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Complying with the Fair Labor Standards Act During the COVID-19 Pandemic

Please contact our
Carr Allison COVID-19 Response Team
with any questions you may have.

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Never before have employment laws been more complicated or difficult to apply as they are now. Issues such as temporary business closures, employees working from home and the need for a significant increase in effort required from “essential” workers greatly complicate matters. Below you will find general guidance for some common issues that are governed by the Fair Labor Standards Act (FLSA). For answers to specific employment-related questions, please feel free to contact us.

Working Hours

For how many hours must an hourly employee be paid during a week of a partial business shutdown due to COVID-19?

The FLSA typically does not require employers to pay non-exempt employees for hours they did not work due to business closures. The FLSA governs hours actually worked. Keep in mind, however, that the Families First Coronavirus Response Act (FFRCA) applies to situations involving Emergency Paid Sick Leave and Emergency Paid Expanded Family and Medical Leave and may require paid leave in the event an employee must be off due to a COVID-19 related issue.

How many hours per day or per week may an “essential” or other employee be required to work?

For employees who are 16 years of age and older, the FLSA generally does not impose limitations on the number of hours per day or per week they may be required to work.

Job Duties

May employees be directed to perform work that is outside of their typical job description?

Generally, yes. The FLSA does not impose limits on the type of work that employees who are at least 18 years of age may be required to perform. There are restrictions, however, on what employees under the age of 18 may be asked to do, regardless of job descriptions. Also keep in mind that other factors must be considered when employees are asked to step outside of their typical job duties, including bargaining agreements with union employees or other employment contracts.

Remote Work

Are employers required to keep records of hours actually worked when an employee works from home?

Yes. Employers must also be sure to pay employees at least the minimum wage for the number of hours worked and pay time-and-a-half for hours in excess of 40 during a workweek.

May an employer require employees to work from a remote or alternative location in an effort to prevent the spread of COVID-19?

Yes. Employers may require employees to work from home or another location as a means of controlling the spread of COVID-19 among the workforce. In fact, allowing telework may, in some circumstances, also be deemed a reasonable accommodation under the Americans with Disabilities Act and be required. It is important that employers apply any remote working arrangement requirement to all employees equally. Certain employees may not be singled out on any basis that might be considered discriminatory and prohibited by the Equal Employment Opportunity laws.

Are employees entitled to the same rate of pay or salary when they work from home?

Employees must be paid the same if remote work is being provided as a reasonable accommodation under the ADA or pursuant to a union or other employment contract. For employees not working under a contract or for whom remote working was not provided as a reasonable accommodation, the FLSA generally only requires employers to pay employees for the hours they actually work, regardless of where that work is performed. Non-exempt employees must be paid at least minimum wage for all hours worked and time-and-a-half for hours worked in excess of 40 during a workweek. Salaried employees must usually be paid their full salary for any weeks during which they perform work.

If an employer prohibits employees from working at the typical workplace due to COVID-19 and requires them to work from home, must employers pay those individuals who are unable to actually perform the work from home?

Generally, no. The FLSA typically only mandates that employers pay employees for the hours they actually work regardless of where that work is performed. Those employees must be paid at least minimum wage for all hours they work and must be paid time-and-a-half for hours in excess of 40 in any given week. Salaried employees must be paid their full salary when they work, with very limited exceptions. When employees are not able to perform work from home, the U.S. Department of Labor encourages employers to consider alternative options to actually allow work from the typical place of employment but to mandate social distancing and allow staggering work shifts.

Must employers cover expenses employees incur as a result of working from home (such as internet access, computers, electricity, etc.)?

It depends. Employers must pay business expenses if requiring the employee to pay them would reduce the employee's compensation below the required minimum wage or overtime compensation amounts. Employers must also reimburse employees for business expenses if remote working was provided as an accommodation for a qualified individual with a disability under the Americans with Disabilities Act.

Do OSHA regulations and standards apply to an employee's home office? What other Federal laws must employers be concerned about for employees working from home?

No, the U.S. Department of Labor OSHA regulations do not apply to teleworking in home offices. Importantly, however, employers who are required to keep records of work-related injuries are still responsible for keeping those records if an illness or injury occurs in a home office. Recently, COVID-19 was included as an illness for which employers must keep records under OSHA. For a more in-depth discussion of that new rule, please see our recent article which is available [HERE](#).

Wages

If an employer utilizes temporary employees from a staffing agency to cover a staffing shortage, is the employer liable if the agency does not pay in accordance with the requirements of the FLSA?

Possibly. Individuals may be deemed "employed" by one or more employers. If an entity is considered to be a "joint" employer, they may be responsible, and jointly and severally liable, for an employee's required minimum and overtime wages. The FLSA's provisions concerning joint employment were recently updated and are located [HERE](#).

Volunteers

May employers allow "volunteers" to help with their business?

Generally, no. The FLSA has stringent requirements with respect to the use of volunteers. Non-exempt workers who are performing work for private, for-profit employers must be paid at least the minimum wage. While there are some circumstances under which volunteering may be allowed, workers are typically not allowed to perform services without compensation.

Must individuals who volunteer to perform work for a private, non-profit organization be compensated?

Generally, no. Non-employee individuals who agree to perform services in an emergency relief capacity for a private, non-profit organization for civic, humanitarian or religious objectives and who do so without expectation of being compensated, are not considered to be employees under the FLSA. If individuals who are actually employed by such organizations perform work they would typically be compensated for, however, they may not volunteer to perform that work without compensation.

Conclusion

Careful thought must be given to employment decisions to ensure compliance with all applicable laws. That is especially true during this time of uncertainty when employers are having to make business decisions for situations they have never faced before. If you have any questions or need assistance with any employment-related matter, the employment team at Carr Allison is readily available to provide guidance. Please do not hesitate to contact us.