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DOL offers additional COVID-19 guidance under the FMLA

Updated COVID-19 guidance from the DOL's Wage and Hour Division addresses qualifying for — and returning to work from — FMLA leave. New Q&As focus on telemedicine and testing issues employers may have to navigate when evaluating requests for leave and bringing employees back into the workplace.

Background

Since March, the DOL's Wage and Hour Division (WHD) has rolled out COVID-19 guidance for employers in the form of questions and answers (Q&As) that address key compliance obligations under the Families First Coronavirus Response Act (FFCRA), Family and Medical Leave Act (FMLA), and Fair Labor Standards Act (FLSA). (For more information, see our March 26, July 15, July 28, and July 30, 2020 issues of *FYI*.)

The FMLA generally applies to businesses that employ 50 or more employees. It entitles employees who satisfy minimum service requirements and work at a site where the employer employs at least 50 employees within a 75-mile radius to take leave for specified family and medical reasons. Among other reasons, eligible employees may take up to 12 weeks of unpaid, job-protected leave in a designated 12-month period for their own or a family member's "serious health condition" as defined by the FMLA.

New Q&As

On July 20, the WHD released additional COVID-19 guidance on qualifying for — and returning from — FMLA leave. New FAQs expressly address whether:

- Telemedicine visits will be considered to be in-person visits for purposes of establishing a serious health condition under the FMLA

- Employees can be required to get a COVID-19 test prior to returning to the office after FMLA leave

Telemedicine visits

Among other reasons, employees are entitled to leave under the FMLA for their own or a covered family member's serious health condition. For these purposes, a serious health condition is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes a period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities) of more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition, that generally involves either:

- Two or more in-person treatments by a health care provider within 30 days of the first day of incapacity
- At least one in-person treatment by a health care provider that results in a regimen of continuing treatment (e.g., antibiotics) under the provider's supervision

FMLA regulations recognize that an illness that ordinarily is not incapacitating, like the flu, may be treated as a serious health condition if complications arise that result in inpatient care or require continuing treatment by a health care provider. The guidance confirms that an employee may be eligible to take FMLA leave to care for themselves or for a family member with COVID-19 if such complications arise.

> **Buck comment.** Employers should be mindful that the FFCRA and certain state or local laws may have different requirements that factor into determining employer obligations to provide sick and/or family and medical leave.

The WHD has indicated that until December 31, 2020, it will consider telemedicine visits to be in-person visits for purposes of establishing a serious health condition under the FMLA, 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. Electronic signatures will be deemed to be signatures for these purposes.

COVID-19 testing

The guidance confirms that an employer may require an employee to get a COVID-19 test before returning to the office after FMLA or any kind of leave, pursuant to a companywide policy requiring testing — even if it was implemented while the employee was out on FMLA leave. However, employers may not single out those returning from FMLA leave for testing.

The WHD reminds employers that other laws — such as the Americans with Disabilities Act (ADA) — may impose restrictions on whether or when employers may require COVID-19 testing and which tests are permitted. Consistent with CDC interim guidelines, the EEOC previously clarified that

employers cannot require employees to undergo antibody or serology testing as a condition of re-entering the workplace without running afoul of the ADA. The EEOC explained that, unlike viral tests, antibody tests do not currently meet the statute's "job-related and consistent with business necessity" standard for permissible employee medical examinations or inquiries. (See our June 24, 2020 *FYI*.)

In closing

This latest guidance from the DOL addresses qualifying for — and returning to work from — FMLA leave. New Q&As focus on telemedicine and testing issues employers currently face in managing coronavirus-related leaves.

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