

Publications

Department of Labor Issues Guidance on Virtual Posters

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CLIENT ALERT | 1.8.2021

The COVID-19 pandemic has accelerated the move to employees working remotely, whether temporarily or permanently. Certain federal laws require that employers post notices in their workplaces informing employees of their statutory rights. With respect to employees who are not working from their company's physical location, the U.S. Department of Labor (DOL) has issued guidance on electronic postings. The DOL's Field Assistance Bulletin explains that electronic postings may satisfy the notice requirements under the Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA), Employee Polygraph Protection Act (EPPA), Davis-Bacon Act (DBA), and Service Contract Act (SCA). However, "in most cases, these electronic notices supplement but do not replace the statutory and regulatory requirements that employers post a hard-copy notice."

Continuous Posting Under the FLSA, FMLA, EPPA and DBA

An employer subject to the FLSA, EPPA, or DBA must post and keep posted a notice explaining the law's provisions in conspicuous places in every establishment where its employees work. Similarly, under the FMLA, employers are required to conspicuously post and keep posted where employees are employed a notice explaining the FMLA's provisions and procedures for filing complaints of violations. Because these laws require continuous posting, the DOL distinguishes between on-site workforces and remote workforces.

Where an employer has employees both on-site and working remotely, the employer may **supplement** – but not supplant – a hard-copy posting requirement with electronic posting. The DOL "encourages" both methods of posting in such cases.

For a remote workplace, the DOL explains that an electronic posting by itself will be sufficient only if (1) **all** of the employer's employees exclusively work remotely, (2) all employees customarily receive information from the employer via electronic means, and (3) all employees have readily available access to the electronic posting at all times. Note that, under the FMLA and EPPA, these three requirements

apply equally to applicants.

An employer may satisfy the posting requirement for a remote workplace by posting the required notice on an internal or external website or shared network drive or file system that is accessible at all times to all employees. This means an individual must be able to access the electronic posting without having to specifically request permission to view a file or access a computer. Further, to be deemed sufficient, the employer must take steps to inform employees of where and how to access the notice electronically, and employees must be able to “easily determine” which postings apply to them and their worksite.

One-Time Notice under the SCA

A contractor subject to the SCA working on contracts in excess of \$2,500 must notify employees of the required compensation and fringe benefits by using WH Publication 1313 and any applicable wage determination. This notice may be delivered to each employee (including via email if customarily used to communicate regarding the employee’s work on the contract), or posted in a prominent and accessible place at the worksite where it may be seen by employees performing work on the contract. An electronic posting of WH Publication 1313, and the applicable wage determination, is sufficient only if (1) **all** employees exclusively work remotely, (2) all employees customarily receive information via electronic means, and (3) all employees have readily available access to the electronic posting at all times. The electronic posting must be as readily accessible to those employees as a hard-copy posting would be, and an employer must inform employees of how and where to access the electronic posting. Employees cannot be required to specifically request access to a computer or ask for file permissions to view the posting.

Conclusion

The DOL’s guidance provides employers with some flexibility to address a regulatory issue affecting remote workers. At the same time, the guidance raises several practical concerns. For example, employers must ensure that employees can discern which posters are applicable to them, that employees are adequately informed where the virtual posters are located, and that applicants receive access to required notices. Finally, employers also must be aware of any state or local posting mandates. Contact your Vorys lawyer if you have questions about workplace posting requirements.

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Vorys COVID-19 Task Force

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