



DOL Issues Long Overdue FMLA Guidance on Eligibility of Remote Employees

February 2023

The Department of Labor (DOL) recently issued Field Assistance Bulletin (FAB) 2023-1 on an eligibility issue that plagued employers and employees throughout the pandemic: how to determine if remote employees are eligible under the prong of the FMLA's eligibility rules that requires an employee to work at a worksite where the employer has at least 50 employees within 75 miles.

Background on the FMLA

For an employee to be eligible for FMLA protections, the employee must meet three eligibility criteria: (1) have worked for the employer for at least 12 months prior to taking leave (need not be continuous); (2) have at least 1,250 hours of service in the 12-month period immediately preceding the leave; and (3) work at a worksite where the employer has at least 50 employees within 75 miles. It's this worksite requirement that has created confusion for employers and employees alike.

Under DOL regulations that interpret the location requirement, the employee's residence is not a worksite. While those regulations do provide some guidance for employees who do not have a fixed worksite, they do not address the worksite of remote employees in any other way.

FAB 2023-1

To provide guidance on the worksite of a remote employee, the FAB takes as its starting point the regulations regarding employees who do not have a fixed worksite: "*for an employee who works from home...their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made.*" The FAB then provides that if 50 or more employees are employed within 75 miles of that location (counting any other remote employees), then the remote employee is eligible for FMLA protections under the worksite prong.

The FAB includes the following helpful example:

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 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.

Outstanding Question

One scenario the FAB does not address in its example is a case in which the manager also works remotely, not at headquarters. In this case, is Employee B's worksite still headquarters? This is not an unusual scenario, and it would have been helpful had the DOL addressed it in the FAB.

What Employers Should Do Now

Employers should review their FMLA policies and revise them if necessary consistent with the FAB guidance. Employers should also confer with any third-party FMLA administrators to make sure determinations on the worksite of remote employees will now be made in accordance with the FAB.

The FAB also includes discussion on the treatment of remote workers under the Fair Labor Standards Act (FLSA), including scheduling and break time. Thus, it may prove useful for employers to review compliance with employment protections for remote workers under the FLSA as well.

Resources

FAB 2023-1 can be found [here](#).



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