

# HR COMPLIANCE OVERVIEW

## Telework and Determining Employee Eligibility Under the FMLA

The Family and Medical Leave Act (FMLA) is a federal law that provides eligible employees of covered employers with unpaid, job-protected leave for specified family and medical reasons. Eligible employees may take up to 12 weeks of FMLA leave during a 12-month period (26 weeks to care for a covered service member). The law applies to (among other entities) private-sector employers with 50 or more employees in 20 or more workweeks in the current or previous calendar year.

To be eligible for FMLA leave, employees must meet specific requirements regarding (among other things) their hours of service and work location. Employers may find these rules particularly challenging to apply when an employee works from home or another location away from an employer's facility (also known as "teleworking" or "telecommuting"), whether permanently or temporarily due to inclement weather or other circumstances. This Compliance Overview provides guidance on determining FMLA eligibility for employees who telework.

### LINKS AND RESOURCES

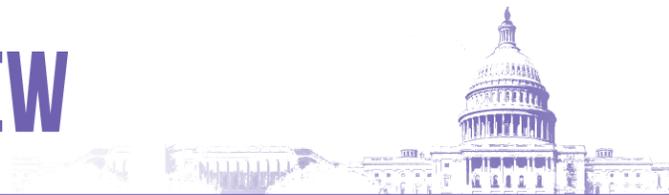
- [Field Assistance Bulletin No. 2023-1: Telework Under the Fair Labor Standards Act and Family and Medical Leave Act](#), from the U.S. Department of Labor's Wage and Hour Division (WHD)
- [The Employer's Guide to The Family and Medical Leave Act](#), a publication of the WHD
- [FMLA regulations](#)

### Highlights

Employees who telework are eligible for FMLA leave on the same basis as employees who report to any other worksite to perform their job. For FMLA eligibility purposes, the following rules apply:

- For purposes of the hours-of-service requirement, all hours worked are counted when an employee teleworks from home consistently or in combination with working at another or various worksites; and
- For purposes of the work location requirement, the employee's personal residence is not a worksite; rather, the determination of the worksite for an employee who teleworks is fact-specific and will be based on factors such as where the employee reports to work or the location where the employee's assignments are made.

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## Background

An employee is generally eligible for FMLA leave if they:

- Work for a covered employer;
- Have worked for the employer for at least 12 months as of the date the FMLA leave is to start;
- Have at least 1,250 hours of service for the employer during the 12-month period immediately before the date the FMLA leave is to start; and
- Work at a location where the employer employs at least 50 employees within 75 miles of that worksite as of the date when the employee gives notice of the need for leave.

Employees who telework are eligible for FMLA leave on the same basis as employees who report to any other worksite to perform their job. However, employers may question how these eligibility rules apply to telecommuting employees—specifically, the requirements for 1,250 hours of service and for an employer’s having 50 employees within 75 miles of the worksite.

## Hours of Service

For most employees, including those who telework, the FMLA’s 1,250 hours of service requirement is determined according to the principles under the federal Fair Labor Standards Act (FLSA) for determining compensable hours of work. Under the FLSA, nonexempt employees must be paid for all hours worked, including work performed in their home or otherwise away from the employer’s premises or job site. Hours worked are not limited solely to time spent on active productive labor but may, for instance, include time spent waiting or on break.

If an employer knows or has reason to believe that work is being performed, the time must be counted as hours worked regardless of whether the employee works at the employer’s location or teleworks from another location. An employer may satisfy its obligation to exercise reasonable diligence to acquire knowledge regarding employees’ unscheduled hours of work by providing a reasonable reporting procedure for nonscheduled time and then paying employees for all reported hours of work, even hours not requested by the employer.

The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by recordkeeping methods or by compensation agreements that do not accurately reflect all the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA principles may be used.

**Key Points:** If an employer does not maintain accurate records of hours worked, including for employees who are exempt from the FLSA’s requirement that a record be kept of their hours worked (e.g., bona fide executive, administrative and professional employees), the employer has the burden of showing that the employee has not worked the requisite hours in order to claim the employee is not eligible for FMLA leave. An employer must be able to clearly demonstrate, for example, that full-time teachers of an educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months.

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## BREAKS

Employees commonly take short breaks during the workday, and employers may be confused about how to treat such breaks for purposes of the FMLA hours-of-service requirement. Breaks of 20 minutes or less must be counted as hours worked. Whether teleworking at home or working at the employer’s facility, employees often take short breaks to use the bathroom, get a cup of coffee, stretch their legs, and perform similar activities. By their very nature, such short breaks primarily benefit the employer by reducing employee fatigue and helping employees maintain focus and be more productive at work. When employees take short breaks of 20 minutes or less, the employer must treat such breaks as compensable hours worked, regardless of whether the employee works from home, the employer’s worksite, or some other location not under the employer’s control.

