

## Department of Labor Provides Clarity to FMLA, FLSA, and FFCRA Covid-19 Guidelines

In response to the COVID-19 pandemic, the Department of Labor (“DOL”) [issued additional clarifications](#) to their FAQs and guidelines related to the Fair Labor Standards Act (“FLSA”), the Families First Coronavirus Response Act (“FFCRA”), and the Family and Medical Leave Act (“FMLA”).

In these clarifications, the DOL addresses questions about telework, compensation for paid leave, and the exempt status of workers.

### [Fair Labor Standards Act and Telework](#)

The DOL’s [new FLSA guidelines](#) remind employers that they must compensate non-exempt employees for all hours of telework performed, including overtime work or time teleworking even if the employer did not authorize the work. However, the DOL further commented that employers are not required to compensate employees for “[unreported hours of telework that you have no reason to believe had been performed, i.e., where you neither knew nor should have known about the unreported hours](#)”. Employers should inform employees of proper time-keeping practices and establish procedures for regular

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submission of time records to avoid running afoul this guideline.

Importantly, the guidance also states that during a public health emergency, otherwise-exempt employees may provisionally perform nonexempt tasks that are required by the emergency without losing their exemption. Such employees will not lose their exempt status so long as they continue to be paid on a salary basis of at least \$684 a week.

Traditionally, “all time between the performance of the first and last principal activities of a workday is generally compensable work time”. In consideration of the challenges faced by many employees balancing work and family obligations during the pandemic, employers may now allow employees to telework with flexible hours. Employers who offer this flexibility need only compensate employees for hours actually worked in a given day. This allows employees to take time out of their normal work schedules to attend to household obligations, without putting too much stress on employers. We hope that this DOL flexibility will remain even after the pandemic ends.

### FCCRA

Under FCCRA, private employers with fewer than 500 employees must provide up to 80 hours of paid sick

leave or expanded family and medical leave for specified reasons associated with COVID-19. The [revised FAQ](#) provides, if an employee exhausts their FFCRA paid sick leave prior to being furloughed, they are not entitled to any additional leave upon returning to work. Alternatively, employees who use fewer than 80 hours of paid sick leave prior to their furlough are entitled to any remaining hours after they return to work. Taking paid sick leave or expanded FMLA leave under the FFCRA does not affect an employee's exempt status.

Additionally, employers may require employees that know they have interacted with someone diagnosed with COVID-19 or are returning from FCRA leave to telework or take leave until they test negative for COVID-19, so long as they take similar measures for all similarly affected employees.

While employees returning from FCCRA leave must generally be reinstated to the same or equivalent positions, employers may temporarily require employees to telework or take equivalent roles that require less direct contact with other employees. Employers may not discriminate against employees or require employees to telework or be tested for COVID-19 simply because they took leave under FFCRA.

## FMLA

Per the DOL [FMLA FAQ](#), sick employees or those caring for sick family members are, under certain circumstances, entitled to FMLA leave to minimize the spread of COVID-19. Employees may not take FMLA leave simply to avoid exposure to the virus or take care of healthy children.

Additionally, until December 31, 2020, telemedicine visits will qualify as in-person visits for determining if an employee has an FMLA serious health condition, provided the visit (1) includes an examination, evaluation, or treatment by a health care provider; (2) is performed by video conference; and (3) is permitted and accepted by state licensing authorities.

Finally, while employers may require employees returning from FMLA leave to provide a negative COVID-19 test before returning to work, employers should be mindful of [EEOC guidelines](#) to ensure they are compliant with the ADA.

For further details on the DOL's revised guidances, see the DOL's [Fact Sheet for Employees](#), a [Fact Sheet for Employers](#), and a [Questions and Answers](#) resource about paid sick and expanded family and medical leave under the FFCRA.

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