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DOL Issues Additional COVID-19 Guidance Covering FFCRA, FMLA, and FLSA Issues

Background

Throughout the COVID-19 pandemic, the U.S. Department of Labor (DOL) has continually issued updated guidance to employers and employees, including a series of [FAQs](#) about the Families First Coronavirus Response Act (FFCRA). As the available facts about COVID-19 have evolved, so has the national response to the pandemic, so it is essential for employers to stay up to date with the latest guidance.

Summary

On July 20, 2020, the DOL issued their latest COVID-19 guidance regarding the Families First Coronavirus Response Act (FFCRA), Family and Medical Leave Act (FMLA), and Fair Labor Standards Act (FLSA). This new and updated guidance is an important resource for employers trying to navigate the challenging employment issues surrounding the current pandemic. Here is our summary, broken down by category.

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FFCRA Guidance (94 – 97):

- Due to the current public-health emergency, employees returning from FFCRA leave may be asked to telework rather than return to the physical workplace. They may also be assigned to a different position or asked to take additional leave until they test negative for COVID-19. Employers must apply these measures fairly and uniformly to all staff, not just to those who took FFCRA leave. Otherwise, it may appear that the employer is taking punitive measures against employees for taking FFCRA leave, which is prohibited.
- Employees who exhausted all their paid sick leave (up to 80 hours) under the FFCRA prior to being furloughed are not entitled to additional paid leave if and when they return to work. Employees who only used part of their FFCRA paid sick leave before being furloughed may still use the remainder upon their return.
- Like the previous point, employees who use a portion of their paid expanded family and medical leave before being furloughed may still use the remainder upon returning to work. However, their request for additional leave should be treated as a new request, not an extension of the old one, as their reason for requesting leave may have changed.
- And finally, employers who have furloughed their staff cannot refuse to bring certain employees back from furlough because they believe these employees may take leave under the FFCRA. Doing so would be considered a form of discrimination and should not play a role in the employer's treatment of their employees.

FMLA Guidance (12 and 13):

- Until December 31, 2020, telemedicine visits will be considered equivalent to in-person visits, and electronic signatures will be considered signatures for the purposes of establishing a serious health condition under the FMLA. To qualify, the telemedicine visit must:
 - Include an examination, evaluation, or treatment by a health care provider;
 - Be performed via video conference; and
 - Be permitted and accepted by state licensing authorities.
- The FMLA does not prohibit employers from requiring employees to pass a COVID-19 test prior to returning to the workplace. Even if the employee's FMLA leave was unrelated to COVID-19, testing requirements may still be enforced. That said, other laws, such as the Americans with Disabilities Act (ADA), may place certain restrictions on mandatory medical testing.

FLSA Guidance (14 – 19):

- For the purposes of determining wages, telework should be treated exactly the same as work performed at the employer's worksite. That means that employers must compensate employees for all telework performed, including overtime work, if the employer knows or has reason to believe the work was performed. Employers should still require nonexempt teleworking employees to submit weekly time records, inform them of proper time recording procedures, and advise them that working off the clock is against policy.
- Employers who offer their nonexempt employees flexible work hours while teleworking due to COVID-19 do not need to compensate them for all hours scheduled between the start and end of the workday. Rather, employers only need to pay these employees for the hours that they "actually worked" during the day.
- Three of the new FAQs relate specifically to the treatment of exempt employees. They are as follows:
 - Exempt employees will not lose their exempt status due to taking paid sick leave or expanded family and medical leave.
 - Exempt employees may perform nonexempt duties as required by the emergency without losing their exempt status, as long as they continue to receive a salary of at least \$684 per week.
 - Exempt employees may have their pay reduced for economic reasons related to COVID-19 without losing their exempt status, as long as: 1) they continue to be paid at least \$684 per week, and 2) the salary change is predetermined and genuinely related to the economic downturn. Salary cannot be reduced after the fact or as an attempt to evade salary requirements.
- Finally, the FLSA does not require hazard pay for employees working during the pandemic. However, state or local laws as well as private agreements with employees may require some form of hazard pay. "Hazard pay" is additional pay for performing hazardous duty or work involving physical hardship.

Employer Next Steps

- Review the most updated guidance regarding the FFCRA, FMLA, and FLSA to ensure that you are compliant with these laws during the COVID-19 pandemic.
- Continue to stay up to date with the most recent guidance from the DOL and other government agencies.
- If you are a Full-Service or Virtual HR client and would like our assistance with updating your policies, please [email us](#).

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