

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

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DOL Provides Guidance on Tracking and Compensating Remote Workers' Unscheduled Hours

As the United States continues to grapple with COVID-19 into the second half of 2020, remote work has become the new normal for an unprecedented number of workers. In response to more employees working from home, employers have had to reassess their procedures for tracking and recording employees' hours for compensation purposes, including overtime pay. For some employers, 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 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. 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 the employer can develop policies and disciplinary measures to prevent unscheduled or undesired work, once the employer has knowledge of unscheduled hours actually worked by an employee, the employer must compensate the employee for that time.

Employers can have actual knowledge of unscheduled time (for example, the employee informing a manager directly) or constructive knowledge, which is defined as times that "the employer has reason to believe that work is being performed." Additionally, an employer may have constructive knowledge "if the employer 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."

In response to these concerns, 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 employers to satisfy this obligation is to establish a reasonable process for an employee to report unscheduled hours. If an employer creates a reasonable process for reporting unscheduled work, that process will generally be sufficient to demonstrate the employer has performed reasonable diligence to learn about unscheduled hours. When

employers establish such processes, neither the FLSA nor Wisconsin law require the employer to undergo unprompted searches through their electronic networks to uncover evidence of unscheduled hours. “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 employer’s established process, the employer 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 employer 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 employers 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 employer has undertaken reasonable diligence to gain constructive knowledge of any unreported time employees may have worked. Employers should ensure that the process is easy and accessible for employees, that employees are trained on how to report unscheduled time, 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, the state agency in charge of state law wage and hour complaints, 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 an employee emails a manager after scheduled work hours or the employer hears from others that an employee is working long hours to complete a project, the employer should still investigate whether the employee worked unrecorded hours that must be compensated. Even if an employer has a reporting process, if an employer has other evidence an employee worked unscheduled time, the employer may have constructive knowledge of those hours that must be compensated.

Employers should also keep in mind that while they must pay employees for all hours worked, employers 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, employers retain the right to establish work hours for employees and discipline or discharge any employees who fail to follow their assigned schedules.

Employers who have questions about their obligations to remote workers under federal and Wisconsin wage and hour regulations are encouraged to contact Boardman Clark’s Labor & Employment team for further advice and additional information.

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