UUNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210

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FIELD ASSISTANCE BULLETIN No. 2023-1

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Jessica Looman
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SUBJECT: Telework Under the Fair Labor Standards Act and Family and Medical Leave Act

This Field Assistance Bulletin ("FAB") provides guidance to Wage and Hour Division (WHD) field staff regarding how to ensure workers who telework are paid properly under the Fair Labor Standards Act (FLSA), how to apply protections under the FLSA that provide reasonable break time for nursing employees to express milk while teleworking from their home or another location, and how to apply eligibility rules under the Family and Medical Leave Act (FMLA) when employees telework or work away from an employer's facility.

Telework and the FLSA

Background

The FLSA requires covered employers to pay nonexempt employees for all hours worked, including work performed in their home or otherwise away from the employer's premises or job site. *See* 29 C.F.R. § 785.11-.12. The Department's regulations in 29 C.F.R. Part 785 outline "the principles involved in determining what constitutes working time." 29 C.F.R. § 785.1. For example, the regulations explain that "hours worked" is not limited solely to time spent on active productive labor but may, for instance, include time spent waiting or on break. *See, e.g.*, 29 C.F.R. § 785.14; 29 C.F.R. § 785.18.

In general, an employee's workday on any particular day 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. *See* 29 C.F.R. § 790.8 (Principal activities are activities which the employee is "employed to perform."). The workday may therefore be longer than the employee's scheduled shift, hours, or tour of duty. *See* Fact Sheet # 22: Hours Worked Under

the Fair Labor Standards Act (FLSA); 29 C.F.R. § 790.6. When it comes to breaks taken during the workday, the FLSA regulations explain that short breaks of twenty minutes or less are generally counted as compensable hours worked. *See* 29 C.F.R. § 785.18. Longer breaks "during which an employee is completely relieved from duty, and which are long enough to enable [the employee] to use the time effectively for [their] own purposes are not hours worked." 29 C.F.R. § 785.16. These principles apply regardless of whether the work is performed at the employer's worksite, at the employee's home, or at some other location away from the employer's worksite.

If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked regardless whether the employee works at the employer's location or teleworks from another location. 29 C.F.R. § 785.11-.12. An employer may satisfy its obligation to exercise reasonable diligence to acquire knowledge regarding employees' unscheduled hours of work by providing a reasonable reporting procedure for non-scheduled time and then paying employees for all reported hours of work, even hours not requested by the employer. *See* Field Assistance Bulletin No. 2020-5 for more information on tracking teleworking employees' hours of work.

Short Breaks of 20 Minutes or Less

Employees commonly take short breaks during the workday. Breaks of twenty minutes or less must be counted as hours worked. *See* 29 C.F.R. § 785.18. Whether teleworking at home or working at the employer's facility, employees often take short breaks to go to the bathroom, get a cup of coffee, stretch their legs, and other similar activities. By their very nature, such short breaks primarily benefit the employer by reducing employee fatigue and helping employees maintain focus and be more productive at work.

When employees take short breaks of 20 minutes or less, the employer must treat such breaks as compensable hours worked regardless of whether the employee works from home, the employer's worksite, or some other location that is not controlled by the employer.

Meal Breaks and Off Duty Time

Unlike short rest breaks of 20 minutes or less, bona fide meal breaks (typically 30 minutes or more) in which an employee is completely relieved from duty for the purposes of eating regular meals are not worktime. *See* 29 C.F.R. § 785.19. Similarly, breaks that are longer than 20 minutes and permit the employee to use the time effectively for their own purposes and during which the employee is completely relieved from duty are not hours worked. *See* 29 C.F.R. § 785.16.

To be completely relieved from duty, the employees must be told in advance that they may leave the job and they will not have to commence work until a specified hour has arrived. *See* 29 C.F.R. § 785.16. An employee may also be completely relieved from duty when the employer allows the employee to freely choose the hour at which they resume working and the time is long enough for the employees to effectively use for their own purposes.

> Example #1: Employee A works at a shared workspace not controlled by their employer and takes a break for lunch from 12:30 p.m. to 1:00 p.m. During this break, Employee A is interrupted by work phone calls, with each call lasting several minutes. Because the meal break period of 30 minutes is frequently interrupted by work phone calls, Employee

A would not be considered relieved of all duties and the meal break period would have to be counted as hours worked.

