

## DOL CLARIFIES PAY REQUIREMENTS FOR REMOTE HOURLY WORKERS

The coronavirus pandemic has created numerous challenges for employers, not least of which is tracking hours worked for remote nonexempt employees. Prior to the pandemic, conventional wisdom cautioned against telework or remote work arrangements for hourly employees due to wage and hour risks and liabilities. By necessity, this practice has been upended, with millions of hourly employees now working from home.

Without the ability to observe hourly employees' working hours in person, how can employers confirm they are paying employees properly for time worked? Today, the U.S. Department of Labor's Wage and Hour Division (WHD) issued [Field Assistance Bulletin \(FAB\) 2020-5](#) to clarify this obligation.

The WHD starts with the long-established proposition that employers must pay their employees for all hours worked, including work not requested. If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked and paid accordingly. For remote employees, an 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, such as emails, texts, or other messages. The FLSA's standard in the overtime context is whether an employer knows or has reason to believe work is being performed through the exercise of "reasonable diligence."

Taking "reasonable diligence" to verify hours worked includes:

- establishing a reasonable process for an employee to report uncompensated work time;
- confirming employees are properly instructed on how to use the reporting system;
- refraining from implicitly or overtly discouraging or impeding accurate reporting; and
- reporting known hours worked, even if they are not during an employee's normal schedule, such as if a manager receives an email from an hourly employee after normal working hours and the employee did not record that time in the timekeeping system.

Employers are not, however, required to investigate unscheduled hours that an employee does not report. Importantly, this means that employers generally are not expected to cull through email and other communication records to proactively determine whether an employee was working off the clock. The WHD advised,

*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.*

In light of the new Field Assistance Bulletin, it is more important than ever for employers to draft and implement time recording policies with comprehensive reporting structures. Both employees and managers alike should be trained on the policy. By taking such efforts, employers can smooth the transition to remote work for nonexempt employees and decrease their wage and hour liability.

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