconvenient, [n]or expensive to the employer to do so” (based on “relevant factors” including those specified in the Guidelines). In order to be considered “private,” the Location must not be open to other individuals frequenting the business, such as employees, customers or other members of the public. The Location should have a door equipped with a functional lock or, as a last resort, a sign advising that the Location is in use and not accessible to other employees or the public. The Location also must be clean, well lit, have any windows covered and contain at minimum a chair and small table, desk, counter or other flat surface. If employers cannot provide a dedicated room for lactation, the use of a vacant office or other room on a temporary basis is acceptable provided that it is not open to the public or other employees while the nursing mother is using it for expressing breast milk.

As a last resort, the use of a cubicle is permitted if it is fully enclosed with a partition, not otherwise accessible to the public or other employees while in use and has walls at least seven (7) feet high. The Location cannot be a restroom or toilet stall.

The Location also must be in walking distance from the employee’s work station without unreasonably lengthening the break period. Employers are also encouraged to provide an outlet, clean water supply and access to refrigeration for storing the expressed milk (although employers are not responsible for ensuring the safekeeping of such expressed milk). If employers have more than one (1) employee at a time needing access to such Location, the employers may dedicate a centralized location for use by all such employees, provided that the employers must make every effort to locate such space at a reasonable distance from the employees using it.

The Guidelines reiterate that employers may not discriminate against employees who avail themselves of the right to express breast milk in the workplace, and warn that “encouraging or allowing a work environment that is hostile to the right of nursing mothers to take leave” to express breast milk may constitute discrimination.

Please contact Sharon Parella, Kenneth A. Raskin or any member of White & Case's Executive Compensation, Benefits and Employment Law Practice Group if you have any questions or comments or you would like an additional copy of this or other issues. You may also call upon White & Case's Legislative Services in Washington, DC for information on pending bills, hearing dates, etc. For address changes or to receive this publication by e-mail, please send your information to [ECBEL@whitecase.com](mailto:ECBEL@whitecase.com).

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