



Labor Department Guidance On Mandatory Postings Poses Challenges for Remote Workplaces

Insights

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Where should an employer post federally required posters when many or most employees are working remotely? The U.S. Department of Labor (USDOL) recently released a Wage and Hour field assistance bulletin on December 23 addressing when electronic notice of notice will satisfy the notice requirements under various federal statutes. Before you throw away all your posters, however, here is what employers need to know about this new communication from the USDOL.

What Laws Enforced By USDOL Require Notices Or Workplace Postings?

It's worth doing a quick review of the various key federal laws that require some form of posting or notice. The following are some of the statutes enforced by USDOL that have a posting requirement:

- The Occupational Safety and Health (OSH) Act: All covered employers are required to display and keep displayed the OSHA "Job Safety and Health: It's the Law" poster. Employers in states with an OSHA-approved state plan may be required to post a state version of the OSHA poster.
- The Family and Medical Leave Act of 1993 (FMLA): All covered employers are required to display and keep on display a poster explaining the provisions of the FMLA and telling employees how to file a complaint with the Wage and Hour Division of violations of the Act.
- The Fair Labor Standards Act (FLSA): Every employer of employees subject to the FLSA's minimum wage provisions must post, and keep posted, a notice explaining the Act in a conspicuous place in all of their establishments.
- The Uniformed Services Employment and Reemployment Rights Act (USERRA): Employers are required to provide to persons covered by USERRA a notice of the rights, benefits, and obligations of the employees and employers under USERRA. To do this, employers may post the notice entitled "Your Rights Under USERRA" where employer notices are customarily placed, mail it to workers, or by distributing it via electronic mail.

What Does The Wage And Hour Field Assistance Bulletin Change?

The Electronic Posting Field Assistance Bulletin No. 2020-7 (FAB) is an internal USDOL document that provides guidance to Wage and Hour field staff on when, as a matter of enforcement policy, the agency will consider these forms of electronic notice to satisfy the notice requirements under the

following statutes and their corresponding regulations: FMLA, Section 14(c) of the FLSA, the Employee Polygraph Protection Act (EPPA), and the Service Contract Act (SCA).

The FAB notes that, while employers may send required notices and posters electronically, statutes like the FLSA and FMLA require employers to “post and keep posted” or require the posting of a notice “at all times.” This means that employers cannot simply meet their notice obligations through a direct mailing or other single notice.

The FAB notes that, if a statute and its regulations require a notice to be continuously posted at a worksite, in most cases, the Wage and Hour Division will only consider electronic posting an acceptable substitute for the continuous posting requirement in certain circumstances. According to the agency bulletin, electronic posting is only acceptable “where (1) all of the employer’s employees exclusively work remotely, (2) all employees customarily receive information from the employer via electronic means, and (3) all employees have readily available access to the electronic posting at all times.”

And as if that was not enough, the FAB states that even where certain statutes permit employers to meet notice requirements by delivering individual notices to each employee, as is the case with the SCA and Section 14(c) of the FLSA, emailing the notice to an employee is only sufficient if the employee “customarily receives information from the employer electronically.” Similarly, the USDOL will not consider electronic posting on a website or intranet to be an effective means of providing notice if an employer does not customarily post notices to affected employees or other affected individuals electronically. Further, if an employer does not inform its employees that certain notices are available electronically, it will be as if the employees have not received said notices.

Conclusion

Given the limitations discussed in the FAB, it is clear that employers with some, but not all, employees working remotely, must continue to post information. The USDOL also “encourages” electronic posting for the teleworking employees as well.

Employers who with fully remote workforces may comply with the continuous posting requirements electronically so long as all their employees work remotely and usually receive work-related information via electronic means. The USDOL’s guidance also requires that employees enjoy “readily available access” to information that has been electronically posted at all times — requiring for example that employees be able to access the notice without having to request permission.

Longer term, employers may want to establish more easily accessible space in the company’s intranet or employee portal for federal and state posters. As an example, does the company’s intranet/portal appear automatically on employees’ computers when they log in? Where hiring occurs, job applicants must be able to view applicable posters. All virtual hiring and orientation process must consider these federal and state requirements.

Check out [this link](#) for more information on what notice is required by the USDOL and other helpful resources. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information on employment law issues, and, for further information, contact your Fisher Phillips attorney.

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