

Monthly Minute Memo: *January 21, 2021 – U.S. Department of Labor Updates*

In the final days of 2020, the U.S. Department of Labor (“DOL”) issued new guidance regarding the expiration of mandatory FFCRA leave, telemedicine visits, electronic posting for FLSA and FMLA Notices, and the compensability of travel time for employees who spend portions of their day working from home and in the workplace. Below is a summary of the recent DOL guidance.

I. The Expiration of Mandatory FFCRA Leave.

As set forth in our previous Minute Memo, mandatory FFCRA leave ended on December 31, 2020. However, Congress passed legislation allowing employers to voluntarily provide FFCRA leave and receive tax credits until March 31, 2021.

According to the recent DOL guidance, even if an employee did not use his or her FFCRA leave before December 31, 2020, employers are not required to provide FFCRA leave after December 31, 2020. However, if an employer did not pay the employee for FFCRA leave taken before December 31, 2020, the employee may have a cause of action to obtain payment for FFCRA leave taken or requested during the effective period of the FFCRA (April 1, 2020 through December 31, 2020). The statute of limitation for a claim related to the FFCRA is two years from the date of the alleged violation or three years in cases involving alleged willful violations.

President Biden’s Proposal for Extending FFCRA Leave.

Prior to his inauguration, President Biden released his COVID-19 plans, which include the renewal the FFCRA mandatory leave requirements. However, under his plan, FFCRA leave will apply to all employers, not just those employers with under 500 employees. Additionally, President Biden’s proposal seeks to eliminate the exemptions for health care providers and those employers with less than 50 employees. President Biden’s plan proposes to provide employees with over 14 weeks of paid sick and emergency FMLA leave for parents with caregiving responsibilities when a child’s school or daycare is closed, for people who have or are caring for people with COVID-19 symptoms, or for people who are quarantining due to exposure. Additionally, leave will be available for people needing time to receive the vaccine. Prior to its expiration, the FFCRA capped the total amount of pay available for sick leave at \$5,110 and emergency FMLA at \$2,000. However, under President Biden’s proposal, the maximum paid leave benefit would be \$1,400 a week or \$19,600 for 14 weeks of FFCRA leave for eligible employees. President Biden also proposes extending the employer tax credit and reimbursing employers for 100 percent of the cost of the leave. FFCRA leave would be extended until September 30, 2021.

Any extension of FFCRA leave, including the changes proposed by President Biden, requires an amendment to the statute by Congress. We will continue to notify our clients on any new developments regarding the possible renewal of FFCRA leave.

II. Electronic Posting for Required FLSA and FMLA Notices.

Considering that more employees are working remotely due to COVID-19, the DOL issued Field Assistance Bulletin 2020-7 stating that electronic notice will satisfy the notice posting requirements under the Fair Labor Standards Act (“FLSA”) and Family and Medical Leave Act (“FMLA”).

Generally, to satisfy the FMLA posting requirements electronically, the electronic notice must be as effective as a hard copy posting. Individuals must be able to access the electronic posting without having to specifically request permission to access the notice. An employer must take steps to inform employees of how to access the electronic notice. Additionally, the electronic notice must be conspicuous and not hidden in an unknown or little-known electronic location. Employees must be able to determine which electronic posting is applicable to them and their worksite.

With regard to the required FLSA posting, electronic notice is only allowed if: (1) all employees exclusively work remotely; (2) all employees customarily receive information from the employer through electronic means; and (3) all employees must have continued access to the electronic posting.

III. Telemedicine and Serious Health Conditions under the FMLA.

Prior to the COVID-19 pandemic, for an employee to establish a serious health condition under the FMLA, an in-person medical professional visit was required. As a result of the COVID-19 pandemic, the DOL initially issued guidance allowing a telemedicine visit to be considered an in-person visit, but that guidance expired on December 31, 2020.

However, pursuant to DOL Field Assistance Bulletin No. 2020-8, a telemedicine visit with a health care provider is considered an in-person visit if the visit includes: (1) an examination, evaluation, or treatment by a health care provider; (2) the telemedicine visit is permitted and accepted by state licensing authorities; and (3) performed by video conference. Communications such as a telephone call, letter, email, or text message are insufficient by themselves to qualify as an in-person visit for purposes of establishing a serious health condition for FMLA eligibility.

IV. Travel Time During a Partial Telework Day.

Finally, the DOL issued an opinion letter addressing whether certain travel time is compensable when employees split their days between teleworking and working from the office. Although the opinion letter was limited to specific facts, the DOL opined that travel time in the following situations would not be compensable:

- An employee leaves the workplace early to attend a parent-teacher conference at her child's school. The employer allows her to work from home rather than return to the office after the conference. The time she left work until she resumes work from home is not compensable.
- The employer allows an employee to work from home before her doctor's appointment but requires the employee to return to the workplace after her appointment. The employee works for an hour from home, but then engaged in 2 hours of personal activities prior to her appointment. Although the one hour of work at home is compensable, the personal time before the appointment, the time at the appointment and travel time to the workplace is non-compensable until she resumes working.

Additionally, the DOL's opinion letter stated that travel between the employee's home, the personal appointments, and the employer's office is not compensable travel time under the continuous workday doctrine. While the period between an employee's first and last principal activities will "in general" be compensable, if an employee is completely relieved of duty, this time is non-compensable. Thus, when an employee arranges for their workday to be divided into a block of time worked from home and a block of time worked at the office, separated by a block of personal time, the personal time is not compensable, even if the employee uses some of that time to travel between home and office.

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