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KD Alert - DOL Issues FLSA Guidance for Employers in the Wake of Coronavirus Pandemic

The U.S. Department of Labor's (DOL) Wage and Hour Division recently issued guidance for employers regarding their obligations to employees under the Fair Labor Standards Act (FLSA), in the wake of the Coronavirus pandemic ("the Guidance"). Below are the critical issues the Guidance addresses:

- Payment of Wages to Non-Exempt Employees – The FLSA does not require employers to pay non-exempt employees for hours the employer's business is closed, regardless of whether the employees would have been scheduled to work those hours. However, state laws may govern payment of final paychecks before qualifying events such as layoffs.
- Requiring Exempt Employees to Use Vacation Time During Office Closures – The FLSA does not require employers to provide vacation time.
  "Therefore, a private employer may direct exempt staff to take vacation or debit their leave bank account in the case of an office closure, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary. In the same scenario, an exempt employee who has no accrued benefits in the leave bank account, or has limited accrued leave and the reduction would result in a negative balance in the leave bank account, still must receive the employee's guaranteed salary for any absence(s) occasioned by the office closure in order to remain exempt."

- Teleworking –
  "An employer may encourage or require employees to telework as an infection-control or prevention strategy, including based on timely information from public health authorities about pandemics, public health emergencies, or other similar conditions."

  Furthermore, telework may be considered a reasonable accommodation under the Americans with Disabilities Act (ADA).

  However, "employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by any of the EEO laws," such as disability, age, pregnancy, etc.

  Payment of Wages for Telework – "If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract," employers must pay the same hourly rate or salary as if the employee reported to work in person.

  Absent a union or employment contract, the FLSA generally requires an employer to pay an employee only for the hours actually worked, whether at home, or in the employer's office. However, the employer is obligated under the FLSA to pay non-exempt employees at least the minimum wage, and overtime for hours worked over 40, and salaried exempt employees "their full salary in any week in which they perform any work, subject to certain very limited exceptions."

  The Guidance is vague regarding the requirement for employers who prohibit their employees from working in the office, to pay wages to employees who are unable to telework.

  Reimbursement for Telework Expenses (internet access, computer, additional phone line, increased use of electricity, etc.) – The FLSA prohibits employers from requiring employees to pay them for business expenses related to teleworking, if payment of such expenses "reduces the employee's earnings below the required minimum wage or overtime compensation."

  Employers are further prohibited from requiring employees to cover such expenses when teleworking is provided as a reasonable accommodation under the ADA.

The Guidance is silent regarding whether an employer must reimburse an employee for telework-related expenses. Employers should use their business judgment in determining the value of employees working from home, and whether it makes economic sense to reimburse them for certain related expenses.

KD's Labor & Employment Practice Group is continuing to monitor the evolving laws and regulations governing employment matters in the wake of the Coronavirus pandemic. It is always a good idea to check your state's laws as well, since they, too, are changing almost daily in response to this global crisis.

For guidance or more information please contact the members of Kaufman Dolowich & Voluck's Labor & Employment Law Practice Group at (516) 681-1100.

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