



## Employment Law Note

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# DOL's Reminder and Guidance: Watch the Clock



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The Fair Labor Standards Act ("FLSA") requires that employers track the number of compensable hours non-exempt employees work, *including* the compensable hours of employees who telework. In direct response to complications created by the increase in teleworking arrangements resulting from the COVID-19 global pandemic, on August 24, 2020, the United States Department of Labor ("DOL") issued a field assistance bulletin (the "FLSA Bulletin," found [here](#)) to remind employers of the manner and extent to which they must accurately account for the number of hours their employees work remotely. In sum, as the DOL states in the FLSA Bulletin, employers are obligated to exercise "reasonable diligence" in tracking the hours worked by their employees—including teleworking employees—and may do so by providing a reasonable reporting procedure for unscheduled time.

### Background – FLSA Requirements

As the FLSA Bulletin affirms, the FLSA requires that employers compensate employees for all hours worked, including work that is "not requested, but suffered or permitted," regardless of whether the work was performed in the workplace or remotely. An employer's knowledge of an employee's hours worked includes both the hours that the employer is *actually* aware that an employee worked, as well as the hours worked by an employee that the employer *has reason to know* were worked. This includes any overtime hours worked by an employee, whether or

not the employee received approval to work overtime.

Under the FLSA, it is the employer's responsibility to manage and exercise control over the hours worked by employees. To this end, employers should establish regular working hours as well as policies and procedures for requesting and approving or denying overtime hours. While an employer cannot avoid payment obligations for unapproved work in violation of company policy, employers should make every effort to enforce such policies, including by providing written discipline to employees who engage in policy violations.

Despite the strict requirements to compensate employees for all hours worked, there is no requirement for an employer to compensate an employee for hours of which it is unaware. This poses an interesting challenge in today's COVID-19 world where many employees are teleworking and employers do not have the same level of control over work hours as they had when employees worked in the office.

### DOL Guidance on Tracking Telework Hours

Although the employer's duty to compensate an employee for all hours worked is daunting, an employer does not have a boundless duty to prevent unwanted work from being performed away from its worksite. Despite this, the employer still has a duty to prevent work of which it knows or has reason to believe was or is being performed.

For telework employees, the employer is said to have knowledge of an employee's regularly scheduled hours and any hours worked which an employee reports or otherwise notifies the employer. An employer is also said to have "constructive knowledge" of hours worked if an employer should have acquired knowledge of hours worked through reasonable diligence. The reasonable diligence standard asks "what the employer *should* have known" and not "what it *could* have known."

The FLSA Bulletin provides that one way an employer may satisfy its obligation to exercise reasonable diligence to acquire knowledge of an employee's hours worked is to establish a reasonable process for an employee to report uncompensated work time. The key is that the employer must not implicitly or overtly discourage or impede the employee's ability to report such hours and must compensate the employee for all reported hours. If an employee fails to report unscheduled work hours through the employer's established process, the employer is generally not responsible to investigate further to uncover unreported hours worked. Even though an employer has access to an employee's emails and other electronic devices, under the FLSA an employer is not generally responsible for investigating and

undertaking impractical efforts such as reviewing emails to discover the hours during which an employee is working. Instead, as the FLSA Bulletin notes, an employee's failure to follow reasonable procedures for reporting unscheduled time "thwarts" an employer's ability to prevent unwanted work; thus, the employer's failure to compensate the employee for that time does not violate the FLSA.

## Key Takeaways for Employers

While the FLSA Bulletin serves as a thankful reminder that employers need not engage in burdensome—and "impractical"—efforts to investigate and discover unreported hours worked by its employees, the FLSA unequivocally requires employers to exercise diligence in recording and compensating employee hours worked. While increased remote workforces necessitated by the current global pandemic have created unique challenges, employers should implement processes to ensure prompt and accurate reporting of all hours worked—including unscheduled time—for *all* employees, including those working remotely. Even if an employee reports hours worked which were not authorized, employees must be compensated while disciplinary action for any policy violation must be addressed separately.

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