What Employers Need To Know About DOL's New Guidance On Return-To-Work, Remote Work, And Wage And Hour Issues

Insights
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The Department of Labor issued several sets of new guidance materials to employers as return-to-work, remote work, and wage and hour issues remain hot – and sometimes confusing – topics. The agency recognizes that the intersection between the Families First Coronavirus Response Act (FFCRA), the Family and Medical Leave Act (FMLA), and the Fair Labor Standards Act (FLSA) can be a challenging place for compliance purposes, and therefore compiled some additional materials to aid you in navigating this journey.

We've reviewed the additional FAQs added by the Wage and Hour Division discussing the FLSA, the FFCRA, and the FMLA, and provided summaries of the significant developments below. What do employers need to know about updated compliance priorities when it comes to return-to-work, remote work, and wage and hour issues?

Labor Department Tackles Common Remote Work Questions
In several of the new questions and answers, the agency clarified your rights and responsibilities when it comes to remote workers.

You May Be Able To Require An Employee To Work Remotely
The Department of Labor said that you may temporarily require an employee returning from FFCRA leave to work remotely, or reinstate them to an equivalent position requiring less interaction with coworkers, in certain situations. While employees returning from FFCRA leave have a right to be restored to the same or an equivalent position, employees who have potentially been exposed to COVID-19 – for example, those who took leave to care for a family member who was advised by a health care provider to self-quarantine because of COVID-19 symptoms – can be treated differently. Specifically, the agency said that you may require any employee who knows they have interacted with an infected person to telework or take leave until they have personally tested negative for COVID-19 infection. "However," the agency said, "you may not require the employee to telework or be tested for COVID-19 simply because the employee took leave under the FFCRA."

You Must Be Mindful Of Compensating Remote Workers Properly
The agency confirmed what most employers already know: you have a responsibility to pay your teleworking employees even for the time they spend working during unauthorized hours. This is a fairly basic premise under the Fair Labor Standards Act (FLSA), but it is worth reinforcing given the exponential rise in remote work arrangements in the last several months – especially among

employers who are not experienced in managing telework relationships. The agency also noted that you must compensate your employees for unreported remote work that you know or have reason to believe had been performed. "However, you are not required to compensate your employee for unreported hours of telework that you have no reason to believe had been performed, i.e., where you neither knew nor should have known about the unreported hours," the DOL said.

State law may offer further contours to this issue, so make sure you are familiar with the standards applied in your local jurisdictions when it comes to working hours. In most cases, you will be able satisfy your compensation obligations with respect to remote workers by providing reasonable time-reporting procedures and ensuring you compensate employees for all reported hours. You may be able to discipline workers who violate your policies or instructions on working past authorized hours, but check with your legal counsel before proceeding.

You Can Offer Flexibility To Remote Workers

The agency encouraged flexibility when it said that you do not always have to include as "hours worked" all the time between an employee's first and last principal activities under "the continuous workday" doctrine. The agency reiterated an illustrative example of an employee using FFCRA leave. "Assume you and your employee agree to a telework schedule of 7–9 a.m., 11:30–3 p.m., and 7–9 p.m. on weekdays. This allows your employee, for instance, to help teach their children whose schools are closed, reserving for work times when there are fewer distractions." While of course you need to compensate your employee for all hours actually worked that day, the agency confirmed that you have no obligation to pay them for all 14 hours between the first principal activity at 7 a.m. and last at 9 p.m. under these circumstances.

Return-To-Work Scenarios Demand Strict Attention

You may feel understandably excited about the prospect of welcoming employees back to work, whether after a furlough, lay-off, or a leave of absence, but employers can't let their guard down during this period of time. You may overlook critical legal obligations that could spell trouble down the road. The DOL's guidance on return-to-work scenarios provides some much-needed clarity and offers you a reminder of your responsibilities during this time.

