

## **U.S. DOL Provides Guidance on Employers' Obligation to Compensate Remote Workers**

Article By:

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Prompted by the many new telework or remote work arrangements that have arisen in response to COVID-19, on August 24, 2020, the Wage and Hour Division of the U.S. Department of Labor (“DOL”) issued [Field Assistance Bulletin No. 2020-5](#) (“Bulletin”) to provide guidance regarding employers’ obligation “to exercise reasonable diligence in tracking teleworking employees’ hours of work.” The guidance, which includes citations to the Fair Labor Standards Act (“FLSA”), the DOL’s interpretive regulations, and federal case law, does not break new ground; rather it offers reminders particularly applicable to teleworking and remote working employees and applies beyond COVID-19 telework arrangements.

The Bulletin reiterates the foundational requirement that employers must pay employees for all hours worked, “including work not requested but suffered or permitted, including work performed at home” and that they must exercise control to ensure that work is not performed that they do not wish to be performed. In other words, when an employer knows or has reason to believe work is being performed, the time must be counted as hours worked – even if the employer did not expressly request it.

The Bulletin notes that for “telework and remote work employees, the employer has actual knowledge of the employees’ regularly scheduled hours; it may also have actual knowledge of hours worked through employee reports or other notifications.” The guidance recognizes, however, that employers may lack – or even be unable to have – actual knowledge that a remote or teleworking employee performed unrequested work. In such instances, the compensability of the work performed turns on whether the employer had “constructive knowledge” that it was being done; that is, whether the employer could have learned of the work by exercising “reasonable diligence.”

The Bulletin reiterates that the burden is on the employer to ensure that “work is not performed if it does not want it to be performed,” and reminds that a rule prohibiting employees from performing additional work without authorization (while important) is insufficient standing alone to establish “reasonable diligence.” The obligation to pay employees for performing unauthorized work, is not boundless, however. The employer must have “reason to believe the work is being performed,” which may exist where, for example, the employer provides “a reasonable reporting procedure for non-scheduled time and then compensating employees for all reported hours of work, even hours not requested by the employer.” If an employee fails to use the employer’s reporting procedure (and

provided the employee has not been prevented or discouraged from using it), “the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours.” As an illustration of “impractical efforts,” the Bulletin offers “sorting through” various “non-payroll records of employees’ activities, such as records showing employees accessing their work-issued electronic devices outside of reported hours.”

The Bulletin concludes with the acknowledgement that “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.”

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