

DOL Issues Guidance on Telework Under the Fair Labor Standards Act and Family and Medical Leave Act

Labor & Employment Law Update

on March 9, 2023

On February 9, 2023 the Wage and Hour Division of the United States Department of Labor (WHD) issued a Field Assistance Bulletin (FAB) providing guidance to WHD field staff regarding proper compensation under the Fair Labor Standards Act (FLSA) and proper leave under the Family and Medical Leave Act (FMLA), for employees who telework or work away from an employer's facility.

While the FAB is not law, it contains what the WHD believes is important enough to direct its enforcement agents to consider. As such, employers are well-advised to address the issues in the FAB in preparation for when the WHD knocks on the door.

FLSA

The FAB emphasizes that overtime and other FLSA rights apply regardless of where an employee works. It then discusses five common FLSA issues as they apply to teleworkers:

1. The workday is determined by how much time the employee actually spends on their "principal activity" (the activity the employee was hired to perform) regardless of scheduled shift or hours.
2. Breaks of less than 20 minutes are compensable - regardless of where the work is performed.
3. Lunch breaks of 30 minutes or more, where the employee is completely relieved from work, are not compensable worktime.
4. Determination of when the employee is relieved from work at the end of the day, which generally occurs when employees are told in advance that they will not have to resume work until a specified time—or when the employer allows employees to freely choose the time to resume work, and that time is long enough for employees to use the time for their own purposes.

5. Reasonable break time, and a private place, for an employee to express milk for a nursing child are requirements that apply to remote workers, particularly with respect to the issue of privacy from video monitoring while expressing breast milk.

The FAB offers little new, specific advice to employers, but notes that an employer may satisfy its obligations by exercising reasonable diligence to acquire knowledge regarding employees' hours of work by providing a reasonable reporting procedure for non-scheduled time and then paying employees for all reported hours of work, even hours not requested by the employer, citing Field Assistance Bulletin No. 2020-5 which contains additional helpful guidance on timekeeping practices.

FMLA

The FAB sets out the general benefits available under the FMLA, i.e., unpaid leave (or paid leave when used concurrently with accrued leave) for specified reasons, preexisting insurance coverage protection and job restoration, and explains that the FMLA applies to teleworkers. Next, the FAB addresses employee eligibility for FMLA: one year of employment; 1,250 hours of service in the 12 months prior to the request for leave; and employment with a covered employer (that employs at least 50 people within a 75 mile radius).

Meeting the 1,250 hours of service requirement is straightforward under FLSA rules. However, in the case of teleworking, the 75 mile radius issue is not as obvious. The WHD explains that when an employee works from home or otherwise teleworks, the worksite for FMLA eligibility purposes is the office to which the employee reports or from which assignments are made. So, if the worksite the teleworker reports to employs 50 people (either on site, remotely, or a combination of the two) within a 75 mile radius, the employee works for a covered employer.

Conclusion

In short, the fact that the WHD issued this FAB suggests that the application of the FLSA and FMLA to teleworkers is on the WHD's radar and likely to be an area of increased strategic enforcement in the near-term. Accordingly, employers should consult with experienced counsel to carefully review and address any potential compliance shortcomings with respect to remote employees.

DOL Issues Guidance on Telework Under the Fair Labor Standards Act and Family and Medical Leave Act