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Question of the Day: DOL's Guidance on Return to Work and Remote Work

Legal Update

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Question

What does the DOL's new COVID-19 guidance say about return to work and remote work?

Answer

On Monday, the United States Department of Labor Wage and Hour Division (DOL) released additional guidance regarding the requirements and protections of the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and the Families First Coronavirus Response Act (FFCRA) with respect to remote workplaces and returning to work in the midst of the COVID-19 pandemic.

Here are the key takeaways from the updated guidance:

Calculating Hours Worked Remotely

Hours worked remotely are treated the same as work performed at the primary worksite for purposes of compensability. Employees must be compensated for all hours of telework actually performed, including overtime, so long as the employer knew or had reason to believe the work was performed. Employers must provide reasonable time-reporting procedures and compensate employees for all reported hours.

Telework with Flexible Hours

Employers who provide teleworking employees flexibility in their hours so that they can take time out of the normal workday for personal and family obligations, such as to care for their children, do not need to compensate employees for all hours between starting work and finishing work under the Wage and Hour Division's continuous workday guidance. Rather, employers must compensate employees for all hours actually worked.

Requiring a Potentially Exposed Employee to Telework

An employer may enact a policy that requires any employee who has interacted with a COVID-19-infected person to telework, take leave until the employee has personally tested negative for COVID-19, or comply with CDC quarantine guidance. However, an employer may not require an employee to telework, be tested for COVID-19, or satisfy any other requirement solely because the employee took leave under the FFCRA. Simply put, employers may not treat employees differently because they took leave under the FFCRA, but they can enact policies that apply equally to all employees who have been exposed to COVID-19.

Right to be Restored to an Equivalent Position

An employee returning from paid sick leave under FFCRA has a right to be restored to the same or an equivalent position, although some exceptions apply. Moreover, if an employee has taken paid sick leave and has potentially been exposed to an individual with COVID-19 during that leave, the employer may temporarily reinstate the employee to an equivalent position requiring less interaction with co-workers or require that he or she telework.

Post-Furlough Paid Sick Leave

Employees are limited to a total of 80 hours of paid sick leave under the FFCRA. If an employee exhausts his or her paid sick leave prior to being furloughed, the employee does not receive additional paid sick leave under the FFCRA after returning to work.

Post-Furlough Expanded Family and Medical Leave

Employees are entitled to a total of up to 12 weeks of expanded family and medical leave under the FFCRA to care for a child whose school or daycare is closed because of COVID-19. If an employee uses a portion of this leave prior to being furloughed, the employee is eligible for the remainder of the 12 weeks of leave after returning to work. The weeks the employee was furloughed do not count as time on leave. Employers should treat a post-furlough request for expanded family and medical leave as a new leave request and may require the employee to provide appropriate documentation related to current leave request.

Recalling Furloughed Employees After Business Closure

An employer deciding which employees to recall from furlough after a business closure due to a COVID-19 quarantine order may not use an employee's request or assumed need for FFCRA leave as a negative factor in the employer's decision. Employers may not discriminate or retaliate against employees, or prospective employees, for exercising or attempting to exercise their right to take leave under the FFCRA.

Telemedicine Visits

For purposes of establishing a serious health condition under the FMLA, the DOL will consider telemedicine visits to be in-person visits through the end of 2020 so long as the visit includes an examination, evaluation, or treatment by a health care provider; is performed by video conference; and is permitted and accepted by state licensing authorities.

If you have questions regarding these obligations or others related to COVID-19, contact your Fredrikson & Byron Employment & Labor attorney.

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