

Insights, News & Events

LABOR DEPARTMENT ISSUES GUIDANCE ON TRACKING EMPLOYEES' TELEWORKING HOURS

Insights
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The U.S. Department of Labor just released a [Field Assistance Bulletin](#) (FAB) to provide employers with guidance regarding their wage and hour obligations to track the hours of employees working remotely or teleworking. Importantly, while the August 24 FAB directly speaks to employers' Fair Labor Standards Act (FLSA) requirements under remote work arrangements that have arisen amid COVID-19, it also applies to all other telework or remote work arrangements. This guidance may be especially useful to employers who are new to the remote work world.

THE BASICS: WHAT DOES FEDERAL LAW REQUIRE?

As a reminder, the FLSA requires that an employer compensate employees for all hours it "suffers or permits" them to work. This means that employees must be compensated for time that may be unscheduled, but during which the employee still performs work. Thus, if an employer knows or has reason to believe that work is being performed, the time must be counted as hours worked.

A challenge for employers is preventing work that it does not want performed. Notably, the employer cannot rely exclusively on its stated policy. Indeed, the guidance notes that it is not easy to define when an employer "has reason to believe that work is being performed." The FAB reinforces that employers are not required to compensate employees for work they do not know about and have no reason to know about.

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Rather, employers are only required to compensate employees for hours worked that are based on “actual knowledge” or “constructive knowledge” of that work. Employers will be deemed to have “actual knowledge” of employees’ regularly scheduled hours and through employee reports or other notification “actual knowledge” of the hours worked. Employers might be deemed to have “constructive knowledge” if it could have acquired information regarding additional work done through the exercise of “reasonable diligence.”

Importantly, the FAB clarifies that “reasonable diligence” is limited to what the employer should have known, not what it “*could have known.*” This means employers are not necessarily required to “cross-reference” phone records or otherwise review other non-payroll records to determine whether or not employees were working beyond their scheduled hours, especially during these remote work times.

WHAT SHOULD EMPLOYERS DO?

Instead, you should provide employees with a process and procedure to report hours worked, particularly to ensure that unscheduled hours also are recorded. If the employee fails to utilize the process or procedure, you might be able to make an argument that the employee has prevented you from satisfying your obligation to compensate employees and thwarted your efforts to prevent unwanted work. Thus, you may be able to avoid FLSA liability for failing to compensate employees for work performed that you did not know about and that the employee didn’t advise you about.

You should review your remote work and telework policies to ensure that they provide clear guidance to employees about your expectations regarding schedules and working hours. You should also implement a policy or procedure by which employees can report work that was performed outside their regularly scheduled time frames or their recorded hours.

CONCLUSION

Overall, you should exercise reasonable diligence to ensure that you capture all hours worked (whether scheduled or not, just as they must for employees working onsite). But

you can take some solace in the USDOL's guidance reminding us all that "constructive knowledge" is not without limits.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in our [Wage and Hour Law Practice Group](#), or any member of [our Post-Pandemic Strategy Group Roster](#). You can also review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

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