

### Department of Labor Issues New Guidance, Including Much Needed Guidance on Telework

On July 20, 2020, the Wage and Hour Division (“WHD”) of the U.S. Department of Labor (“DOL”) published further guidance regarding the protections and requirements of certain Acts—the [Fair Labor Standards Act \(“FLSA”\)](#), the [Family and Medical Leave Act \(“FMLA”\)](#), and the [Families First Coronavirus Response Act \(“FFCRA”\)](#)—as understood during the COVID-19 pandemic. Most notably, the guidance provides much-needed clarification regarding telework and obtaining medical certifications for purposes of FMLA and FFCRA leave, as well as additional guidance regarding employees’ rights with respect to FFCRA leave and whether employers are permitted to require COVID-19 tests.

#### **Fair Labor Standards Act**<sup>1</sup>

The July 20, 2020 guidance confirms that when employees are teleworking, the number of compensable hours worked should be determined in the same manner as when employees are at the primary worksite.<sup>2</sup> Employees must be compensated for all hours of telework actually performed—even if the hours were not authorized or reported—as long as the employer knew or had reason to know the work was performed.

Importantly, the WHD clarified that ***employers need not compensate teleworking employees for time taken during the normal workday that the employee uses to complete personal and family obligations***—such as caring for their children during school closures.<sup>3</sup> While, under the WHD’s broadly applicable regulation and its continuous workday guidance, all time elapsing between the employee’s performance of the first and last principal activity of a workday is usually compensable, the Department readily recognized that ***applying this guidance to current teleworking arrangement during a global pandemic would discourage needed flexibility***. Thus, an employer that permits an employee to telework with a flexible-hour arrangement during the COVID-19 health emergency need not count as hours worked all time between the employee’s first and last principal activity of the day.<sup>4</sup> (State laws should also be reviewed with respect to computation of hours, as they may provide enhancements for the benefit of the employee).

Monday’s guidance also provides additional instruction on other FLSA-related issues, including clarification that:

- During the public health emergency, “otherwise-exempt employees may temporarily perform nonexempt duties that are required by the emergency without losing the exemption” as long as they continue to be paid on a salary basis of least \$684 per week;
- The FLSA does not require employers to offer hazard pay;
- Taking FFCRA leave does not affect an employee’s status as exempt or non-exempt; and
- If an employer properly reduces an FLSA-exempt employee’s salary due to an economic slowdown—under proper conditions and pursuant to requirements set out in the guidance—an employee will not lose their exempt status, as long as the employee still receives on a salary basis at least \$684 per week.<sup>5</sup>

<sup>1</sup> COVID-19 and the Fair Labor Standards Act Questions and Answers, <https://www.dol.gov/agencies/whd/flsa/pandemic> (Question and Answer Nos. 14-19, added 07/20/2020)

<sup>2</sup> COVID-19 and the Fair Labor Standards Act Questions and Answers, <https://www.dol.gov/agencies/whd/flsa/pandemic> (Question and Answer No. 14)

<sup>3</sup> COVID-19 and the Fair Labor Standards Act Questions and Answers, <https://www.dol.gov/agencies/whd/flsa/pandemic> (Question and Answer No. 15)

<sup>4</sup> COVID-19 and the Fair Labor Standards Act Questions and Answers, <https://www.dol.gov/agencies/whd/flsa/pandemic> (Question and Answer No. 15)

<sup>5</sup> COVID-19 and the Fair Labor Standards Act Questions and Answers, <https://www.dol.gov/agencies/whd/flsa/pandemic> (Question and Answer Nos. 16-19)

## **Family and Medical Leave Act**<sup>6</sup>

Like the FLSA guidance, the recent FMLA guidance also address questions arising from a world increasingly forced to embrace a “tele” environment—this time with respect to *telemedicine*. Until December 31, 2020, ***the WHD will consider telemedicine visits to be in-person visits, and will consider electronic signatures to be signatures, for purposes of establishing a serious health condition under the FMLA.***<sup>7</sup> To qualify, the telemedicine visit must include an examination, evaluation, or treatment by a health care provider; must be performed by way of video conference; and must be permitted and accepted by state licensing authorities.

