

# CLIENT ALERT: The Department of Labor Issues Technical Guidance on FLSA and FMLA for Remote Workers

On February 9, 2023, the Department of Labor (“DOL”) issued a Field Assistance Bulletin setting forth various guidance for its Wage and Hour Division (WHD) field staff pertaining to issues arising under the Federal Labor Standards Act (“FLSA”) and Family and Medical Leave Act (“FMLA”) and related to remote workers. The guidance addresses proper payment of remote workers, application of break time for nursing mothers to remote workers, and how to apply eligibility rules under the FMLA when employees work away from an employer’s facility.

## Paying Remote Workers for Breaks under the FLSA

The FLSA requires covered employers to pay nonexempt employees for all hours worked, including work performed in the employees’ home or otherwise away from the employer’s premises or job site. “Hours worked” under the FLSA includes both active time working and time spent waiting or on some breaks as noted below. In general, an employee’s workday is the period between the time when the employee commences their first “principal activity” and the time on that day at which they cease such principal activity or activities. This means that the employee’s workday can be longer than their scheduled shifts or hours. Breaks that are twenty (20) minutes or less are compensable under the FLSA; longer breaks where the employee is completely relieved from duty and are long enough for employee to use the time effectively for their own purposes are not hours worked. These principles apply regardless of where the employee is performing the work.

While not reflecting any new legal obligations, the latest guidance clarifies that remote workers are entitled to the same treatment as workers at the employer’s worksite under the FLSA. Breaks that are 20 minutes or less are considered compensable hours – this includes time for bathroom breaks, snacks or a cup of coffee, or a quick stretch. The rationale for compensating employees for short breaks is that these breaks ultimately benefit the employer by increasing morale, improving productivity, and reducing fatigue.

As with other employees, remote workers are not required to be compensated for breaks longer than 20 minutes. Where remote workers are working at a location that is not controlled by the employer, however, it can be difficult to determine whether an employee has been completely relieved of duty. The guidance provides several examples of situations that could arise when a remote worker is taking (or attempting to take) a break while working. For example, an employee who attempts to take a 30-minute lunch but is frequently interrupted by work calls would not be completely relieved from their duties, and would be required to be compensated. On the other hand, employees who are allowed to set their own schedules and take more than 20 minutes to, for example, help their children get ready for school or cook dinner before returning to work would not be compensated under the FLSA.

## Break Time for Lactating Employees

The FLSA also requires that employers provide covered employees a reasonable amount of break time for an employee to express breast milk for an employee’s nursing child for one (1) year after the child’s birth each time such employee has need to express the milk. The employer is also required to provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk. These protections apply to teleworking employees and even employees at a site that is not controlled by the employer, such as a client worksite. Teleworking employees are entitled to express breast milk “shielded from view,” which would include being free from observation by a computer camera or

other device possibly used to track employees' work.

Employers are generally not required to compensate employees for time taken to express breast milk, so long as employees are completely relieved of work duties to do so. Though, remote employees who take a video meeting or conference call while expressing breast milk – even if off camera – are entitled to pay for that time.

#### Calculating Eligibility of Remote Workers for FMLA

The FMLA entitles employees who have worked for the employer for at least 12 months; have at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave; and work at a location where the employer has at least 50 employees within 75 miles to unpaid leave for covered purposes. Questions have arisen as to how to calculate the 75-mile worksite requirement when employees are working remotely.

For purposes of the FMLA, the employee's home is not a worksite used to calculate whether the employee works at a location where the employer has at least 50 employees within 75 miles. When 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. The count of employees within 75 miles of a worksite includes all employees whose worksite is within that area, including employees who telework and report to or receive assignments from that worksite. So, if the employer employs 50 or more employees out of a headquarters in one location from which work is assigned and reviewed, but all or most of those employees telework, those employees may still meet the worksite requirement for purposes of FMLA leave.

For most employers, remote work is here to stay in some form, along with complicated issues involving wage and hour and leave laws, such as the ones outlined here. Given this latest guidance, employers should have detailed and meticulous timekeeping mechanisms for employees, especially those working remotely or at a worksite not in the control of the employer, so as to avoid any of the potential issues set forth above. Should you have any questions about telework and its interaction with various federal and state laws, please contact your MJB attorney.

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