

Blog Post

DOL Guidance on COVID-19 Leave Evolving

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With employers and employees still working under the shadow of COVID-19, the Department of Labor (DOL) is keeping watch on new issues arising from the changing circumstances. But, while the DOL watches issues to provide guidance, a federal judge in New York is watching the DOL. This week, a New York judge vacated four portions of the DOL's Family First Coronavirus Response Act (FFCRA) enacted earlier this year. The judge claims that the DOL exceeded its authority when it denied workers benefits when employers do not have work, defined healthcare provider to include "anyone employed at" a facility where medical services are provided, inconsistently interpreted the intermittent leave provision, and required leave documentation that resulted in an "unambiguous conflict." The extent to which that ruling applies outside of New York is unclear. In any event, although those parts of the FFCRA may now be in question, the remaining portion of the law remains in effect.

Meanwhile, the DOL continues to issue COVID-19 related guidance to ensure uniform interpretation and compliance with federal labor and employment laws, like the Fair Labor Standards Act (FLSA), the FFCRA, and the Family and Medical Leave Act (FMLA). In its most recent update on July 20, 2020, the DOL answered a myriad of questions. Among those answered questions was guidance related to telework, flexible schedules, hazard pay,

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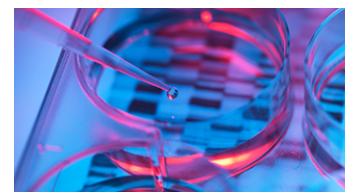
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telemedicine and the FMLA, COVID-19 testing requirements, and leave availability before and after furlough.

Fair Labor Standards Act – Questions 14-19

Wage and Hour Requirements and Flexible Schedules Under the FLSA for Teleworking Employees

With many employees teleworking, employers question whether wage and hour requirements under the FLSA remain the same as if employees are working on site. The DOL confirmed that work performed while teleworking, or away from the physical worksite, is treated the same under the FLSA for compensation purposes. This means that an employer is required to compensate its employees for all work actually performed while teleworking. These compensable hours include unauthorized hours, overtime hours, and unreported hours that an employer has reason to believe have been performed. An employer can ensure compliance under the FLSA by establishing time reporting procedures and compensating employees for all reported hours.

With teleworking becoming the new normal for many businesses, employers are exploring their ability to provide employees with flexible work hours. Typically, all hours between the first and last work activity performed are compensable under the FLSA. Due to the added pressures of COVID-19, the DOL recognized the need for additional flexibility in work hours in the FFCRA. The FFCRA provided that not all hours between the first and last work activity performed would be considered compensable hours. This temporarily changed the traditional notion of a work day to allow employees flexibility to address childcare or schooling needs, among other things.

COVID-19 Impact on Employees Exempt from Wage and Overtime Requirements Under the FLSA

The FLSA recognizes certain exemptions to minimum wage and overtime requirements under Section 13(a)(1), including executive, administrative, or professional exemptions. Recent changes to job duties, leave, and salaries of exempt employees have resulted in many questions by employers and employees alike. These changes have since been addressed by the DOL.

First, an exempt employee temporarily performing nonexempt duties during a public health emergency, including COVID-19, will not necessarily lose the exempt status. More specifically, DOL guidance recognizes that its regulations allow an employee to perform nonexempt duties in emergencies that “threaten the safety of employees, a cessation of operations or serious damage to the employer’s property’ and which are beyond the employer’s control and could not reasonably be anticipated.” It follows that employees who are required to perform these duties resulting from COVID-19 and otherwise meet the salary requirement (paid a salary of at least \$684 a week) will not lose their exempt status.

Second, an exempt employee will not lose their exempt status if he or she elects to take leave provided under the FFCRA. The DOL clarified that when an employee chooses to take emergency paid sick leave or expanded family and medical leave under the FFCRA, it will not be construed as undermining any FLSA exemption requirements.

Finally, an employer can reduce an exempt employee’s salary for economic reasons under COVID-19 if certain conditions are met and without losing the exempt status. For instance, any reductions in salary must be determined before work is performed by an exempt employee, not as a deduction after an employer’s needs are determined. Additionally, an exempt employee’s salary cannot be reduced as a way to circumvent FLSA salary requirements, but instead must genuinely be a result of COVID-19. If these two conditions—plus, the salary requirement of no less than \$684 per week –

are met, an employee should not lose their exempt status.