Unlike short rest breaks of 20 minutes or less, bona fide meal breaks (typically 30 minutes or more), during which an employee is completely relieved from duty to eat regular meals, are not work time. Similarly, breaks that are longer than 20 minutes and permit the employee to use the time effectively for their own purposes and during which the employee is completely relieved from duty are not hours worked. These principles apply regardless of whether the work is performed at the employer’s worksite, at the employee’s home or at some other location away from the employer’s worksite.

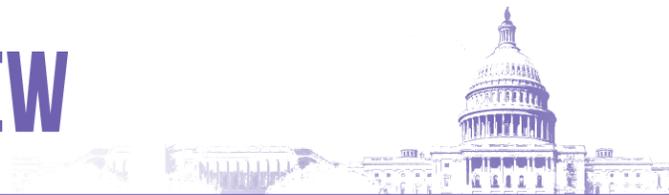
To be completely relieved from duty, employees must be told in advance that they may leave the job and will not have to commence work until a specified hour has arrived. An employee may also be completely relieved from duty when the employer allows the employee to freely choose the hour at which they resume working and the time is long enough for the employee to effectively use for their own purposes. The examples below illustrate the concepts above.

**Example #1:** Employee A works at a shared workspace not controlled by their employer and takes a break for lunch from 12:30-1:00 p.m. During this break, Employee A is interrupted by work phone calls, with each call lasting several minutes. Because the meal break period of 30 minutes is frequently interrupted by work phone calls, Employee A would not be considered relieved of all duties, and the meal break period would have to be counted as hours worked.

**Example #2:** Employee B works from home and is allowed flexibility to set their own schedule. Employee B starts work at 7:00 a.m., takes a one-hour break from 8-9 a.m. to get their children ready for school and resumes work at 9:00 a.m. The period between 8 and 9:00 a.m. is not work time under the FLSA because Employee B is completely relieved from duty, chooses when to resume work and is able to effectively use the time for their own purposes.

In sum, bona fide meal breaks and periods when employees are completely relieved from duty and are able to effectively use the time for their own purposes are not hours worked under the FLSA. This is true regardless of the location from which employees perform their work. Employers should keep the principles above in mind when determining whether an employee has met the 1,250 hours of service requirement for FMLA eligibility purposes.

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## 50 Employees Within 75 Miles

To be eligible for FMLA leave, an employee must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. For FMLA eligibility purposes, the employee's personal residence is not a worksite. When an employee works from home or otherwise teleworks, their worksite for FMLA eligibility purposes is the office to which they report or from which their assignments are made. Thus, if 50 employees are employed within 75 miles from the employer's worksite (the location to which the employee reports or from which their assignments are made), the employee meets that FMLA eligibility requirement. The number of employees within 75 miles of a worksite includes all employees whose worksite is within that area, including employees who telework and report to or receive assignments from that worksite. The following examples illustrate these concepts.

**Example #3:** Employee A works for a department store as a customer service representative. Following a weather emergency, the store is temporarily closed to everyone except essential personnel and building maintenance staff. Employee A and her supervisor perform their duties by teleworking from their homes during the period the store is temporarily closed. For FMLA eligibility purposes, the store remains Employee A's and her supervisor's worksite.

**Example #4:** 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 by 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 does not work within 75 miles of the company headquarters.

## Conclusion

Employees can have the flexibility of working from home, teleworking or working away from premises managed or controlled by the employer and also remain covered by the protections of the FLSA and the FMLA. For most employees, including those who telework, the FMLA's hours-of-service requirement is determined according to the principles under the FLSA for determining compensable hours of work. Protections under the FLSA apply equally to employees who telework as to employees working at an office, factory, construction site, retail outlet or any other worksite location.

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Under the FMLA, all hours worked are counted for purposes of determining an employee’s FMLA eligibility when an employee teleworks from home consistently or in combination with working at another or various worksites.

Furthermore, for FMLA eligibility purposes, the employee’s personal residence is not a worksite. For FMLA eligibility, the determination of the worksite for an employee who teleworks is fact-specific and will be based on factors such as where the employee reports to work or the location where the employee’s assignments are made.

Employers should also be aware that their obligations may be affected by other federal, state and/or local laws. Employers with questions on FMLA eligibility for employees who telework should contact local counsel for specific legal advice to ensure they fulfill all obligations.