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U.S. DOL Issues Additional Guidance on COVID-19 and FLSA, FMLA and FFCRA Rules

The United States Department of Labor (DOL) recently issued new FAQs addressing requirements under the Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), and Families First Coronavirus Response Act (FFCRA) as employees return to work amid the coronavirus pandemic.

FLSA Guidance

The DOL has stated that work performed remotely is treated the same as work performed at the primary worksite for purposes of compensability. Employers must compensate nonexempt employees for all hours of telework actually performed, including overtime work, provided that the employer knew or had reason to believe the work was performed. This includes unauthorized hours worked and unreported hours by an employee when an employer knew or had reason to believe that the work was performed.

In addition, the DOL has noted that in some instances, the "continuous workday" rule — where an employee is generally compensated for all time between the performance of the first and last principal activities in a workday — will not apply in order to foster flexible hours for employees who are teleworking during the COVID-19 pandemic. In other words, an employer can allow employees flexibility to stop working for periods of the day for personal and family obligations. Employers need to only compensate for hours actually worked in a given day.

For exempt employees, the DOL has confirmed that exempt employees may temporarily perform nonexempt duties that are required by the public health emergency without losing their FLSA exemption as long as they are paid on a salary basis and at the minimum salary level required by law.

The Bottom Line

With the "new norm" of remote work, employers should ensure compliance with FLSA requirements pertaining to compensation of all hours worked by nonexempt employees and salary payments to employees who are classified as exempt.

For employees who request FMLA leave, the DOL has confirmed that telemedicine visits will count as in-person visits to establish a serious health condition.

Employers should be mindful of DOL guidance pertaining to reinstatement of employees following FFCRA leave and rights available to employees who return to work following a furlough.

Also, an exempt employee will not lose his or her exempt status by taking paid sick leave or expanded family and medical leave under the FFCRA. Furthermore, the DOL has stated that the FLSA does not require hazard pay for employees working during the COVID-19 pandemic. However, state or local laws and private agreements between employers and employees may impose other pay obligations.

The guidance further clarifies that an employer may prospectively reduce exempt employees' salaries for economic reasons related to COVID-19 or a related economic slowdown. However, such reduction must be predetermined and bona fide and not after-the-fact based on employer's "day-to-day" or "week-to-week" needs. Additionally, the change cannot be an attempt to evade salary requirements.

FMLA Guidance

The DOL has advised that until December 31, 2020, telemedicine visits (i.e. face-to-face examinations or treatment of patients by remote video conference via computers or mobile devices) will be considered in-person visits and electronic signatures will be considered signatures for purposes of establishing a serious health condition under the FMLA. To be considered an in-person visit, the telemedicine visit must include "an examination, evaluation, or treatment by a health care provider; be performed by video conference; and be permitted and accepted by state licensing authorities."

The guidance notes that the FMLA does not prohibit the employer from requiring all employees, regardless of whether they have taken any kind of leave, to be tested for COVID-19 before returning to the workplace. However, other laws may impose restrictions on circumstances when the employer can require COVID-19 testing and what types of tests are permitted.

FFCRA Guidance

The DOL has added new FAQs interpreting FFCRA requirements pertaining to reinstatement of employees after FFCRA leave and leave taken after employees return from furlough. The DOL has indicated that employees returning from FFCRA leave must be restored to the same or equivalent position, subject to exceptions.

However, due to the public health emergency and employee's potential exposure to COVID-19, employers may temporarily reinstate the employee to an equivalent position requiring less interaction with co-workers or require telework. In addition, an employer may uniformly require employees who knowingly interacted with a COVID-19 infected person to telework or take leave until they have tested negative for COVID-19, but these requirements cannot be imposed simply because such employees took leave under the FFCRA.

LABOR & EMPLOYMENT

The DOL clarified that employees are limited to 80 hours of paid sick leave under the FFCRA. For example, if an employee exhausts their 80 hours of paid sick leave prior to being furloughed, when they return to work they are not entitled to any additional paid sick leave under the FFCRA. Furthermore, if an employee used a portion of their EFMLA leave before being furloughed, the employee is entitled to the remaining leave after returning to work.

Lastly, the DOL has reminded employers that they may not discriminate or retaliate against employees or prospective employees for exercising their rights to take leave under the FFCRA. For example, an employer cannot extend an employee's furlough in anticipation of an employee's request to take FFCRA leave.

For More Information

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