

U.S. Department of Labor Issues New Guidance on Remote Work

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The COVID-19 pandemic has led to a transformation of the workplace and an explosion of remote work, including for employees previously not covered under employers' telecommuting policies. Despite the [reopening](#) of most state economies, many employers are continuing to allow their workforces to work remotely. Remote work by nonexempt employees can pose a challenge with regard to ensuring employees are paid for all time worked, as the traditional workday may be blurred in a remote environment. On August 24, 2020, the U.S. Department of Labor's (DOL) Wage and Hour Division issued [Field Assistance Bulletin \(FAB\) No. 2020-5](#) regarding employers' obligations to use reasonable diligence in tracking remote employees' hours. The guidance affirms the value of a clear system for reporting time and a requirement that employees promptly and accurately report their time—especially in a remote work environment.

General Obligations Under the FLSA

Under the Fair Labor Standards Act (FLSA), employers are obligated to compensate nonexempt employees for all hours the employees are "suffered or permitted" to work. In other words, even if an employer did not request that an employee perform work, if the employer knows or has reason to believe the employee performed the work, the employer must pay the employee for his or her time performing the work.

The FLSA also requires an employer to "exercise its control and see that the work is not performed if it does not want it to be performed." Employers bear the burden of preventing work that they do not want performed, and therefore have the authority to promulgate and enforce rules prohibiting employees from working when they are not supposed to be working. Employers may discipline employees for performing unauthorized work—but they must pay for the time.

The FLSA also requires employers to pay employees for hours worked based on either "actual knowledge or constructive knowledge" of the employees' work hours. Employers generally have actual knowledge of remote employees' regularly scheduled work and will have obtained actual knowledge of hours worked through other means, such as "employee reports or other notifications." The DOL's guidance instructs that "[a]n employer may have constructive knowledge of additional unscheduled hours worked by [its] employees if the employer should have acquired knowledge of such hours through reasonable diligence."

The FLSA and Remote Work

FAB No. 2020-5 confirms that while it is an employer's obligation to make every effort to prevent unwanted work, the employer's duty to do so is not unlimited. The DOL recognizes that in a remote work environment, an employer may have

difficulty exercising control when the employer does not have reason to believe work is being performed—and therefore the employer's obligation is “not boundless.” Accordingly, the guidance states that an employer must “exercise reasonable diligence” to ensure employees are paid for all time worked. The employer may satisfy its obligation under the FLSA by establishing a system that requires nonexempt employees to accurately record and report all time worked each day. Employers may also pay for all *scheduled* working time and have policies requiring employees to self-report work time that is not otherwise scheduled. Employers “cannot implicitly or overtly discourage or impede accurate reporting” under their policies.

In the event that an employee fails to report unscheduled hours worked through this procedure, the DOL guidance states that an “employer is generally not required to investigate further to uncover unreported hours.” This is true even if the 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”

Likewise, the DOL notes that an employer’s “failure to compensate an employee for unreported hours that the employer did not know about, nor had reason to believe was being performed, does not violate the FLSA.” Citing case law, the DOL also pointed out that an employee who “fails to follow reasonable time reporting procedures ... prevents the employer from knowing its obligation to compensate the employee.”

Practical Takeaways

The COVID-19 pandemic has presented many unique challenges for employers, including issues arising from increased teleworking. The DOL’s guidance provides some practical takeaways for employers to consider as the pandemic continues:

- *Employer obligations under the FLSA remain intact.*

Despite the changing work environment, employers still have the same obligations under the FLSA to compensate employees for all hours worked, including *all* work performed remotely. The failure to abide by these obligations can result in hefty damages, which can include unpaid wages, liquidated damages, and attorneys’ fees.

- *“Exercise reasonable diligence.”*

As described above, the obligation to compensate employees for all work that employers have reason to believe occurred remains. When an employer has or should have actual knowledge that employees are working outside of their scheduled hours—as evidenced by work produced, communications, or other reports—it is the employer’s duty to compensate the employees for the hours worked.

- *Work schedule policies may require review.*

The DOL guidance points out that “[e]mployers are required to exercise control to ensure that work is not performed that they do not wish to be performed.” In light of this requirement, employers may want to maintain policies making clear that employees should not be working outside of their scheduled work times. Employers may also want to have policies in place for employees to report unscheduled or uncompensated work hours.

- Consider whether management is enforcing policies consistently.

Finally, once the above-referenced policies are in place, employers may want to consider whether they are being enforced consistently. In this regard, it may be helpful to make sure that employees know to work during their scheduled work hours and that the failure to do so without approval will result in corrective action.

Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm's [Coronavirus \(COVID-19\) Resource Center](#) as additional information becomes available. Important information for employers is also available via the firm's [webinar programs](#).