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Insights

The Ongoing Pandemic of Information: Updates to FFCRA, FLSA, and FMLA Guidance

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The Department of Labor (DOL) recently updated its guidance on the Families First Coronavirus Response Act (FFCRA), the Fair Labor Standards Act (FLSA), and the Family and Medical Leave Act (FMLA). To properly handle employees' requests for leave and comply with wage and hour requirements, employers should understand the DOL's most recent guidance.

I. The FFCRA: Returning to Work Post-FFCRA Leave, and the Effect of Furloughs on FFCRA Leave for Child Care.

The DOL expanded upon its prior **FFCRA Questions and Answers** guidance by adding questions and answers related to self-quarantine advisements and the effect of furloughs on FFCRA leave for child care. "FFCRA Leave" is both the paid leave under the Emergency Paid Sick Leave Act ("Paid Sick Leave") and the paid/unpaid leave under the Emergency Family and Medical Leave Expansion Act ("Expanded Family and Medical Leave").

Returning to Work Post-FFCRA Leave

If an employee takes FFCRA Leave to care for a family member advised by a health care provider to self-quarantine after experiencing symptoms of COVID-19, an employer can require the employee to telework temporarily or take leave before returning to work. The FFCRA requires employers to reinstate or restore employees returning from FFCRA Leave into the same or an equivalent position, with certain exceptions. However, because of the concerns related to COVID-19 exposure, the DOL permits employers to temporarily reinstate the employee in an equivalent position requiring less interaction with co-workers or require the employee to telework. Employers can also require the employee to take leave until the employee tests negative for COVID-19.

- Compliance Note: Employers should apply requirements uniformly regardless of the type of leave that the employee takes. Employers could risk violating the FFCRA non-discrimination provisions if they only required such action because the employees were returning from FFCRA Leave.

The Effect of Furloughs on FFCRA Leave for Child Care

Employees are entitled to 12 weeks of Expanded Family and Medical Leave and employees need not take such leave in a continuous period. For example, if an employee used 4 weeks of Expanded Family and Medical Leave before being furloughed, upon return to work, the employee can use the remaining leave (8 weeks) to care for the

employee's child if the child's place of care is closed or unavailable due to COVID-19. Since the employee used 4 weeks before being furloughed, the employee may use the remaining 8 weeks.

- *Compliance Note:* The original reason for taking the first 4 weeks of leave may differ from the remaining 8 weeks. For example, the employee may have sought leave because the child's school was closed; however, now the employee may need leave because the child's summer camp is closed. Thus, employers should treat the request to use the remaining weeks as a new request for FFCRA Leave.

If an employer places employees on furlough and then seeks to bring employees back to work, the employer cannot extend an employee's furlough for the reason that the employee would need to take FFCRA Leave if the employee returned. Basing employment decisions on whether an employee would need to take FFCRA Leave is considered discriminatory. To avoid allegations that such choices are discriminatory or retaliatory, employers should not consider an employee's actual or anticipated request for protected leave as a factor in any employment decision.

- *Compliance Note:* Apply policies to employees uniformly to avoid potential claims of discrimination.

II. The FLSA: Compensable Time while Teleworking, Exempt Employees Performing Non-Exempt Duties, Hazard Pay, and Effect of FFCRA Leave on Exempt Status

The DOL expanded its **COVID-19 and the FLSA Questions and Answers** to address compensable time while teleworking, exempt employees performing non-exempt duties, hazard pay, and what effect, if any, FFCRA Leave has on exempt status.

Compensable Time while Teleworking

Employers must compensate employees for all time actually worked regardless of whether the employer authorized such work time, including time worked but unreported if the employer had reason to believe the employee performed work. Under the FLSA, work is work regardless of whether the employee performs work at the employee's primary worksite or another location, such as the employee's home.

- *Compliance Note:* Telework arrangements present unique challenges to FLSA compliance. While employers should carefully evaluate each situation, the safest approach is to err on the side of caution by compensating the employee and then addressing the issues moving forward, either through clarified expectations or disciplinary action, if the employee worked when directed not to or violated a similar directive.

