

USDOL Issues Guidance on Tracking Compensable Hours of Remote Employees

On August 24, 2020, the United States Department of Labor (DOL) issued guidance to assist employers in complying with their obligation to track compensable hours of employees working in remote or telework arrangements. While this guidance was issued in response to the increase in remote work due to the COVID-19 pandemic, it applies to all employees working remotely for any reason.

For many employers, the task of managing employees remotely is a new one. One issue employers may be facing for the first time due to COVID-19 is how to accurately track remote employees' hours of work, including unscheduled hours.

As in any work setting – remote or otherwise – employers are obligated to pay employees for all hours worked. Under the Fair Labor Standards Act and New York law, this includes not only work that was requested, but also work that was suffered or permitted. In other words, if an employer knows or has reason to believe that an employee is performing unscheduled work, those hours must be counted as compensable time.

If an employer has either actual or constructive knowledge that unauthorized or unscheduled work is being performed, the time spent by the employee on that work is compensable. The actual knowledge standard is clear, but the application of the constructive knowledge standard may not be as obvious to some employers. As stated by the DOL in its guidance, courts generally consider whether the employer should have acquired knowledge of an employee's hours worked through "reasonable diligence." According to the DOL's guidance, one method of exercising reasonable diligence is to provide a reporting procedure through which employees can report unscheduled time worked. Time reported, whether or not it was performed at the direction of the employer, must be paid.

The DOL also confirmed in its guidance that it is the employer's burden to prevent employees from performing work that the employer does not desire to be performed. The mere promulgation of a rule against performing unauthorized work is not sufficient to make the unauthorized work non-compensable. An employee who violates the rule by reporting hours worked that were not authorized is still entitled to payment for those hours, but the employer may impose disciplinary action against the employee for violating the rule.

If an employee fails to report unscheduled hours that were worked, an employer has no obligation to undergo unreasonable efforts to discover the unreported time. However, if an employer is aware that an employee is performing unscheduled work without reporting the time, the employer will likely have an obligation to determine how much work time was unreported and pay the employee for the time. Similarly, employers may not discourage or impede employee efforts to accurately report all hours worked. Employee training on the use of reporting processes is also necessary to ensure employees know when and how to use the procedure.

If you have any questions about this information memo, please contact the attorney at the firm with whom you are regularly in contact.

