

July 22, 2020

COVID-19 Update: Additional Department of Labor Guidance on Wage and Hour Rules and Family and Medical Leave as Workplaces Reopen

The Department of Labor (the “DOL”) has issued additional guidance (the “DOL Guidance”) on how the requirements under the Fair Labor Standards Act (the “FLSA”), the Family and Medical Leave Act (the “FMLA”), and the Families First Coronavirus Response Act (the “FFCRA”) affect the workplace as businesses reopen amid the COVID-19 pandemic.¹ The DOL Guidance addresses critical issues regarding wage and hour, family and medical leave, discrimination, and returning furloughed employees to work.

I. Key Takeaways

- Work performed remotely, including overtime work, should be compensated at the same rate as work performed at the worksite. Employers must compensate employees for all reported and unreported hours of telework, provided that they knew or had reason to believe the work was actually performed. Employees need not be compensated for time between work if they are working remotely.
- During a COVID-19 public health emergency, exempt employees may temporarily perform nonexempt duties without losing exempt status, provided that the FLSA minimum salary requirement is satisfied. Also, employers may reduce an exempt employee’s salary if any such salary change is predetermined and bona fide.
- Employers may not discriminate against an employee based on the employee’s actual or anticipated request for leave under the FMLA or FFCRA. However, it is permissible to enforce broadly applicable workplace policies, such as requiring employees to be tested for COVID-19 before returning to work.
- Time an employee is on furlough is not considered time on leave. Furloughed employees would be entitled to any unused family or medical leave benefits for qualifying reasons after coming back to work.

II. Wage and Hour

The Centers for Disease Control and Prevention (the “CDC”) and many state governments recommend that businesses develop and implement flexible policies that encourage employees to work from home, to the

¹ See Department of Labor, “U.S. Department of Labor Publishes Additional Guidance on Wage and Hour Rules, Family and Medical Leave as Workplaces Reopen” (July 20, 2020), <https://www.dol.gov/newsroom/releases/whd/whd20200720-0>.

extent feasible.² The DOL Guidance offers helpful responses on issues that employers may encounter as they prepare to reopen their workplace and institute work-from-home policies, if any.

- Work performed remotely should be treated the same way as work performed at the worksite for purposes of compensability as to non-exempt employees. Thus, employers must compensate hourly employees for all reported and unreported hours of telework actually performed, including overtime work and hours of telework that they did not authorize, provided that they knew or had reason to believe the work was performed. In general, employers would be able to satisfy their FLSA wage and hour obligations by following reasonable time-reporting procedures and compensating employees for all reported hours.
- While the DOL ordinarily requires employers to compensate non-exempt employees for all time between the performance of the first and last principal activities of a workday, it has modified its guidance in light of the need to encourage flexibility during the pandemic. Employers that allow non-exempt employees to telework with flexible hours need not count as hours worked all the time between an employee's first and last principal activities in a workday. For instance, if it was agreed upon that an employee would telework during 7–9 a.m., 11:30–3 p.m., and 7–9 p.m. on weekdays, an employer only need to provide compensation for hours actually worked during these time frames, instead of all 14 hours from 7 a.m. to 9 p.m.
- During the period of a COVID-19 public health emergency declared by a federal, state, or local authority, exempt employees may temporarily perform nonexempt duties due to COVID-19 without losing the exemption, as long as they continue to be paid at least the minimum salary requirement under the FLSA. Additionally, taking leave under the FFCRA does not affect an employee's exempt status or eligibility for any exemption from the FLSA's minimum wage and overtime requirements.
- An exempt employee whose salary has been reduced as a result of the pandemic does not lose their exempt status as long as the salary reduction (a) is "bona fide" (*i.e.*, not an attempt to evade the FLSA salary basis requirements and is actually because of COVID-19 or an economic slowdown); (b) has been predetermined (rather than after the fact) based on the employer's needs; and (c) the reduction does not cause the salary to fall below the minimum salary basis for exempt employees.

² See CDC, Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>; see also, *e.g.*, New York State Department of Health, "Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency," <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/offices-interim-guidance.pdf>; Office of California State Government, "Resilience Roadmap" (last updated June 18, 2020), <https://covid19.ca.gov/roadmap/>.

- The FLSA does not require hazard pay for employees working during the COVID-19 pandemic. Employers should note, however, that they may be subject to hazard pay obligations under relevant state or local laws or contractual arrangements.

III. Discrimination and Anti-Retaliation

In developing and implementing leave policies, employers should ensure that such policies are facially neutral and enforced in a way that does not discriminate or retaliate against anyone for taking or attempting to take leave under the FMLA and FFCRA.

- Employers should not base any employment decision, such as a decision as to which employees to recall from furlough, upon an employee's actual or anticipated request for leave.
- Employers can require an employee who is returning from leave (whether for reasons unrelated to COVID-19 or for COVID-19-related reasons) to get tested for COVID-19 as long as the employers' requirement for testing applies equally to any type of leave and not simply because the employee has taken FMLA or FFCRA leave. For example, an employer may require any employee who knows they have interacted with a person with COVID-19 to telework or take leave until they have personally tested negative, as long as the testing requirement applies upon return from any kind of leave.

IV. Returning Furloughed Employees to Work

Since employees are not considered to be on leave when they are on furlough, employers should provide furloughed employees with any unused FFCRA benefits if they choose to bring them back to work.

- Employees who have exhausted their 80 hours of paid sick leave under the FFCRA ("EPSLA leave") before they were furloughed cannot take additional EPSLA leave after returning to work. However, if an employee had taken fewer than 80 hours of EPSLA leave before the furlough, they would be entitled to use the remaining hours after the furlough for qualifying reasons.
- Similarly, if an employee had used four out of 12 weeks of family and sick leave under the FFCRA ("FMLEA leave") before they were furloughed, they would still be entitled to eight additional weeks of leave post-furlough for qualifying reasons.

V. Flexibility Relating to FMLA Requirements

Given that many health care providers are under advisories to prioritize urgent and emergency visits, the DOL has adopted the below change to offer additional flexibility.

- Until December 31, 2020, telemedicine visits count as in-person visits and electronic signatures count as signatures for purposes of establishing a "serious health condition" under the FMLA. In order 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 DOL Guidance addressing the requirements under the FLSA can be found [here](#).

The DOL Guidance addressing the requirements under the FMLA can be found [here](#).

The DOL Guidance addressing the requirements under the FFCRA, including issues relating to furlough, can be found [here](#).

An online tool that helps determine an employee's eligibility for FFCRA benefits can be found [here](#).

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus \(COVID-19\) Resource Center](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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