Indiana Department of Transportation Case ID: 1608009

FLSNM NARRATIVE

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State of Indiana
Indiana Department of Transportation
100 N. Senate Avenue
Indianapolis, IN 46214

Federal ID#: 35-6000158

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Indiana Department of Transportation Case ID: 1608009

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Investigative Period: 3/23/2010 to 2/03/2012

(b)(6), (b)(7)(C), (b)(7)(E)

(b)(7)(E)

(b)(7)(E)

HISTORY: There has been no PPACA prior history.

COVERAGE:

(b)(7)(E)

Indiana Department of Transportation is a public employer with over 50 employees and all employees are covered under Section 3(s)(1)C of the FLSA. Government agencies have enterprise coverage under 29 U.S.C. 203(s)1.

The 2010 Nursing Mothers Amendment to the Fair Labor Standards Act (FLSA) was enacted as part of the Healthcare Reform Law. The Patient Protection and Affordable Care Act (“PPACA”) includes a provision for nursing mothers. The new provision amended Section 7 of the FLSA. The federal policy became effective on 3/23/2010. All employers covered by the FLSA, regardless of size of their business,
are required to comply with the nursing mothers break time provision. The employer is a covered employer. (See Exhibit E-1).

(b) (7)(E) is covered under the PPACA.

EXEMPTIONS:

29 U.S.C. 207 (r)(3): Employer is not exempt and employs more than 50 employees.

29 U.S.C. 213: does not qualify as exempt, under Section 7 of the FLSA.

STATUS OF COMPLIANCE:

(b) (7)(E)

(d) (7)(E) also alleges that the employer was not going to provide her with a reasonable amount of break time to express her milk. did not feel she could just express milk once per day, just during her 1/2 hour lunch time. states that she was unjustly terminated. was terminated on 1/19/2011. termination date is 12/31/2010, the last day she was on pay status. (b) (7)(E)

29 U.S.C. 207 (r) (1) (B): The employer failed to provide a place, other than a bathroom, that is
shielded from view and free from intrusion from co-workers and the public, which may be used to express milk.

had to express her milk in a bathroom stall when she returned to work on 12/20/2010. used the bathroom to express her milk on 12/20/2011, 12/21/2011, & 12/22/2011. 29 U.S.C. 207 (r) (1)(A): The employer failed to provide a reasonable break time for to express breast milk for her nursing child when she had a need to express the milk. son was born on 11/2/2010. returned to work on 12/20/2010 and initially was allowed to express her breast milk 3 times per day. did not have a problem for 3 days, 12/20/2010, 12/21/2010, & 12/22/2010, because her supervisor, Jimmy Brandenburg, had her mainly working around the unit facility for the 3 days cleaning and maintaining the unit facility. may have been put in a truck and sent out on 12/22/2010 for a partial day. was a field employee whose job was to be away from the unit facility to maintain the roads. The fourth day, 12/23/2010, and the fifth day, 12/24/2010 were considered holidays by the employer. 12/25/2010 and 12/26/2010 were weekend days. 12/27/2010, 12/28/2010, & 12/29/2010 were put down as vacation days on time sheet. 12/30/2010 was documented as 5.75 hours vacation, 1.25 hours personal leave, and .50 hours of unauthorized leave without pay. (See Exhibits A-1, B-1 & B-5).

On 12/29/2010 the employer sent an Email to requesting that she fill out a “Lactation Schedule Location Request Form.” filled it out and stated that she would need to express her milk every 3 hours. In a normal 8 hour shift it could be 2 or 3 times. On 12/30/2010, the employer Emailed a “modified” “Lactation Schedule Location Request Form.” The form was signed by Todd Johnson, Highway Maintenance Director.

The “modified” form stated that a field employee cannot disrupt the operations running from the field back to the unit site multiple times per day. was approved to return to the unit site once a day, at lunch time, to express her milk. was not allowed to exceed her unpaid ½ hour lunch time. The employer could not guarantee breaks but the employer would allow two 15 minute breaks, based on operational needs,
that could be used by the to express her milk, if she was at the unit facility. Per Todd Johnson, Highway Maintenance Director, there are days the field employees never come back to the unit facility when plowing snow, except only to start the day or end the day. The routes are set-up as 2-1/2 to 3 hours each, to do one run. Sometimes field employees have to do two passes, and stay out all day. They do not always get the 1/2 hour lunch maybe just a break. The 15 minute breaks are not always available due to operational needs. was terminated by the employer on 1/19/2011. Employer states in a Memorandum dated 1/19/2011, that was absent without proper authorization, and failed to return to work after being directed to do so on 1/19/2011, according to the employer. The 12/31/2010 termination date was used because it was the last day, was in pay status with the Indiana Department of Transportation.

On 2/10/2011, USDOL visited the site. WHI met with with Dennis Warnick, Sub-District Manager and others. WHI did interviews. WHI was allowed to view the bathroom where the expressed her milk. WHI also got to see the “new” lactation room that was set-up by the employer but was never used by, because she was terminated. Employer was provided Fact Sheet#73 and FLSA coverage information.