Generally, an employer must compensate an employee for any time worked between the employee's first and last principal activities of the workday. However, the DOL acknowledges that this guidance does not comport with teleworking arrangements and would discourage flexibility. Therefore, the FFCRA provides that employers allowing employees to telework with flexible hours during COVID-19 do not need to count all hours worked between the first and last principal activities. If an employee works 7:00-9:00 AM, 11:30 AM-3:00 PM, and 7:00-9:00 PM, the employer only needs to compensate the employee for the time actually worked, 7.5 hours.

Exempt Employees Performing Non-Exempt Duties

Employers may allow exempt employees to temporarily perform non-exempt duties required by the COVID-19 public health emergency without losing their exempt status, as long as employers continue to pay exempt employees on a salary basis and at least $684 per week. The DOL Wage and Hour Division regulations state that an exempt employee may "perform nonexempt duties 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 reasonably anticipated." The DOL recognizes that COVID-19 is undoubtedly a "rare event affecting the public welfare of the entire nation that an employer could not reasonably anticipate and is consistent with the FLSA's regulatory criteria for emergencies."[1]

Hazard Pay

The FLSA does not require hazard pay for employees working during the COVID-19 pandemic. While the FLSA dictates the federal minimum wage and overtime requirements, private employers generally determine whether they will offer hazard pay to employees.

- *Compliance Note:* While the FLSA does not impose hazard pay requirements, state or local laws or regulations might. Employers should verify any applicable state and local requirements.

Effect of FFCRA Leave on Exempt Status

An employee's exempt status will not change if the employee takes FFCRA Leave, nor will it affect the employee's eligibility for exemption from the FLSA's minimum wage and overtime requirements.

III. The FMLA: Telemedicine for Health Certifications and the Effect of COVID-19 Viral Tests

In the DOL's most recent update to the **COVID-19 and FMLA Questions and Answers**, it added two more questions and answers that address the following: (1) telemedicine for health certifications; and (2) the effect of COVID-19 viral tests on FMLA leave.

Telemedicine for Health Certifications

From now until December 31, 2020, telemedicine visits will be considered in-person visits to establish a serious health condition under the FMLA. Additionally, electronic signatures are considered signatures. To consider a telemedicine visit as an in-person visit, it must include an examination, evaluation, or treatment by a health care provider; occur via video conference; and state licensing authorities must permit and accept such visits.

The Effect of COVID-19 Viral Tests on FMLA Leave

An employer can require an employee to get a COVID-19 viral test upon returning from FMLA leave. An employer must reinstate an employee in the same or an equivalent position after FMLA leave. However, employees returning from FMLA leave are not protected from actions that would have affected them if they were not on FMLA leave. Thus, if employees on a leave of absence are required to get a COVID-19 test before their return, an employer may require a COVID-19 test for employees returning from FMLA, as well.

- *Compliance Note:* Employers must ensure they treat all employees equally and should document this practice in a policy. In other words, employers cannot only test those returning from FMLA leave but rather must test all employees returning from a similar leave (perhaps of a particular duration) to avoid an FMLA-related claim.

IV. More on the FMLA: Updates to FMLA Forms

The DOL Wage and Hour Division also updated and streamlined FMLA forms for employers. The updated forms include (1) **Notice of Eligibility and Rights and Responsibilities under the FMLA**; (2) **Designation Notice**; (3) **Certification of Health Care Provider for Employee's Serious Health Condition**; and (4) **Certification of Health Care Provider for Family Member's Serious Health Condition**. Although these forms are optional for employers to use, they assist in ensuring compliance with FMLA notices and requests for leave.

These updates do not alter the substance of FMLA leave benefits or protections, but they allow more questions to be answered, allow additional information to be added, and are reorganized with the goal of more efficiently determining whether a condition qualifies as a serious health condition. Also, the forms allow electronic signatures, which is important for employers with employees working remotely. Employers should strongly consider utilizing these forms in their FMLA process.