Hazard Pay Is Not Required Under the FLSA for Employees Working During COVID-19

A question that has been percolating since the inception of COVID-19, is whether employees working during the pandemic are entitled to hazard pay under the FLSA. The recent guidance by the DOL provides an answer: no. The DOL reasoned that hazard pay is usually an issue determined between an employer and employee, unless otherwise addressed by state or local laws. Instead, the FLSA requires employers to pay its employees: (i) no less than the federal minimum wage of \$7.25 an hour; and (ii) overtime for any hours worked in a week over 40 at one and a half times the employee's regular rate of pay.

Family Medical Leave Act – Questions 12 and 13

Telemedicine Visit Qualifies as an In-Person Visit Required to Establish a Serious Health Condition under the FMLA

In order to qualify for FMLA leave, an employee must establish the existence of a serious health condition for themselves or for an immediate family member. This usually requires an employee to visit a health care provider in-person and to obtain a signed certification from the health care provider. To better serve the public's interest and current COVID-19 related health care directives, the DOL will consider a telemedicine visit in lieu of an in-person visits if it: (i) includes an examination, evaluation or treatment by a health care provider; (ii) is performed by video conference; and (iii) is permitted and accepted by state licensing authorities. In addition to allowing telemedicine visits until December 31, 2020, the DOL will also consider electronic signatures to be signatures for establishing a serious health condition under the FMLA.

The FMLA Does Not Prohibit an Employer from Requiring a COVID-19 Test Before Returning to Work

To ensure the safety of employees, many employers have considered requiring employees to test for COVID-19 prior to returning to work. The DOL guidance recently clarified that the FMLA does not prohibit an employer from requiring such tests. Laws other than the FMLA, however, may impose restrictions on the manner in which an employer can require a test and the type of test required.

Under the FMLA, an employer has a duty to reinstate an employee to the same job or an equivalent position. But, the FMLA does not provide protection from actions that an employee would have been subject to outside of FMLA leave. Thus, an employer can require COVID-19 testing so long as it is required of all employees without regard to whether FMLA or other types of leave have been taken.

Family First Coronavirus Act – Questions 94 – 97

An Employer May Be Able to Require an Employee to Take Leave or Telework Prior to a Negative COVID-19 Test Under the FFCRA

Like returning from FMLA leave, an employee who returns to work after taking emergency paid sick leave under the FFCRA has a right to be restored to the same or equivalent position with some exceptions. Because of the health concerns surrounding COVID-19, the DOL allows an employer to temporarily restore an employee to an equivalent position that requires less interaction with other employees or require that such an employee telework.

Moreover, an employee returning from emergency paid sick leave who has interacted with a person diagnosed with COVID-19 may be required to telework or take leave until he or she has tested negative for COVID-19. As mentioned in prior DOL

guidance, a testing policy such as this must be applied equally to employees returning from emergency paid sick leave. Further, an employer would be prohibited from requiring an employee to telework or be tested merely because the employee took FFCRA leave.

FFCRA Leave and Furlough

The DOL recently addressed issues arising from employees returning from furlough, including an employee's entitlement to and amount of leave as well as the extension of furlough to avoid granting leave.

As it relates to emergency paid sick leave, pursuant to the FFCRA, an employee is entitled to up to 80 hours of leave, whether before or after a furlough. For instance, the DOL guidance stated that an employee is not eligible for emergency paid sick leave under the FFCRA after furlough if he or she used 80 hours of paid sick leave prior to furlough. If an employee took less than 80 hours of emergency paid sick leave prior to the furlough, he or she would be entitled to use the remaining hours after the furlough if you had a qualifying reason to do so.

As it relates to expanded family and medical leave under the FFCRA, an employee is entitled to up to a total of 12 weeks regardless of whether all or part of it was taken before or after furlough. For example, an employee who uses four weeks of expanded family and medical leave prior to furlough can use up to eight weeks after furlough if such a request is supported by a qualifying reason. Such qualifying reasons may include caring for a child because a child care provider is unavailable for COVID-related reasons. The DOL suggests that employers treat post-furlough requests for expanded family and medical leave as a new a request for new leave, assuming it is supported by proper documentation to identify any new reasons for leave, which may have changed during furlough.

Further, the DOL provided guidance that an employer cannot extend a furlough for particular employees to avoid granting FFCRA leave. The DOL reasoned that this type of pointed furlough extension would be considered discrimination or retaliation against an employee for attempting to or exercising their right to take FFCRA leave. If an employee qualifies for leave under the FFCRA, he or she is entitled to take it until it has been exhausted. An employer cannot use a request for FFCRA leave as a reason to support a negative employment decision, such as determining which employees to recall from furlough.

The DOL guidance is subject to frequent updates and changes as laws related to COVID-19 continue to develop. Akerman continues to follow COVID-19 developments as they impact the workplace and will provide frequent updates on those developments. For assistance addressing issues in your workplace, contact your Akerman attorney.

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