

Department of Labor Issues New Guidance for Tracking Teleworkers' Hours

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Last week, the U.S. Department of Labor's Wage and Hour Division (WHD) issued Field Assistance Bulletin (FAB) 2020-5, clarifying employers' obligation to track work hours for employees working remotely. Although the DOL's guidance stems from the increase in employees working from home due to COVID-19, it nonetheless applies to everyone working from home, whether due to COVID-19 or not.

Background:

The Fair Labor Standards Act (FLSA) requires employers to pay for all hours that an employee is "suffered or permitted to work." An employer must compensate an employee for all of the employee's work hours, whether scheduled or unscheduled. The FLSA does not require employers to pay for hours worked that it did not know about and had no reason to know about. But employers must make every effort to prevent employees from performing unauthorized work — merely having a policy against unauthorized work is insufficient. The FLSA requires employers to exercise their control to prevent employees from working unauthorized hours, but this task has become more challenging for employers as the number of remote workers increases. It is more difficult for employers to monitor and control employees' work hours since many employees are working irregular hours and from home. Employers may discipline employees for working unauthorized hours and prohibit it going forward, but an employer may not withhold pay for hours worked by an employee, even if they were unauthorized.

The DOL's Guidance:

The DOL's guidance reminds employers that they must pay for hours an employer knows or has reason to believe an employee is performing work. An employer knows or has reason to know work is being performed if an employer has actual knowledge or constructive knowledge of hours worked. Determining if an employer has actual knowledge of hours worked is relatively straightforward. An employer has actual knowledge of an employee's regularly scheduled hours and all other hours reported by an employee. On the other hand, whether an employer has constructive knowledge of hours worked is determined by whether an employer has reason to believe work is being performed. If an employer could have discovered an employee was working unscheduled hours through reasonable diligence, an employer likely has constructive knowledge of hours worked and will be required to pay for them.

The DOL's guidance focuses on what an employer *should* have known, not what it *could* have known. One way for employers to demonstrate reasonable diligence is by establishing a clear and reasonable process for employees to report scheduled and unscheduled work hours. Employers should notify employees about the process and instruct them on how to use it. If an employee fails to report



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unscheduled hours through such a procedure, the employer generally is not required to conduct an investigation to discover unreported hours. The employer will not violate the FLSA if it lacked knowledge of the unscheduled hours worked and the employee failed to report them. Of course, employers cannot prevent or discourage employees from accurately reporting work hours.

The DOL's guidance notes the reasonable diligence standard does not impose an unlimited duty on employers to undertake impractical efforts to determine whether employees worked unscheduled hours. The guidance cites to a 7th Circuit decision where the court determined that an employer was not required to sort through work-issued phone records to determine whether employees were working overtime and owed additional pay: "Though an employer may have access to non-payroll records of employees' activities, such as records showing employees accessing their work-issued electronic devices outside of reported hours, reasonable diligence generally does not require the employer to undertake impractical efforts such as sorting through this information to determine whether its employees worked hours beyond what they reported." However, the DOL's guidance cautioned that depending on the circumstances, consultation of non-payroll records could be practical.

The Takeaway:

It takes two to tango, and it takes two to ensure employees are properly tracking their work hours. Employers should determine whether they know or have reason to believe unscheduled work is being performed and compensate employees for those hours accordingly. Wage claims are expensive and heavily penalized, so it is important that employees are properly compensated for their hours worked. Employers should make it clear to employees that prior approval is required for work performed outside scheduled hours, and utilize disciplinary procedures when necessary. Likewise, employees should follow time reporting procedures established by their employers and accurately report all scheduled and unscheduled hours.

Now is a great time for employers to review current policies and procedures for telework or remote work arrangements, or enlist an employment law attorney to get these policies established. Telework or remote work policies should set clear expectations for work schedules and have a process for employees to report all hours worked.

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