Notice of Eligibility and Rights and Responsibilities under the FMLA

Employers may use this form to provide employees with notice of their eligibility to take FMLA leave, the next steps they must take, and their responsibilities in requesting FMLA leave. Employers using this form must provide it within five (5) business days of the employee notifying the employer of a need for FMLA leave.[2]

The Notice of Eligibility and Rights and Responsibilities under the FMLA has three sections. The first section contains the notice to the employee of his or her eligibility, which indicates whether the employee is or is not eligible for FMLA and whom to contact with questions. The next section is for the employer to detail any additional information needed. And the last section reiterates the employee's rights and responsibilities. Specifically, it identifies the leave period, whether the employee is a key employee, whether any of the employee's FMLA leave will be paid, a discussion of the employee benefits available during FMLA leave, return to work requirements, and any other requirements while on leave. This form is particularly helpful because it relieves the employer of the burden to remember to provide all of this information.

Designation Notice

Employers may use this form to provide employees with notice that their leave has been designated as FMLA leave, or in other words, approved. Not only are employers required to designate leave as FMLA leave, but they must also notify employees of the amount of leave that will be counted against an employee's leave entitlement. An employer may request an employee to support their leave by certification. This form allows the employer to request such certification and dictate whether a prior certification is lacking necessary information.[3]

The Designation Notice has three sections: (1) a designation of the reason and whether such leave is approved, partially approved, or not approved; (2) a section allowing an employer to request additional information due to an incomplete or insufficient certification; and (3) the final details of the employee's approved leave and whether any part will be paid.

Certification of Health Care Provider for Employee's Serious Health Condition and for Family Member's Serious Health Condition

The remaining two forms are both health care provider certifications, one for an employee's serious health condition, and one for a family member's serious health condition. Under the FMLA, an employer may require an employee seeking FMLA leave for the employee's own serious health condition or a family member's serious health condition to submit medical certification from a health care provider.[4] An employer must give an employee fifteen (15) days to provide such certification, but if the employee fails to provide complete and sufficient medical certification, the leave request may be denied.[5]

Both forms have a section for the employer to note the deadline when the employee must complete the certification and the employee's information regarding their job and essential job functions. Both forms also have a section for the health care provider to identify the extent of the employee's/family member's treatment and the amount of leave needed. The Certification of Health Care Provider for Employee's Serious Health Condition also contains a section for the health care provider to explain whether the employee can perform his or her job duties. The Certification of Health Care Provider for Family Member's Serious Health Condition also contains a section for the employee to indicate his or her relationship to the family member, the care the employee will provide, the amount of leave needed, and whether a reduced work schedule is being requested.

V. Takeaways

The uncertainty of COVID-19, the amount of information available, and the frequency of developments can be overwhelming for employers. While some questions and uncertainty remain, the DOL's recent guidance provides better guardrails for decision-making.

Employers should consider the following steps:

- Review prior policies on FFCRA Leave, wage and hour compliance under the FLSA, and FMLA leave, including FMLA forms.;
- Update policies as necessary, including FFCRA Leave request forms and FMLA forms;
- Revise employee handbooks as necessary to contemplate these additional issues moving forward; and
- Train Human Resources professionals, supervisors, and managers on these topics and encourage them to practice flexibility when addressing requests for leave.

If you need assistance reviewing and updating policies, or determining how the most recent guidance affects your business, please contact **Elizabeth M. Roberson** of Krieg DeVault LLP's Labor and Employment Law practice group.

[1] Q and A #16.
[2] This form satisfies the requirements of 29 C.F.R. §§ 825.300(b) and (c).
[3] This form satisfies the requirements of 29 C.F.R. §§ 825.300(d), 825.301, and 825.305(c), which require an employer to provide an employee with a determination whether leave is for an FMLA qualifying reason within five (5) business days of the employer having enough information.

[4] 29 U.S.C. §§ 2613, 2614(c)(3); 29 C.F.R. § 825.305.
[5] 29 C.F.R. § 825.313.