



August 25, 2020

U.S. Department of Labor Issues Guidance On Tracking Telework Hours

On August 24, 2020, the U.S. Department of Labor (“DOL”) issued guidance for employers to track the number of hours of compensable work performed by employees who are teleworking or otherwise working remotely away from the worksite, so as to comply with the Fair Labor Standards Act (“FLSA”). Employers must pay their employees for all scheduled and unscheduled work that the employer has knowledge of through reasonable diligence. While the guidance responds directly to needs created by the COVID-19 crisis, it is also applicable to other telework or remote work arrangements.

FLSA Requirements

The FLSA requires employers to compensate their employees for all hours worked, including work not requested but suffered or permitted, including work performed at home. See 29 C.F.R. § 785.11-12. If an employer knows or has reason to believe that work is being performed, it must count the time as hours worked. *Id.* at § 785.11. Employers are required to exercise control to ensure that work is not performed if they do not want it to be performed. *Id.* at § 785.13. Thus, employers have the burden of preventing work that is not desired, and “[t]he mere promulgation of a rule against such work is not enough.” *Ibid.*

Employers Must Pay for All Hours Worked That It Knows or Has Reason to Believe Was Performed

The rule is also applicable to work performed away from the premises. If an employer knows or has reason to believe that work is being performed at home or remotely, it must count the time as hours worked. See 29 C.F.R. § 785.12. Employers may counsel or discipline employees who are spending

too much time on a particular task. The employer must however compensate the employee for all time worked.

According to the DOL guidance, an employer may have actual or constructive knowledge of additional unscheduled hours worked by its employees if the employer should have acquired such knowledge through “reasonable diligence.” See *Hertz v. Woodbury County, Iowa*, 566 F.3d 775, 782 (8th Cir. 2009). One way an employer can establish reasonable diligence to acquire knowledge of its employees’ unscheduled hours is by establishing a reasonable process for an employee to report uncompensated work time, including hours not requested by the employer. See *Allen v. City of Chicago*, 865 F.3d 936, 938 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1302 (2018). If an employee fails to report unscheduled hours through such procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours or provide compensation for those hours. However, if the employer’s reporting system implicitly or overtly discourages or impedes accurate reporting, or if employees are not properly instructed on using the reporting system, it will not constitute reasonable diligence, and the employer must compensate its employees for all hours worked. Employees may not waive their rights to compensation under the FLSA. See *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 388 (6th Cir. 2016).

Takeaway

As the pandemic has made long-term telework a reality for many businesses, effected employers should establish and train their employees on a reasonable process for reporting uncompensated work time.

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If you have any questions regarding this alert, please do not hesitate to contact us.

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