

DOL issues new answers on pandemic leave, FLSA and FMLA



The Department of Labor has been busy updating employer advice on the interplay between the coronavirus pandemic and the paid leave provisions of the Families First Coronavirus Response Act, the Fair Labor Standards Act and the FMLA.

Families First Act provisions

Returning following furlough. When some states ordered widespread shutdowns, many employers had to furlough employees. Now many have begun calling employees back to work.

But what happens if an employee being called back asks to take paid school-closing leave instead of returning? Do you have to pay that employee or can you extend the furlough instead?

According to the DOL, you must call him back and then pay for any leave he is entitled to under the FFCRA. The DOL wrote, "If your employee's need to care for his child qualifies for FFCRA leave, whether paid sick leave or expanded family and medical leave, he has a right to take that leave until he has used all of it."

Paid emergency FMLA leave and furloughs. The DOL also told employers they must not count any furloughed time against the new paid emergency FMLA leave entitlement. For example, if a worker took four weeks of paid emergency FMLA leave, was furloughed for 10 weeks and was then called back, she may be eligible for the remaining eight-week balance of her 12 weeks of emergency FMLA. You can, however, ask for information again on the reason for her need.

Returning from FFCRA leave and testing. The DOL says someone returning from paid leave to care for a relative who has covid-19 may be tested. However, the requirement must be part of an overall testing requirement for those on leave, not just those who took paid FFCRA leave.

Fair Labor Standards Act

Tracking time for telework under the FLSA. DOL has clarified that employers that allow hourly workers to work remotely must pay for all hours worked and must use a reliable method to track that time. As long as the employer has no reason to believe that additional work has been performed, it can rely on the worker's reported hours.

Childcare and telework. The DOL explained that employers may grant childcare flexibility to hourly teleworkers. For example, employers can allow workers to begin work early, take an extended break to care for their children and help them with school work and then resume work later in the day. Employers do not have to pay for the time between work sessions.

Qualifying for traditional FMLA

FMLA and telehealth. Many healthcare providers have recently developed robust telehealth programs that allow a virtual doctor's visit via computers and smartphones. Some employers have asked whether a telehealth visit can qualify an employee for FMLA leave. It does. Until Dec. 31, 2020, you must count telehealth visits as if they are physical visits.

To count, telehealth visits must be allowed by state licensing authorities and include an examination (remotely), evaluation and treatment. Employers must also accept remote signatures on FMLA forms.