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New Guidance on Telework From the U.S. Department of Labor

Field Assistance Bulletin

On February 9, 2023, the United States Department of Labor, Wage and Hour Division ("WHD") issued Field Assistance Bulletin No. 2023-1 (the "Bulletin"), providing guidance to employers of non-exempt teleworking employees under the Fair Labor Standards Act ("FLSA") and the Family and Medical Leave Act ("FMLA"). Essentially, the Bulletin addressed when an employer is required to pay non-exempt teleworking employees for breaks, how protections under the FLSA should be applied to employees who are nursing and working remotely, and how the FMLA's rules on eligibility apply to remote employees.

Short breaks taken by non-exempt employees must be paid as compensable time. The Bulletin stated that "[w]hen employees take short breaks of 20 minutes or less, the employer must treat such breaks as compensable hours worked regardless of whether the employee works from home, the employer's worksite, or some other location that is not controlled by the employer."

Meal breaks taken by non-exempt employees are not compensable time if relieved of all duties. The Bulletin explained that employees' "bona fide meal breaks (typically 30 minutes or more)" are not compensable hours worked if employees are relieved of their duties and effectively allowed to use their meal breaks for their own purposes. Importantly, this is true whether the employee performs their work at the employer's location or remotely.

Break time and privacy for non-exempt employees to express breast milk. The Bulletin stated the FLSA requires employers to provide covered non-exempt employees "reasonable break time" to express breast milk for up to one year following the employee's child's birth, and this protection extends to employees who work remotely. This protection applies at the employee's worksite, the Bulletin notes, including when that location is a home or other location where the employee teleworks. If breast milk is expressed in the workplace, employers must provide covered employees privacy to express breast milk, defined as "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public." The employee also must be "free from observation by any employer-

provided or required video system, including a computer camera, security camera, or web conferencing platform, when they are expressing breast milk regardless of the location they are working from."

Frequency and duration of break time for non-exempt employees to express milk. The Bulletin noted the frequency and duration of break times for expressing breast milk varies but, generally, an employer "cannot deny the employee the right to take a needed break to pump breast milk." While employers are not required under the FLSA to compensate nursing employees for breaks taken to pump, when an employer provides compensated rest breaks, employees who use that time to express milk must be compensated.

FMLA eligibility for teleworking employees. In relation to FMLA eligibility requirements and how they apply to teleworking employees, the Bulletin clarified that an employee must work at a location/worksite where the employer has at least 50 employees within 75 miles of that worksite and directly stated that "the employee's personal residence is not a worksite" for purpose of eligibility under this requirement. The Bulletin further provided that "[w]hen an employee works from home or otherwise teleworks, their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made." Put differently, when determining whether the requirement of at least 50 employees within 75 miles is met, the location of the employee's personal residence is not applicable, but, instead, where an employee reports to work or the location where the employee's assignments are made is the relevant location.

Opinion Letter

Also on February 9, 2023, the WHD responded to a request for an opinion on whether the FMLA requires a covered employer to indefinitely limit the workday of an employee to eight hours per day due to a chronic and serious health condition although the employee's normal work schedule was more than eight hours per day. The employer that submitted the question also inquired into whether the reduced scheduled would be "better suited" under the Americans with Disabilities Act ("ADA") as a reasonable accommodation.

The WHD advised that if an employee has a qualifying reason for leave under the FMLA, and the employee is eligible for FMLA leave, the employee may continue to use FMLA leave indefinitely until the leave is exhausted. In other words, the FMLA allows an eligible employee with a serious health condition that necessitates limited hours may use FMLA leave to work a reduced number of hours per day (or week) for an indefinite period of time as long as the employee does not exhaust their FMLA leave entitlement. In the specific situation relevant to the opinion letter, the employee's normal shift was more than eight hours, but the employee was not able to work the full eight hours due to an FMLA-qualifying reason; therefore, the WHD advised that the employee should be permitted to use FMLA leave for the part of their shift they could not work due to the FMLA-qualifying reason and the employee could do so until the leave was exhausted.

In response to whether the limited workday would be "better suited" as a reasonable accommodation, the WHD noted that the FMLA and the ADA "are separate and distinct," and "an employee may be entitled to invoke the protections of both laws simultaneously." Therefore, an employee who has exhausted their FMLA leave and who is no longer entitled under the FMLA to work a reduced schedule may have additional rights to reasonable accommodations under the ADA or other laws. Finally, the WHD concluded its opinion letter by highlighting that the leave afforded by the FMLA is 12 workweeks of leave and "[a]n employee does not accrue FMLA-protected leave at any particular hourly rate." (emphasis added). Therefore, by way of example, an employee who works 60 hours per week could take 720 hours of FMLA leave, as this would equate to 12 workweeks of leave at 60 hours per week.

If you have any questions about this new guidance from the WHD, or how it may impact your organization, please contact your Kutak Rock attorney or a member of the firm's National Employment Law Group or FLSA Litigation and Wage and Hour Defense Group. You may also visit us at www.KutakRock.com.