

Department of Labor Posts Guidance for Employers on FMLA and FLSA Issues Arising From Employers' Response to Flu Outbreak

For more information regarding this or any other employment-related issue, please contact your Vorys attorney or a member of the Vorys Labor and Employment Group by calling 614.464.6400.

The Wage and Hour Division of the U.S. Department of Labor (DOL) has posted information on its website regarding issues that may arise under the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA) for employers who are preparing for and responding to current flu outbreak. The information is provided in a question and answer format and addresses issues that commonly arise for an employer when its employees or their family members become ill with the H1N1 flu or another flu virus. This information can found here, [Pandemic Flu and the FLSA: Questions and Answers](#) and here, [Pandemic Flu and the FMLA: Questions and Answers](#).

The DOL guidance clarifies, among other things, that the FMLA does not cover the following types of employee absences:

- Leave taken by a healthy employee to avoid getting the flu;
- Leave taken by an employee to stay home with a healthy child whose school or day care center has been closed due to the flu; and
- Absences of healthy nonexempt employees who miss work when an employer shuts down its facilities due to the flu.

The DOL guidance also notes that the FLSA does not require an employer to pay nonexempt employees who miss work because an employer shuts its facilities down because of the flu. However, subject to very limited exceptions, exempt employees must receive their full salary for any week in which they perform any work without regard to the number of days

or hours worked. There is no exception for a shutdown initiated by the employer due to a flu outbreak.

The guidance also addresses the FLSA implications of having employees work from home during a flu outbreak. The guidance notes that the FLSA does not prohibit employers from requiring employees to work from home during a flu outbreak. However, the guidance reminds employers of the requirement to keep an accurate record of all hours worked for nonexempt employees who are working at home and encourages employers to develop a mechanism for recording such hours.

The guidance does not provide a definitive answer to the question of whether leave taken by an employee who is sick with the flu or leave to care for a family member with the flu qualifies as FMLA leave. Thus, as with any other potential FMLA leave due to illness, employers will need to make a case-by-case determination of whether the flu qualifies as a "serious health condition" under the FMLA.

The DOL guidance addresses the impact of two federal laws on employers' responses to the current flu outbreak. However, employers would also be well advised to consider the impact of state wage/hour and family/medical leave laws, which may impose additional requirements beyond the FMLA and FLSA.

The DOL guidance described in this E-Alert should be read in conjunction with the recent flu-related guidance issued by the EEOC, which we addressed in an earlier Alert (October 26, 2009) that can be found [here](#).

This client alert is for general information purposes and should not be regarded as legal advice.