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Recent Developments in Employment Law from the Department of Labor

The United States Department of Labor (“DOL”) has recently published a new rule and other guidance that address specific compliance issues under the Fair Labor Standards Act (“FLSA”) relating to independent contractor classification, payment of travel time for employees partly working from home, overtime pay for live-in caregivers, telemedicine, and employers’ electronic posting of notice.

Independent Contractor Classification

The DOL adopted a [final rule](#) regarding independent contractor status under the FLSA, which was published in the Federal Register on January 7, 2021, and is scheduled to become effective on March 8, 2021 (60 days after publication). Specifically, the rule reaffirms the “economic reality” test to determine whether a worker should be classified as an employee or an independent contractor. The rule identifies two “core factors” relevant to making this determination: (1) the nature and degree of control over the work; and (2) the worker’s opportunity for profit or loss based on initiative and/or investment. Where these two core factors do not point to the same worker classification, the DOL also identifies three other factors that may assist in making this classification determination: (1) the amount of skill required for the work, (2) the degree of permanence of the working relationship; and (3) whether the work is part of an integrated unit of production. In addition, the rule now allows companies to offer certain benefits to independent contractors, such as the payment of proceeds owed into a worker’s own health plan or retirement account, without automatically changing the worker’s classification, although doing so still may be evidence of an employment relationship. The DOL was careful to state that such workers must still satisfy the weight of other five factors associated with the new rule where companies offer such benefits. The incoming Biden administration is expected to respond in any number of ways to this rule before it becomes effective, including potentially revising or rescinding it, so companies should anticipate further guidance on this issue in the coming months.

Travel Time While Partly Working from Home

In [Wage and Hour Division Opinion Letter FLSA2020-19](#), dated December 31, 2020, the DOL evaluated the compensability of travel time where employees work partly from home. Specifically, the DOL considered whether an employee must be compensated for travel time where they work in the office, work at home, and have a break for personal activities in the same day. While considering several scenarios, the DOL determined that travel time between the employee's home or office and the employee's personal appointment would not be compensable as worksite-to-worksite travel because the employer is not requiring the employee engage in the travel as part of their work; rather, they are traveling of their own volition, for their own purposes, and during their off-duty time. Such travel also would not be considered compensable under the continuous workday doctrine where the travel time is primarily for the benefit of the employee and taken in a long enough "block" of time to be spent effectively for the employee's own purposes.

Overtime for Live-In Caregivers

In [Wage and Hour Division Opinion Letter FLSA2020-20](#), also issued on December 31, 2020, the DOL considered a discrete factual situation related to the payment of overtime hours for live-in caregivers working extended shifts of 24 hours or more. The employer noted its difficulty in effectively tracking the caregivers' time spent performing compensable work versus for their own personal purposes during each shift. Therefore, the employer "precalculated" what employees would earn based upon their scheduled hours, rate of pay, and with a premium of 1.5 times their hourly rate for hours worked beyond 8 in a workday or 40 in a work week. Thus, the employer presumed the caregivers were always engaged in compensable work, unless they were engaged in sleep (up to eight hours) or on a bona fide meal break whereby they were relieved of all principal duties. If these breaks were interrupted, however, the employer agreed to pay the employees additional overtime premium pay. The employer sought guidance on whether these overtime payments may be excluded from the regular rate and whether they may be credited toward any overtime owed to the caregivers. Citing the regulations, the DOL endorsed such an agreement between an employer and employee. Overtime premiums paid for hours worked in any day or workweek because such hours are in excess of 8 in a workday or 40 in a workweek may be excluded from the regular rate under 29 U.S.C. § 207(e)(5) and may be credited towards an employer's overtime pay obligations under 29 U.S.C. § 207(h).

Telemedicine and Treatment Under the FMLA

In a [Field Assistance Bulletin](#) issued on December 29, 2020, the DOL observed that telemedicine typically involves face-to-face examinations or treatment of patients by video conference. To be considered an

“in-person” visit for purposes of establishing a serious health condition under the Family and Medical Leave Act (“FMLA”), the telemedicine visit must include:

- an examination, evaluation, or treatment by a health care provider;
- be permitted and accepted by state licensing authorities; and,
- generally, should be performed by video conference.

Therefore, phone calls, letters, emails and text messages with health care providers will not qualify as an “in-person” visit under the FMLA.

Electronic Posting and Notice Requirements

Employers are required to provide employees with notice of their statutory rights under the FLSA, the FMLA, and other federal laws. Depending on the statutory scheme, employers are required to “post and keep posted” notice, other notices must be delivered to individual employees, and sometimes employees must have ready access to the notice. In a [Field Assistance Bulletin](#) dated December 29, 2020, the DOL outlined these federal notice requirements and how they may be met by posting notices electronically.

Additional Information

If you have questions about the DOL’s new guidance, please contact your Kutak Rock attorney or any of the attorneys in the [Employment Law Group](#) or [FLSA Litigation and Wage and Hour Defense Group](#), and we would be happy to discuss this with you. You may also visit us at www.KutakRock.com.