Example #2: Employee B works from home and is allowed flexibility to set their own schedule. Employee B starts works at 7:00 a.m., takes a one-hour break from 8:00 a.m. to 9:00 a.m. to get their children ready for school, and resumes work at 9:00 a.m. The period between 8:00 a.m. and 9:00 a.m. is not work time under the FLSA because Employee B is completely relieved from duty, chooses when to resume work, and is able to effectively use the time for their own purposes.

Example #3: Employee C teleworks from home and has an arrangement with their employer where Employee C works from 9:00 a.m. to 4:00 p.m., takes a three-hour break from 4:00 p.m. to 7:00 p.m., and returns to work at 7:00 p.m. and works until 8:00 p.m. Employee C is free to do whatever Employee C chooses during this three-hour break, including staying at home to make dinner and do laundry, for example. Under these circumstances, because Employee C is relieved from duty and is able to effectively use the period between 4:00 p.m. and 7:00 p.m. for their own purposes, that time is not work time under the FLSA.

In sum, bona fide meal breaks and periods where employees are completely relieved from duty and are able to effectively use the time for their own purposes are not hours worked under the FLSA. This is true regardless of the location from which employees perform their work.

Break Time for Pumping Breast Milk, and Privacy to Pump

The FLSA also requires that employers provide covered employees "reasonable break time for an employee to express breast milk for such employee's nursing child for 1 year after the child's birth each time such employee has need to express the milk" and 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." 29 U.S.C. § 218d(a).[1] These protections apply at the employee's worksite, including when an employee is teleworking from their home or another location.

For example, an employer must provide an appropriate place for an employee to pump breast milk when the employee is working at an off-site location, such as a client worksite. *See* Reasonable Break Time for Nursing Mothers, Request for Information ("RFI"), 75 Fed. Reg. 80,073, 80,077 (Dec. 21, 2010). Additionally, an employer must ensure the employee has a place to express breast milk that is "shielded from view." 29 U.S.C. § 218d(a)(2). This includes ensuring that an employee is free from observation by any employer provided or required video system, including a computer camera, security camera, or web conferencing platform, when they are expressing breast milk regardless of the location they are working from.

[1] On December 29, 2022, President Biden signed the Consolidated Appropriations Act, 2023 into law, which includes the PUMP for Nursing Mothers Act ("PUMP Act"). Pub. L. No. 117-328, 136 Stat. 4459, 6093-97 (Dec. 29, 2022). The PUMP Act extended coverage to more employees, among other changes. The PUMP Act did not change the basic requirements under the FLSA that reasonable break time and space must be provided to employees for pumping breast milk.

The frequency and duration of the breaks that a nursing employee needs will vary depending on the individual situation. In most cases, an employer cannot deny the employee the right to take a needed break to pump breast milk.[2] Employers are not required under the FLSA to compensate nursing employees for breaks taken for the purpose of expressing milk.[3] However, when an employer provides compensated breaks, an employee who uses that break time to express milk must be compensated for the break. In addition, consistent with the FLSA's general requirement, if an employee is not completely relieved from duty during these breaks, the time must be compensated as work time. 29 U.S.C. § 218d(b). If a remote employee chooses to attend a video meeting or conference call – even if off camera – generally the employee in that case is not relieved from duty and, therefore, must be paid for that time.

Telework and the Family and Medical Leave Act

Background

The FMLA entitles eligible employees of covered employers to take job-protected leave, which may be unpaid or used concurrently with accrued paid leave, for specified family and medical reasons. In addition to providing job-protected family and medical leave, employers must also maintain any preexisting group health plan coverage for an employee on FMLA-protected leave under the same conditions that would apply if the employee had not taken leave. Once the leave period is concluded, the employer is required to restore the employee to the same or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

Employee Eligibility

To use FMLA leave, an employee must work for a covered employer and be eligible for leave. Employees who telework are eligible for FMLA leave on the same basis as employees who report to any other worksite to perform their job. Employees are eligible for FMLA leave when they 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[4]; and work at a location where the employer has at least 50 employees within 75 miles. 29 C.F.R. § 825.110(a).