The State of Indiana, already had a written Policy Statement on Lactation Support that was effective on 7/1/2008. It provides guidelines to agencies for meeting the needs of employees who desire to express breast milk for the nutritional needs of their infant child. The FLSA requirement of break time for nursing mothers to express breast milk does not preempt State laws that provide greater protections to employees.

requested to express her milk every 3 hours. In her normal shift that ran from 7:30 AM to 3:00 PM, that could be 2 or 3 times. Management modified request to once per day, during her ½ hour lunch. states it takes about 30 minutes to express milk each time, manually.

child was born on 11/2/2010, and was approximately 7 weeks old, when came back to work on 12/20/2010. worked the first 2 days at the unit facility. The third day, 12/22/2010, states she did take the snow plow and salt truck out starting at about 8:35 A.M. and returned to the unit facility at about
10:00 A.M. to express milk. Her supervisor was not sure whether he had do any work away from the unit facility on 12/22/2010. did not feel the employer was going to provide her with “reasonable break time” for her to express her milk. did not feel that she could adhere to the “modified” lactation schedule. job, which consisted of taking the snow plow and salt truck out, did not work well with expressing milk because she would be away from the unit facility. Shifts could be 12 hours in the winter months. could not pump just once per shift. The two 15 minute breaks would not be available to when she was off-site. The employer did provide compensated breaks, and if did use them to express milk she would have to be compensated in the same way that other employees are compensated for breaks. (b) (7)(E)

had used all her FMLA time and had a little over 3 days of vacation time left, and 1.25 hours of personal time when she returned to work. After returning to work, asked if she could possibly get additional time off, without pay, thinking that it would help her employer meet the operational needs of the unit. On 12/28/2010, sent an Email to Robert Alderman, District Director, requesting a designated place to pump and time off. On 1/3/2011, put in an Email to Todd Johnson, Highway Maintenance Director, that the Governor had given approval for State employees to take time off. The employer did not grant her additional time off without pay. duties included operating a snow plow and being on the highways away from her unit facility. It was not uncommon, during the winter months for the State of Indiana to transfer employees from other departments to plow snow. People can come from traffic, construction, testing, planning and production. (b) (7)(E)

never did use the “new” lactation room that was set-up on 12/29/2010, by the employer, for employees needing to express milk. The room that was set-up is also used as a kitchen area. There is a refrigerator and microwave in the lactation room. There is a table and chair in the lactation room and an electrical outlet. The room has a door that can be locked, and the employer did provide a sign that states, “ROOM IN USE”, to be put on the outside of the door. A nursing mother would be shielded from view from her co-workers and the public when she is the only one in the room and the door is shut. Because the room is used by other co-workers during lunch, there could be employees knocking on the door while the room is in use and locked. Whether this would be acceptable as a room “free from intrusion” would be questionable. was to express her milk during the lunch break, according to the employer. A bathroom is located right next to the “new” lactation room and has a separate door. (b) (7)(E)
Findings:

1. Employer did not initially provide a place, other than a bathroom, as required under 29 U.S.C. (r) (1) (B). [b](7)(E) [Redacted]

2. Employer did not provide "reasonable" break time, as required under 29 U.S.C. 207 (r) (1) (A). The frequency of breaks needed to express milk as well as the duration of each break would likely vary. The employer approved only once per day, at lunch time, and [Redacted] could not exceed the unpaid 1/2 hour. The employer does provide compensated 15 minute breaks, but they were not guaranteed to be available, away from the unit facility. [b](7)(E) [Redacted]

3. Employer did not provide adequate break time and space for [Redacted] when she is not in a fixed place during the work shift. [Redacted] was a "field" employee. [b](7)(E) [Redacted]

4. Employer violated 29 U.S.C. 15 (a) 2 when [Redacted] was terminated. [b](7)(E) [Redacted]

Under U.S.C. 217, because [Redacted] was terminated, [Redacted] could file a private cause in federal district court or through the Department for reinstatement and lost wages. [Redacted] requested reinstatement with back wages in her interview statement taken on 5/12/2011. [Redacted] at that time was still not able to find a job, was still nursing, and had not gotten any unemployment pay. [Redacted] has filed her 2nd appeal for her unemployment. [b](7)(E) [Redacted]

On 6/23/2011, [Redacted] advised USDOL that she was now receiving her unemployment benefits after her appeals. In [Redacted] statement of 2/4/2011, she stated she really did not want her job back because they would harass her like they have others. She would return to work if she was sure there would be no harassment. She felt she was already being harassed. There is a provision if an employee is discharged or in any other manner discriminated against because she has filed a complaint or caused to be instituted any proceeding regarding break time for expressing breast milk, the employee may file a retaliation complaint with the Department or she may file a private cause of action seeking reinstatement, lost wages and other
appropriate remedies, 29 U.S.C. 215 (a)(3), 216(b). State did not implement their own policy they had in place since 7/1/2008. They did not give the policy and instructions to the employee, or to the supervisors. State did not start paperwork soon enough and did not have a lactation room designated on return of employee from leave. State knew that employee was on pregnancy leave due to FMLA request for birth. State could have given the State Lactation Policy out with the FMLA papers to the employee, and the supervisors, to be aware of what they had to do. State did not determine in advance whether break time for lactation would unduly disrupt the operations of the agency.