Leave Issues After Bringing Employees Back From Furlough

The Department of Labor offered two specific examples to illustrate the leave obligations you may have to offer your workers brought back from furlough. First and foremost, the agency reminded employers that the FFCRA obligates you to provide up to 12 weeks of expanded family and medical leave to your workers once they return from any furlough absence, and that their time off on furlough does not count as FFCRA time. If an employee used four weeks of leave before furlough, for example, and then was off work for several months, they are still eligible for eight additional weeks of leave for any qualifying reason. The agency reminded employers that the reason for any such leave may have changed during the furlough, so you should treat a post-furlough request for expanded family and medical leave as a new leave request and have the employee provide you the appropriate documentation related to the current reason for leave. "For example," the agency said,

"before the furlough, she may have needed leave because her child's school was closed, but she might need it now because her child's summer camp is closed due to COVID-19-related reasons."

The second example involves a situation where an employer is returning employees to work after a local quarantine order forced a mass furlough. If a specific worker would require FFCRA leave to care for their child upon being called back for work, the Labor Department warned employers that you cannot extend the furlough for that employee to avoid FFCRA obligations. That would be considered discrimination or retaliation against an employee for exercising or attempting to exercise their right to take leave under the FFCRA.

"If your employee's need to care for his child qualifies for FFCRA leave, whether paid sick leave or expanded family and medical leave, he has a right to take that leave until he has used all of it. You may not use his request for leave (or your assumption that he would make such a request) as a negative factor in an employment decision, such as a decision as to which employees to recall from furlough," the agency said.

Paid Sick Leave Could Have Been Exhausted Before Furlough

The DOL also discussed the limitations of FFCRA paid sick leave and how it could come into play on the other end of a furlough. If a worker used two weeks (80 hours) of FFCRA paid sick leave before being furloughed, the agency indicated that the worker would not be eligible for an additional bank of FFCRA paid sick leave after returning to work. Employees are limited to a total of 80 hours of FFCRA paid sick leave.

Things Are Different In This New COVID-19 Era

The agency also reminded employers that the workplace employees are returning to is different from the one they left at the start of the pandemic. This includes the fact that telemedicine visits will count as in-persons visit when establishing whether workers have a "serious health condition" under the FMLA. And a health care provider's electronic signature is sufficient to satisfy the signature requirement.

Wage And Hour Clarifications

Finally, the agency answered several questions confirming and clarifying issues related to compensation during the pandemic.

- You can require exempt employees to **temporarily perform nonexempt duties** during the COVID-19 public health emergency and continue treat them as exempt (so long as you continue to pay them a salary basis of least $684 per week). As the agency indicated, COVID-19 is a rare event affecting the public welfare of the entire nation that employers could not reasonably anticipated. For this reason, it is considered an "emergency" under the FLSA permitting temporary flexibility in this regard. Nonetheless, you should be cognizant of these circumstances and, if only to minimize the risk of a challenge, limit them in nature and duration to the extent possible.

- **"Hazard pay" is not required under the FLSA for employees working during the COVID-19 pandemic.** The DOL confirmed that pay above and beyond minimum wage and overtime requirements are usually determined privately between employers and employees or their authorized representatives. Obviously, local laws may impose other obligations, so check with your legal counsel to ensure you are in compliance. Moreover, there can be regular rate implications for non-exempt employees.
- You can provide **exempt employees with paid sick leave or expanded family and medical leave under the FFCRA** without affecting their exempt status. You should proceed carefully with respect to unpaid time off, however, to ensure that you only make permissible salary deductions.
- You can also **reduce an exempt employee's salary** because of the COVID-19 pandemic and subsequent economic slowdown. Employers are generally permitted to prospectively reduce the amount regularly paid to a salaried exempt employee for such reasons so long as it is predetermined rather than an after-the-fact deduction based on your day-to-day or week-to-week needs. Also, the agency confirmed that any such salary change must be bona fide, meaning the change is not an attempt to evade the salary basis requirements and is actually because of COVID-19 or an economic slowdown as opposed to the quantity or quality of the employee's work. This distinction is not always clear, so check with legal counsel before proceeding.

Conclusion

"The U.S. Department of Labor understands how critically American workers and employers need this information as they return to work. Continuing to provide it remains a top priority for the Wage and Hour Division," said DOL Wage and Hour Division Administrator Cheryl Stanton in a statement accompanying the release. "With so many workers and employers committed to the greatest comeback the American workforce has ever seen, we are providing ongoing guidance to help them better understand their rights and responsibilities to protect workers and help ensure a level playing field for employers as our economy recovers."

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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Richard R. Meneghello
Chief Content Officer
503.205.8044
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