



# School Law FYI

SEPTEMBER 14, 2020

## ***DOL Provides Guidance to School Districts on Tracking and Compensating Remote Workers' Unscheduled Hours***

As the United States continues to grapple with COVID-19 into the second half of 2020, some school districts have continued to have some employees perform their job duties remotely. School districts should review their procedures for tracking and recording employees' hours for compensation purposes, including overtime pay and/or compensatory time. For some school districts, accurately recording employees' hours has become especially difficult due to employees working more flexible and unscheduled hours due to their removal from the traditional worksite and school and childcare closures resulting in increased childcare responsibilities for employees.

With this in mind, the Department of Labor (DOL) recently released [Field Assistance Bulletin 2020-5](#) (FB 2020-5) to provide guidance for all employers on their obligations under the Fair Labor Standards Act (FLSA) to track the number of hours of compensable work performed by employees who are working remotely away from the employer's worksite and are *not exempt* from overtime pay. Under both the FLSA and Wisconsin law, employers are required to pay employees for all hours worked for the employer's benefit, even if that work was not requested by the employer or was performed outside the employee's normally scheduled hours. While a school district can develop policies and disciplinary measures to prevent unscheduled or undesired work, once the school district has knowledge of unscheduled hours actually worked by an employee, the school district must compensate the employee for that time, including applicable overtime pay or compensatory time.

School districts may have actual knowledge of unscheduled hours (for example, the employee informing an administrator directly) or constructive knowledge, which is defined as when "the [school district] has reason to believe that work is being performed." Additionally, a school district may have constructive knowledge "if the [school district] should have acquired knowledge of such hours through reasonable diligence." While it may be easy to identify actual knowledge of unscheduled hours, the DOL acknowledges that it can be difficult for employers to know when they should "have reason to believe" that unscheduled work is being performed or what constitutes reasonable diligence, "particularly when employees telework or otherwise work remotely at locations that the employer does not control or monitor."

The DOL explains in FB 2020-5 that the FLSA does not require employers to pay for work they did not know about and had no reason to know about. One way for school districts to satisfy this obligation is to establish a reasonable process for an employee to report unscheduled hours. If a school district creates a reasonable process for reporting unscheduled work, that process will generally be sufficient to demonstrate the school district has performed reasonable diligence to learn about unscheduled hours. Neither the FLSA nor Wisconsin law require the school district to undergo unprompted searches through their electronic networks to uncover evidence of unscheduled hours. The DOL stated "Though an employer may have access to non-payroll records of employees' activities, such as records showing employees accessing their work-issued electronic devices outside of reported hours, reasonable diligence

generally does not require the employer to undertake impractical efforts such as sorting through this information to determine whether its employees worked hours beyond what they reported.”

If an employee works unscheduled hours but fails to report the hours through the school district’s established process, the school district is generally not required to investigate further to uncover unreported hours or compensate the employee for that time—assuming the employee did not otherwise inform the school district about working unscheduled hours. “Where an employee does not make use of a reasonable reporting system to report unscheduled hours of work, the employer is thwarted from preventing the work to the extent it is unwanted, if the employer is not otherwise notified of the work and is not preventing employees from using the system.”

The takeaway from FB 2020-5 is that school districts are strongly advised to set up a reasonable process where employees can report any unscheduled or unanticipated hours worked. Under both federal and Wisconsin law, having a reporting process will help create a presumption that the school district has undertaken reasonable diligence to gain constructive knowledge of any unreported time employees may have worked. School districts should ensure that the process is easy and accessible for employees, that employees are trained on how to report unscheduled work, and that employees are not discouraged from reporting or otherwise prevented from using the reporting process.

However, setting up a reporting process is not foolproof. According to Wisconsin’s Department of Workforce Development, all employers should still be diligent and pay attention to other evidence they receive that employees might have worked unreported and unscheduled time. For example, if a non-exempt employee emails an administrator after scheduled work hours or an administrator hears from others that a non-exempt employee is working long hours, the school district should still investigate whether the employee worked unrecorded hours that must be compensated. Even if a school district has a reporting process, if a school district has other evidence an employee worked unscheduled time, the school district may have constructive knowledge of those hours that must be compensated.

School districts should also keep in mind that while they must pay employees for all hours worked, school districts can enforce, through discipline or discharge, policies that prohibit employees from working additional hours without prior approval from a supervisor. Even in the unusual circumstances of a pandemic, school districts retain the right to establish work hours for employees and discipline or discharge any employees who fail to follow their assigned schedules.

School districts that have questions about their obligations to remote workers under federal and state wage and hour laws are encouraged to contact a member of Boardman Clark’s School Law Practice Group for further advice and additional information.

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