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# DOL Modifies Enforcement Policies in Light of Remote Working

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**EXECUTIVE SUMMARY**

In the waning days of the Trump administration, the Department of Labor (DOL) has been busy. Recognizing that the pandemic has resulted in many employees working from home, on December 29, 2020, the DOL issued guidance to Wage and Hour Division (WHD) field staff who review employer compliance with statutory and regulatory requirements. First, as an enforcement policy, WHD will consider electronic posting an acceptable substitute for the continuous posting requirement under various statutes only where all employees (1) exclusively work remotely, (2) customarily receive information from the employer via electronic means, and (3) have readily available access to the electronic posting at all times. (Field Assistance Bulletin No. 2020-7). Second, for purposes of the Family and Medical Leave Act (FMLA), a telemedicine visit will be considered an "in-person" visit where: 1) it includes an examination, evaluation, or treatment by a health care provider; 2) is permitted and accepted by state licensing authorities; and, 3) is generally, performed by video conference.


**Posting Required Notices:** Several of the statutes enforced by the DOL, including the Fair Labor Standards Act (FLSA), Employee Polygraph Protection Act (EPPA) and the Family and Medical Leave Act (FMLA), require employers to "post and keep posted" specified notices "at all times" and do not permit employers to meet their notice obligations through a direct mailing or other single notice to employees. The purpose of the mandatory notice requirements is to ensure that employees are notified of their rights under the various statutes. Therefore, if an employer seeks to meet a worksite posting requirement through electronic means, such as on an intranet site, internet website, or shared network drive or file system posting, the electronic notice must be as effective as a hard-copy posting. According to the DOL, in most cases, these electronic notices supplement but do not replace the statutory and regulatory requirements that employers post a hard-copy notice.

**Telemedicine / FMLA:** The DOL provided additional guidance under the FMLA, which allows eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons. Eligible employees may take up to 12 workweeks of leave in a 12-month period for, among other things, an employee's serious health condition or for an employee to care for the employee's spouse, son, daughter, or parent with a serious health condition. Under the FMLA a "serious health condition" is an "illness, injury,


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impairment, or physical or mental condition that involves" either: (1) "inpatient care," such as an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity or any subsequent treatment in connection with such inpatient care, or (2) "continuing treatment by a health care provider." The FMLA regulations define the term "treatment" to include "examinations to determine if a serious health condition exists and evaluations of the condition." See 29 CFR § 825.113(c).

The newly issued guidance will consider a telemedicine visit with a health care provider as an in-person visit under 29 C.F.R. §825.115, provided specified criteria are met. The telemedicine visit must include:

- an examination, evaluation, or treatment by a health care provider;
- be permitted and accepted by state licensing authorities; and,
- generally, should be performed by video conference.

A simple telephone call, letter, email, or text message are insufficient, by themselves, to satisfy the regulatory requirement of an "in-person" visit.

If you have any questions, please contact a member of the Employment, Labor and Benefits Practice Group.

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