

July 22, 2020

On July 20, the U.S. Department of Labor (DOL) published new guidance on the protections and requirements of the [Fair Labor Standards Act \(FLSA\)](#), the [Family and Medical Leave Act \(FMLA\)](#), and the [Families First Coronavirus Response Act \(FFCRA\)](#) as they apply to workers and employers affected by the coronavirus pandemic. There is a lot of detail in the new guidance, but here are some key takeaways.

FLSA

The DOL's guidance attempts to answer some common questions about how the FLSA's wage and hour rules apply to the working conditions created by the coronavirus pandemic:

- Under the Wage and Hour Division's (WHD) continuous workday guidance, all time between the performance of the day's first and last work tasks is compensable work time for non-exempt employees. However, the DOL has provided alternative guidance for employees authorized to telework on a flexible schedule, according to which not all hours between the first and last work tasks of the day need be counted as compensable. If, for example, an employee teleworks in the early morning and late evening to allow for child care in the afternoon, the employee must be compensated for only those hours actually worked.
- Salaried executive, administrative, or professional employees exempt from the FLSA's minimum wage and overtime requirements may perform nonexempt duties during the pandemic without losing exempt status, as long as they continue to be paid a weekly salary of at least \$684. The DOL notes that WHD regulations permit exempt employees to perform nonexempt duties, without losing exempt status, during 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 be anticipated. The DOL's guidance indicates that the coronavirus pandemic is considered an emergency of this description.
- The FLSA does not provide for hazard pay for employees working during the pandemic, although, as the DOL notes, state or local law might require it.

- Salaried employees exempt from the FLSA's wage and hour requirements may take leave under the Families First Coronavirus Response Act (FFCRA) without affecting their status as exempt.
- An employer may reduce the salary of a salaried employee exempt from the FLSA's wage and hour requirements without affecting that employee's status as exempt, as long as any reduction is due to the economic consequences of the pandemic; is determined prospectively, not retrospectively given the employer's day-to-day or week-to-week needs, or the quantity or quality of the employee's work; and does result in a salary of less than \$684 per week.

FMLA

The FMLA requires public employers and private employers with more than 50 employees to allow eligible employees up to 12 weeks per year of unpaid, job-protected leave. The DOL's guidance makes several points about the FMLA's provisions as they apply to the circumstances created by the coronavirus pandemic:

- A person incapacitated by COVID-19 or the flu may have a "serious health condition" for the purposes of the FMLA. An employee with a "serious health condition," or who must care for a family member with a "serious health condition," is protected by the FMLA, if otherwise eligible.
- However, a person taking leave to avoid infection by COVID-19 is not protected by the FMLA.
- The DOL's guidance reminds employers that an employee with a disability can be properly excluded from the workplace only if the employer (a) obtains objective evidence that the employee poses a direct threat (a significant risk of substantial harm) and (b) determines that there is no reasonable accommodation available that would eliminate the direct threat.
- Until December 31, 2020, telemedicine appointments will be considered in-person appointments for the purposes of establishing a "serious health condition" under the FMLA, provided that the telemedicine appointment 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.
- An employer is not prohibited by the FMLA from requiring an employee on FMLA leave to take a COVID-19 test before returning to work as part of a testing policy implemented while the employee was on leave, as long as the employer's new testing requirement applies to all employees and not only those returning from FMLA leave.

FFCRA

The FFCRA requires that public employers and private employers with fewer than 500 employees provide sick leave and expanded family and medical leave to employees unable to work for reasons related to the coronavirus pandemic. The DOL's new guidance answers several questions about how the FFCRA affects employers and employees as workers seek to extend leave or return from it:

- An employer may require an employee seeking leave under the FFCRA to identify his or her symptoms and a date for a test or doctor's appointment. An employer may not require an employee to provide any further documentation or certification. The DOL notes that this minimal requirement of documentation is intended to encourage employees with COVID-19 symptoms to take leave and so slow the spread of the virus.
- An employee may not take emergency paid sick leave or expanded family and medical leave to care for a child whose school is in summer recess or closed for some reason not related to the coronavirus pandemic. However, the employee may be able to take leave if the child's care provider, such as a camp or a similar program, is closed for a pandemic-related reason.
- Employees returning from paid sick leave under FFCRA have a right to be restored to positions equivalent to the ones they occupied before taking leave. However, employers concerned about the possibility that returning employees might expose others to the virus may require returning employees to telework or take a COVID-19 test, if these requirements apply to all employees possibly exposed to the virus, and not just to those returning from FFCRA leave. Any requirement that an employee take a test or telework cannot apply only to those taking FFCRA leave.
- Employees' allowance of two weeks' emergency paid sick leave if used up is not replenished after return from a furlough.
- Employers may not extend an employee's furlough because that employee would need to take FFCRA leave if recalled from furlough. Employers may not discriminate or retaliate against employees exercising or seeking to exercise their right to FFCRA leave.

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