

# Employee Benefit Plan Review

## U.S. Labor Department Updates FLSA and Unemployment Compensation Guidance

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**T**he U.S. Department of Labor (“DOL”) recently issued additional guidance about the Fair Labor Standards Act (“FLSA”) and state unemployment compensation.

### TELEWORK AND FLEX SCHEDULES

The DOL’s Wage & Hour division updated its “COVID-19 and the Fair Labor Standards Act Questions and Answers” (the “Q&A”)<sup>1</sup> to address some of the unique work arrangements that employers may utilize during the pandemic.

In the Q&A, the DOL clarified that employers are still required to pay employees who are teleworking for all hours actually worked, provided that the employer “knew or had reason to believe the work was performed.” This requirement includes any hours the employee may have worked although they were not authorized to do so – as long as the employer is aware or has reason to be aware of the hours worked, the employee must be compensated for the time.<sup>2</sup>

Employers can implement a flexible work schedule and pay employees only for the time actually worked, rather than compensating the employee for all the hours between the start and stop time. For example, an employee can work a few hours in the morning, take a break from work to handle any

responsibilities at home, and then return to work in the evening. In that example, the employer would compensate the employee only for the hours actually worked in the morning and at night.<sup>3</sup>

### HAZARD PAY

Hazard pay and the decision whether to provide a bonus or increase wages for people working throughout the pandemic has become a hot topic around the country. But in the latest guidance from the DOL, it reiterated that the FLSA does not require hazard pay for employees working during the COVID-19 pandemic.<sup>4</sup>

### EMPLOYEE CLASSIFICATION

Generally, if an otherwise exempt employee performs duties typical of a non-exempt employee, it may jeopardize the employee classification. “WHD’s regulations permit an employee who otherwise qualifies for a Section 13(a)(1) exemption [executive, administrative, or professional exemption] to perform nonexempt duties during emergencies that threaten the safety of employees, a cessation of operations or serious damage to the employer’s property and which are beyond the employer’s control and could not reasonably be anticipated.”<sup>5</sup>

The Families First Coronavirus Response Act (“FFCRA”) provides leave in a number

of different scenarios for employees impacted by the COVID-19 pandemic. Exempt employees who choose to take paid sick leave or expanded FMLA, provided under the FFCRA, on an intermittent basis will not lose their exempt status.<sup>6</sup>

Due to business decline, employers may opt to cut salaries for exempt employees. “[A]n employer may prospectively reduce the amount regularly paid to a salaried exempt employee” due to economic reasons stemming from the pandemic. Any salary reduction must be consistent and predetermined – it cannot change from week to week depending on the ebb and flow of business finances.

The DOL added, “any such salary change must also be bona fide, meaning the change is not an attempt to evade the salary basis requirements and is actually because of COVID-19 or an economic slowdown as opposed to the quantity or quality of work you performed.” With limited exceptions, employees still must receive the minimum salary of \$684 per week to retain exempt status.<sup>7</sup>

#### UNEMPLOYMENT

The CARES Act significantly expands existing state unemployment benefits, providing coverage to those not traditionally eligible who are unable to work as a direct result of COVID-19 (the temporary Pandemic Unemployment Assistance (“PUA”) program), and granting an enhanced benefit of \$600 per week to all workers eligible for unemployment compensation, whether under state law or through the PUA program. The \$600 per week benefit has now ended, but Congress is currently debating a stimulus package that would extend some form of the benefits.

On July 21, the DOL’s Employment and Training Administration (“ETA”) issued a letter<sup>8</sup> to state workforce agencies responding to questions about PUA eligibility.

Initially, some employers found it difficult to get employees to come back to work because the additional \$600 benefit provided more money than the employer could offer. If an employee refuses to return to work because they receive more compensation on unemployment (or another reason not covered by state or federal law), they are no longer eligible for PUA.

However, if an individual refuses an offer of work because it “unreasonably exposes him or her to COVID-19, the state may conclude that the work is not suitable, if permitted under the state’s suitable work provisions.”<sup>9</sup> In that circumstance, the individual still would be eligible for PUA, as long as they meet the other state requirements.

If an individual receiving PUA turns down “suitable” work because of one of the COVID-19 reasons delineated in the CARES Act, such as not having child care, they would remain eligible for PUA. Additionally, an individual still will be eligible for PUA if he or she turns down “suitable” work for a “good cause” under state law and is still unemployed or unable or available to work due to COVID-19.<sup>10</sup>

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Some employers forced to lay off employees at the onset of the pandemic may be able to bring employees back to work for a limited time before laying them off again. In that circumstance, an employee may stop

receiving PUA benefits. However, an employee will resume receiving benefits if they become unemployed again for a qualifying COVID-19 reason.<sup>11</sup>

The PUA does not extend unemployment compensation to individuals unemployed for reasons separate from the pandemic who also are unable to find work because of business closure related to COVID-19.<sup>12</sup> But if an individual is disqualified for regular unemployment compensation because of the circumstances of a prior termination, they still may be eligible for PUA if they are “unable or unavailable to work for one of the listed COVID-19 related reasons in Section 2102(a)(3)(A)(ii)(I) of the CARES Act.”<sup>13</sup>

In addition to responding to eligibility questions, the ETA’s letter also detailed how to calculate the weekly benefit amount, tax withholdings, overpayments, and fraud. 🌐

#### NOTES

1. U.S. Department of Labor, “COVID-19 and the Fair Labor Standards Act Questions and Answers,” available at <https://www.dol.gov/agencies/whd/flsa/pandemic>.
2. See Question #14.
3. See Question #15.
4. See Question #17.
5. See Question #16.
6. *Id.*
7. See Question #19.
8. [https://wdr.doleta.gov/directives/attach/UIPL/UIPL\\_16-20\\_Change\\_2.pdf](https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Change_2.pdf).
9. See Question #16.
10. See Question #16.
11. See Question #18.
12. See Question #14.
13. See Question #12.

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