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[2] The PUMP Act includes exemptions from the reasonable break time and space requirements for crewmembers of air carriers, and certain employees of rail carriers and motorcoach service operators. 29 U.S.C. § 218d(d)-(f). It also includes a limited exemption for employers of less than 50 employees if its requirements would "impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." 29 U.S.C. § 218d(c); RFI, 75 Fed. Reg. at 80,077-78 (WHD considers the applicability of this stringent standard on a case-by-case basis).

[3] Compensation for such breaks may be required under state law.

[4] A special rule applies to the hours-of-service requirement for airline flight crew employees, including pilots, co-pilots, flight attendants, and flight engineers. *See* 29 C.F.R. § 825.801; *see* also Fact Sheet #28J: Special Rules for Airline Flight Crew Employees under the Family and Medical Leave Act.

The determination of whether an employee has been employed for at least 12 months and has at least the required hours of service is made as of the date FMLA leave is to start; the determination of whether at least 50 employees are employed at the employee's worksite, or within 75 miles, is made when the employee gives notice of the need for leave. 29 C.F.R. § 825.110(d) and (e).

For most employees, including employees who telework, the 1,250 hours of service requirement is determined according to the principles under the FLSA for determining compensable hours of work (*see* 29 C.F.R. Part 785). 29 C.F.R. § 825.110(c). If accurate records are not kept, the employer has the burden of showing that the employee has not met the hours-of-service requirement in order to claim the employee is not eligible for FMLA leave.

Employee's Worksite

To be eligible for FMLA leave, an employee must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. For FMLA eligibility purposes, the employee's personal residence is not a worksite. *See* 29 C.F.R. § 825.111(a)(2). 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. Thus, if 50 employees are employed within 75 miles from the employer's worksite (the location to which the employee reports or from which their assignments are made), the employee meets that FMLA eligibility requirement.[5] 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.

> Example #4: Employee A works for a department store as a customer service representative. Following a weather emergency, the store is temporarily closed to everyone except essential personnel and building maintenance staff. Employee A and her supervisor perform their duties by teleworking from their homes during the period the store is temporarily closed. For FMLA eligibility purposes, the store remains Employee A's and her supervisor's worksite.
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> Example #5: Employee B works in data processing for an advertising company headquartered in a large city and teleworks from her home more than 75 miles away. Many of the employees in Employee B's department telework from different cities and states. All teleworking employees are assigned projects for data analysis from the manager who works at the company headquarters. Employee B's worksite, for FMLA eligibility determination, is the company's headquarters. The company's headquarters is

[5] The legislative history of the FMLA indicates that Congress intended the term "worksite" to be construed in the same manner as the term "single site of employment" under the Worker Adjustment and Retraining Notification Act ("WARN"), Pub. L. No. 100-379, § 2(a)(3)(B), 102 Stat. 890 (codified at 29 U.S.C. § 2101(a)(3)(B), and regulations under that Act (20 C.F.R. Part 639). *See* S. REP. 103-3, 23. For employees that do not have a fixed worksite, the legislative history specifically cites WARN Act regulatory language providing that their worksite should be construed to mean the site "to which they are assigned as their home base, from which their work is assigned, or to which they report." *Id.*

also, under the FMLA, the worksite for the data processors in Employee B's department who telework from different cities and states but report to and receive assignments from their manager at headquarters. There are 300 total employees who work at or within 75 miles of the company's headquarters. Thus, the employee is considered to be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite even though she herself does not work within 75 miles of the company headquarters.

Conclusion

Employees can have the flexibility of work from home, telework, or work away from premises managed or controlled by the employer and also remain covered by the protections of the FLSA and the FMLA.

Under the FLSA, employees who telework are entitled to compensation for all hours worked, for short rest breaks and, in qualifying circumstances, to take breaks to express breast milk free from intrusion and shielded from view. Protections under the FLSA apply equally to employees who telework as to employees working at an office, factory, construction site, retail outlet, or any other worksite location.

Under the FMLA, all hours worked are counted for purposes of determining an employee's FMLA eligibility when an employee teleworks from home consistently or in combination with working at another or various worksites. For FMLA eligibility, the determination of the worksite for an employee who teleworks is fact specific and will be based on factors, such as where the employee reports to work or the location where the employee's assignments are made.

Questions

Please address any questions regarding this FAB to the WHD National Office, Office of Policy, through appropriate channels.