

Legally speaking, working from home blurs line between 'work' and 'home'



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The COVID-19 pandemic has forced businesses across Arkansas to transition from a traditional office environment to remote work. With flu season approaching and an increasing number of COVID-19 cases, many employers will continue to allow their employees to work from home for the foreseeable future. Although remote work provides a flexible and safe option for employees during an unprecedented pandemic, potential employment issues may arise as the line between work and home continues to blur.

Acknowledging the challenges that remote work presents to employers and the difficulty of tracking employees' hours worked remotely, the U.S. Department of Labor (DOL) recently issued new guidance to ensure employers comply with the Fair Labor Standards Act (FLSA). Specifically, Field Assistance Bulletin No. 2020-5 clarifies an employer's obligation "to track the number of hours of compensable work performed by employees who are teleworking or otherwise working remotely away from any worksite or premises controlled by their employers." Employers would be wise to remember, however, that employees considered "exempt" under the FLSA must be paid their predetermined amount of compensation each pay period. Subject to limited exceptions, the predetermined amount of compensation cannot be reduced because of variations in the employee's work quality or quantity.

Citing portions of the FLSA, the DOL affirms the requirement that employers must compensate their non-exempt employees for all hours worked, even those "not requested but suffered or permitted." 29 C.F.R. § 785.11. Thus, employers have the burden to prevent employees from working when such work is not requested. Although this requirement might seem boundless, it does not require the employer to pay an employee for work that the employer did not know about and had no reason to know. Therefore, to comply with the FLSA, employers should compensate employees for work when they have actual or constructive knowledge of that work.

Even in the remote work context, actual knowledge is relatively easy to define. Employers have an essential understanding of employees' regularly scheduled work hours and hours detailed in employee reports. However, constructive knowledge, or what an employer should reasonably have known about, is more difficult to define. That is especially true in the context of remote work, where an employee works at a location not monitored or controlled by the employer. To solve this problem, the DOL explains that one way to satisfy the constructive knowledge requirement is to establish a reasonable process for an employee to report any unpaid work time. It is important that employers properly instruct employees on using this reporting system, and employers must compensate employees for any reported time.

Generally, an employer does not have a duty to investigate if an employee fails to report unscheduled hours that the employee worked. That means that an employer does not have to make drastic efforts to sort through employees' activities, such as records of an employee's access to work-issued devices outside of work hours. Therefore, if an employee does not follow established time reporting procedures,

an employer does not violate the FLSA by failing to compensate that employee for any unreported hours worked outside of regularly scheduled work hours that the employer should not reasonably have known were worked.

In response to the DOL's guidance, employers should establish written work reporting policies and engage with employees to ensure that they are compensated for all work. Although the DOL's guidance focuses on wage and hour issues, remote working will likely bring changes to many other aspects of the traditional employment context.

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