The guidance also clarifies that ***the FMLA does not prohibit employers from requiring employees to receive a COVID-19 test before coming into the office following FMLA leave.***<sup>8</sup> Other laws, however, may limit whether and what types of tests can be required of an employee. For example, requiring that an employee take an antibody test before re-entering the workplace (as opposed to a test to determine if someone has an active case of COVID-19) is not allowed under the ADA.<sup>9</sup>

## **Families First Coronavirus Response Act**<sup>10</sup>

The WHD also issued FFCRA-related guidance targeting certain legal complexities that have arisen as employees begin returning to work following periods of furlough or paid sick-leave. The WHD advised that:

- ***Employers may not require an employee to telework or be tested for COVID-19 simply because the employee took leave under the FFCRA.*** However, if an employer has concerns about an employee’s exposure to COVID-19, the employer may temporarily reinstate her to an equivalent position requiring less interaction with co-workers or require that she telework.<sup>11</sup>
- ***Employees who have been furloughed, and then return to work, are still limited to a total of 80 hours of paid sick leave under the FFCRA.*** For example, an employee who has used 80 hours of paid sick leave under the FFCRA before being furloughed cannot use paid sick leave under the FFCRA after returning to work.<sup>12</sup>
- ***Under the FFCRA, an employee is entitled to up to 12 weeks of expanded family and medical leave, and that time need not be taken all at once.*** If an employee used four (4) weeks of leave before being furloughed, for example, she will have eight (8) weeks remaining after returning to work.<sup>13</sup>
- ***Employers may not discriminate or retaliate against employees (or prospective employees) for exercising or attempting to exercise their right to take leave under the FFCRA.*** For example, when bringing employees back to work, employers may not extend a particular employee’s furlough because that employee may need to take FFCRA leave to care for a child if called back to work.<sup>14</sup>

<sup>6</sup> COVID-19 and the Family and Medical Leave Act Questions and Answers <https://www.dol.gov/agencies/whd/fmla/pandemic#q12> (Question and Answer No. 12-13, added 07/20/2020)

<sup>7</sup> COVID-19 and the Family and Medical Leave Act Questions and Answers <https://www.dol.gov/agencies/whd/fmla/pandemic#q12> (Question and Answer No. 12)

<sup>8</sup> COVID-19 and the Family and Medical Leave Act Questions and Answers <https://www.dol.gov/agencies/whd/fmla/pandemic#q12> (Question and Answer No. 13)

<sup>9</sup> See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

<sup>10</sup> Families First Coronavirus Response Act: Questions and Answers, <https://www.dol.gov/agencies/whd/pandemic/ffcrq-questions> (Question and Answer Nos. 94-97, added 07/20/2020)

<sup>11</sup> Families First Coronavirus Response Act: Questions and Answers, <https://www.dol.gov/agencies/whd/pandemic/ffcrq-questions> (Question and Answer No. 94)

<sup>12</sup> Families First Coronavirus Response Act: Questions and Answers, <https://www.dol.gov/agencies/whd/pandemic/ffcrq-questions> (Question and Answer No. 95)

<sup>13</sup> Families First Coronavirus Response Act: Questions and Answers, <https://www.dol.gov/agencies/whd/pandemic/ffcrq-questions> (Question and Answer No. 96)

<sup>14</sup> Families First Coronavirus Response Act: Questions and Answers, <https://www.dol.gov/agencies/whd/pandemic/ffcrq-questions> (Question and Answer No. 97)

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In sum, the July 20, 2020 guidance provides clarifications (and reminders) on a few fronts. A few things to remember: **First**, as to telework, employers can typically satisfy their obligations to compensate teleworking employees by providing reasonable time-reporting procedures, compensating employees for all reported hours, and following up with employees if the reported hours do not appear consistent with the hours the employer believed the employee may actually have worked. **Second**, as to testing, in many circumstances employers may require that employees undergo a COVID-19 test before returning to the office; however, testing requirements should be enforced consistently, cannot be retaliatory, and must comply with other federal and state laws. **Third**, as furloughed employees return to work, the amount of paid sick-leave that each employee may be entitled to under the FFCRA should be assessed closely and, of course, on an individual basis.

**This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.**

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