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US COVID-19: REMEMBER THE FMLA: DOL ISSUES NEW Q&A ON COVID-RELATED FMLA ISSUES

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With all of the attention being given to COVID-19-related leave under the Families First Coronavirus Response Act ("FFCRA"), we mustn't forget the (traditional) Family and Medical Leave Act ("FMLA"). To remind us, the federal Department of Labor ("DOL") recently issued new FMLA Q&A on COVID-19-related subjects.

COVID-19 Testing: The DOL clarified that the FMLA's "reinstatement" requirement does not interfere with an employer's ability to require all employees to take a COVID-19 test before coming to the office. (See Q&A #13.) This is because employees who have taken FMLA leave are still subject to the same actions that would have applied to the employee had the employee not taken FMLA leave.

For BCLP discussions about what the federal Equal Employment Opportunity Commission ("EEOC") has said about COVID-19 related testing, see this blog post on 4 Takeaways from the EEOC's New Guidance on Antibody Testing, Older Workers, and Accommodations and this one on EEOC Updates COVID-19 Guidance, Permitting Employers To Administer COVID-19 Tests and Clarifying Accommodation Obligations.

Telemedicine: The DOL clarified that, until December 31, 2020, and in light of the current pandemic-related demands on health care providers and PPE/supplies, "telemedicine" visits will count as "in-person visits" for FMLA purposes. (See Q&A #12.) This decision is significant because one of the common categories of serious health condition under the FMLA – "incapacity plus treatment" – requires certain "in-person" visits to a health care provider. According to the DOL, a telemedicine visit will constitute an in-person visit as long as it:

- Includes an examination; evaluation; or treatment by a health care provider;
- Is performed by video conference; and
- Is permitted and accepted by state licensing authorities.

Other FMLA Reminders: Although not "new," the DOL's previously-existing FMLA Q&A contained a number of important reminders, including:

- An individual who is ill with COVID-19 *may* have a serious health condition for purposes of FMLA, depending on whether all of the applicable requirements are met, such that an eligible employee who has COVID-19 or who is caring for a covered family member with COVID-19 may be entitled to FMLA leave. (See Q&A # 2.)

- An employee's request to take leave to avoid exposure to COVID-19 is *not* protected by the FMLA. (See Q&A #3.)

- Under the FMLA, an employee who has taken FMLA leave may only be required to submit a fitness-for-duty certification to return to work if all similarly-situated employees are subject to the requirement and if the employee is notified of the requirement in advance. That said, under the ADA, in light of the pandemic, an employer may require an employee who has been out sick with COVID-19 to provide a doctor's note, undergo a medical examination, or be "symptom free" for a period of time before allowing the employee to return to work. Any such requirements should be applied consistently to all similarly-situated employees, not just those who have taken FMLA leave, and without regard to protected characteristics such as race, gender, religion, national origin, etc. (See Q&A #s 6-7.)

- Layoff or furlough decisions may not be based on an employee having requested or taken FMLA leave. (See Q&A #s 9-10.)

BCLP has assembled a COVID-19 HR and Labor & Employment taskforce to assist clients with labor and employment issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bclplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at https://www.bclplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html

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