Employer employed more than 50 employees. Compliance would not cause “an undue hardship on the employer.” The difficulty or expense of compliance, due to size, financial resources, nature, and structure of the employer’s business would not apply. Under U.S.C. 207 ( r)(3), all employers covered by the FLSA, regardless of the size of their business, are required to comply with the nursing mothers break time provision.

DISPOSITION:

Guidance was received from DD-Lewis in an Email dated 1/6/2012. The employer was to be advised that the nursing mother provisions of the FLSA does apply to field employees, as well as office employees, and that they must ensure future compliance.

was called on 1/13/2012. stated that she was ready to go to work and that she had just renewed her unemployment again. was receiving $355.00 per week in unemployment benefits. was told that contact would be made with INDOT and that we would let her know the outcome.

Several calls were made to various contacts at the INDOT in order to get their decision. Finally on 1/31/2012, a contact was made with Bruce Baxter, Employee Relations Director. Mr. Baxter stated that INDOT was in compliance and that he wanted to make things right by reinstating and paying her lost wages. Mr. Baxter stated that he would have to meet with his people to get the final approval. Mr. Baxter stated that Joy Grow, Employee Relations/Dispute Resolution would advise USDOL by 2/2/2012 or 2/3/2012. Field employees under the nursing mother provision of the FLSA was discussed. Mr.
Baxter was advised that the lactation room that was set-up on 12/29/2010 had a door lock, but may not be "free from intrusion", because other employees would be needing the refrigerator and microwave at the same break time. was no longer nursing, so, at present, it was not an issue, but could be down the road. Mr. Baxter was not sure how the issue for lactation facilities for field employees was going to be resolved by the State but they are always in the process of reviewing compliance. Mr. Baxter stated that he would allow time for the [redacted] to make daycare arrangements if needed. (b)(7)(E)

On 2/2/2012, Ms. Joy Grow, Employee Relations/Dispute Resolution, State Personnel Department was called and she stated that INDOT had agreed to reinstate [redacted] with a reinstatement date of 2/6/2012 and they were in the process of computing the lost wages. Ms. Grow stated that [redacted] would have to sign a release, which was standard practice for the State, when bringing someone back to work. The release sample was sent the same day and was sent to USDOL to review.

The lost wages were computed and sent to USDOL on 2/3/2012 and totaled $26,485.64 gross. was advised, and it was confirmed she still had renewed her CDL and it was current. needed time to arrange for daycare. The reinstatement date stayed as 2/6/2012 but [redacted] would begin work on 2/13/2012. understood that she would not be paid for the week of 2/6/2012. INDOT had changed her reporting Unit, from #1, to #2 and questioned the change. Ms. Grow was emailed to respond to the change. Ms. Grow responded that she ran a staffing report and there were no openings in Unit #1 for [redacted] was advised, was not happy about the Unit change, but would report to work on 2/13/2012. The Unit #2 location is located at 10422 U.S. 27 South, Ft. Wayne, IN 46805.

On 2/9/2012, a copy of the release from Ms. Grow was received by Email. On 2/10/2012 it was forwarded to [redacted]. On 2/14/2012, the signed release was received. Ms. Grow sent an Email stating the check for lost wages would be issued on 2/15/2012 with proof-of-payment to the USDOL within 15 days. The proof-of-payment would be a signed canceled check.

The lost wages were computed for the period from 1/1/1011 thru 2/6/2012 and totaled $26,485.64 Gross. was paid $464.66/week. on a biweekly payroll. Weekly lost wages were computed for 57 weeks. [redacted] Brenda S. Recobs, INDOT Payroll Director computed the wages. $7,455.00 was paid back to unemployment, with [redacted] agreement, and a balance of $19,030.64 Gross, was paid to [redacted] minus tax withholdings. According to Ms. Grow, it was in the State's best interest to

Page 9
to get (b)(7) back to work and not continue to pay the $355,.00 per week unemployment compensation. A copy of the check was Emailed to USDOL on 2/16/2012.

I recommend this file be closed, once proof-of-payment is received. All correspondence should go to Ms. Grow. (See Contact Section of Narrative). Also note, that (b)(7) address had changed from her initial contact. (b)(6), (b)(7)(C) address is now (b)(6), (b)(7)(C)

Pubs: FS#73. The USDOL website www.wagehour.dol.gov.

(b)(6), (b)(7)(C)

UDSOL Investigator
Wage-Hour Division
February 23, 2012