Department of Labor Issues Guidance Relative to Remote Employees

BY TRACY THOMAS BOLAND AND CHELSIE A. VOKES • FEBRUARY 23, 2023

On February 9, 2023, the Department of Labor's Wage and Hour Division ("DOL") issued a Field Assistance Bulletin ("Bulletin"). The Bulletin provides guidance on the application of the Family and Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA) to remote employees. Specifically, the Bulletin addresses break time requirements, breaks for lactating employees, and coverage of remote employees under the FMLA.

FLSA PAID BREAK CLARIFICATION

In the Bulletin, the DOL reminds employers which break-times are compensable working time under federal law. Specifically, employees must be paid for breaks of 20 minutes or less, while longer breaks are not compensable only if the employee is completely relieved from duty and able to use that time effectively for their own purposes.

While the Bulletin does not address this, employers should also be mindful of state-specific break law requirements applicable to all employees. For example, Massachusetts employers must provide at least a 30-minute meal break for every six hours worked in a calendar day. During their meal break, workers must be free of all duties and free to leave the workplace.

FLSA LACTATION BREAK CLARIFICATION

The Bulletin also restates an employer's obligation to accommodate employees who are expressing breastmilk. Namely, employees are entitled to reasonable break time to express breast milk for their child for one year after the child's birth and a place, other than a bathroom, that is "shielded from view" and "free from intrusion" from coworkers and the public. The Bulletin specifies that "shielded from view" also means that an employee must be free from observation by an employer-provided or required video system (e.g., a computer camera or security camera).

The Bulletin states that lactation breaks can be unpaid only if the employee is completely free from duty. However, if the employee is expressing breastmilk during an otherwise paid break or during working time (e.g., off camera during a

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meeting), then the employee must be paid for that time.

While the Bulletin does not specify the length of a reasonable break, employers should be flexible as the length and number of pumping breaks may vary for each individual. In addition to the typical 15 to 30 minutes spent pumping per session, employers should be mindful that employees will also need time to travel to and from the lactation space, set up, break down equipment, and store the expressed milk.

Employers should also remember that many states, including Massachusetts, already have laws that provide similar protections to lactating workers. Massachusetts employers are subject to the Pregnant Workers Fairness Act (PWFA), which requires employers to provide employees with a suitable (non-bathroom) space and time to express breast milk, among other accommodations. Under the PWFA, if the employer provides paid breaks to employees, then the employer must allow employees to use those paid breaks to express breast milk.

In addition, employers should note that the FLSA is not the only federal law requiring employers to provide lactation breaks. The recent federal Pregnant Workers Fairness Act (PWFA) requires employers with 15 or more employees to make reasonable accommodations to "the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee" unless the employer can demonstrate that the accommodation would impose an undue hardship. Such reasonable accommodations will include lactation breaks, so this law will also apply when it goes into effect on June 27, 2023.

Finally, employers should know that the FLSA's protections for lactating mothers apply to both salaried and hourly workers. This is due to the recent Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), which expanded the FLSA's protections for lactating mothers to also cover salaried employees. Employees may file suit for violations of the PUMP Act beginning in April 2023.

Employers can read more about the PUMP Act and the PWFA by viewing our recent client alert New Year, New Protections for Pregnant and Lactating Employees, Restrictions on Pre-Dispute Non-Disclosure and Non-Disparagement Provisions.

FMLA CLARIFICATION

The Bulletin also addresses how remote work impacts whether an employee is eligible for FMLA leave. Among other eligibility requirements, in order to be to be eligible for FMLA coverage, an employee must report to a "worksite" having at least 50 employees within a 75 mile radius. The Bulletin clarifies that the definition of "worksite" is, for a remote employee, the office to which they report to or from which their assignments are made. An employee's personal residence is not considered an employee's "worksite" for the purposes of FMLA eligibility.

For example, Employee A teleworks from her home more than 75 miles away from the Company's headquarters. Employee A is assigned work projects from her manager, who works out of the Company headquarters. There are 100 total employees who work at or within 75 miles of the Company's headquarters. In this case, Employee A's worksite is considered the headquarters and she is considered to be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. This is true even though Employee A does not reside or telework within 75 miles of the Company's headquarters.

Employers should review the Bulletin in full and ensure that they have remote work policies in place that comply with the Bulletin's contents. For additional questions, please consult with your Bowditch attorney.

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