

# Insights

## Time to Tidy Up Remote Work Policies as Work from Home Arrangements Likely to Continue

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2020 has been challenging for everyone with unique challenges arising in the workplace and impacting employers and employees alike. Remote work arrangements and compliance with the Fair Labor Standards Act ("FLSA") have not made matters easier. With remote work likely to continue in 2021, it is a great time for employers to evaluate the effectiveness of current work from home policies, identify potential compliance gaps, and implement changes to ensure FLSA compliance.

### **FLSA Compliance**

**Non-Exempt Employees.** Under the FLSA, employers must compensate non-exempt workers for all hours worked, including overtime hours and "[w]ork not requested but suffered or permitted."<sup>1</sup> This general requirement applies regardless of the location from which employees perform their work. Additionally, while state law may dictate meal and rest requirements, the FLSA addresses the compensability of such break periods.

**Exempt Employees.** Employers must pay exempt employees, i.e., workers meeting one of the overtime pay exemption requirements, their guaranteed salary even if such employees do not work full days or full workweeks; however, employers may appropriately charge other forms of paid time off (vacation, sick time, or other forms of paid time off) for the nonworking hours. Additionally, to maintain the exempt status of employees, employers must ensure that exempt employees continuously meet exemption requirements, which provide job-specific requirements and wage requirements.

### **Non-Exempt Employees: Unscheduled Work in Remote Environment and Break Periods**

#### **Unscheduled Work**

One risk that remote work poses under the FLSA arises when non-exempt employees engage in unscheduled work and fail to properly report such time. The U.S. Department of Labor ("DOL") issued **Field Assistance Bulletin 2020-5** (the "Guidance") addressing this issue.

**Unscheduled Work.** Unscheduled work is work performed by a non-exempt employee outside of their scheduled work time. The FLSA requires an employer to "exercise its control and see that the work is not performed if it does not want it to be performed."<sup>2</sup> Employers must go beyond simply establishing a policy prohibiting unscheduled

work; rather, employers must take steps to enforce such policies.

When determining an employee's hours worked, employers must count all hours when they *knew work was being performed or had reason to believe work was being performed*, regardless of whether a policy was in place preventing or prohibiting such work. An employer's obligation to compensate for time worked does not dissipate in the face of blurred home-work boundaries; rather, establishing strong compliance practices is especially important during such times.

Knowledge of Unscheduled Work. An employer's actual knowledge of work performed is typically easy to identify and define. The tricky part is determining when an employer has constructive knowledge, i.e., when the employer "has reason to believe work is being performed." An employer may have reason to believe work is being performed if the employer *should* have gained such knowledge of hours through exercising reasonable diligence. Reasonable diligence is "what the employer should have known, not what 'it could have known.'"<sup>3</sup>

An employer can exercise reasonable diligence by establishing a timekeeping process that allows employees to report or log unscheduled, uncompensated work time. Establishing such a process alone is not enough, as the employer also must encourage employees to actually make reports. If an employer implicitly discourages or prevents employees from reporting such time, the employer has failed to exercise reasonable diligence and is likely in violation of the FLSA.

Likewise, the employer must compensate employees for all hours worked even if the employer did not ask for the work, did not want the work, and/or had a rule against doing the work.<sup>4</sup> Employers, however, are not required to compensate employees for hours worked that the employer "did not know about, and had no reason to know about."<sup>5</sup> Employers should keep in mind that hours reported through a different method, rather than the established process, may constitute constructive knowledge that the employee was performing work.

Uncovering Unscheduled Work. Employers are generally not required to investigate or uncover an employee's unscheduled hours worked if the employee fails to report such hours. Reasonable diligence does not require employers to actively sift through an employee's non-payroll records to determine work activities, nor does it require employers to engage in impractical efforts to evaluate an employee's hours worked when they are not reported.

### **Rest and Meal Periods**

Employers with non-exempt workers working remotely must ensure that those workers are taking rest and meal breaks as required by state law, and appropriately compensate employees for that time when required under the FLSA.

When non-exempt employees are working remotely, monitoring an employee's rest and meal periods is difficult, and employees may attempt to alter their work hours by working through their allotted meal periods to start their day late or end their day early. Additionally, employees may take longer breaks than normally allowed because of the lack of supervision. Either way, employers may face challenges in determining the number of hours worked.

To address these risks, employers should ensure that managers and supervisors are communicating with employees about expectations for work hours and break periods during the day. Employers should also ensure

that managers and supervisors are adequately enforcing agreed upon work schedules with employees and addressing issues as they arise rather than a later date. Additionally, employers should reiterate their standard break policies to employees frequently and encourage employees to accurately report all time worked.

## **Exempt Employees: Risks Posed by Unclear Expectations and Changing Tasks**

### **Unclear Expectations**

Exempt employees are guaranteed a set salary each week. This salary guarantee does not deviate based on the number of hours worked unless the employer can appropriately charge the employee for time off by using vacation pay, sick time, or other forms of paid time off. The potential risk for employers arises where exempt employees take advantage of the lack of supervision and work less than the hours expected, yet receive the same amount of pay in return. Another issue arises where exempt employees working remotely take on odd working hours and are not available during peak times. However, this is a balance for employers as micromanaging the work time of exempt employees may indicate they are improperly classified and should be entitled to overtime pay.

To avoid these potential issues, employers should clearly communicate working expectations for exempt employees and reiterate that existing policies and procedures remain in effect regardless of the work location. With the effect of COVID-19 on home life and, consequently, changing home obligations, this may be a good opportunity for employers to have managers check in with exempt employees and determine whether their current work schedule is sustainable, or whether changes are needed in a new, agreed upon working schedule. This is, of course, a balancing act for employers between wanting to ensure exempt employees are meeting expectations and wanting to show compassion for changed circumstances by offering flexibility.

### **Changing Tasks and Salary Basis**

Changing Tasks. Exemptions under the FLSA require that an employee's role meets certain requirements, including job-specific duties. When employees moved to work from home arrangements, they may have kept the same duties or they could have received additional duties for others as well. This occurs most often when employers experience employee turnover or have to reduce the number of employees because of economic circumstances. The DOL provided **guidance** on this issue and stated that exempt employees may temporarily perform nonexempt duties that are required by the COVID-19 public health emergency without losing their exempt status.

Employers should evaluate whether exempt employees are currently performing non-exempt duties and communicate to those employees that the non-exempt job duties are temporary and will change if COVID-19 is no longer a public health emergency. Additionally, employers may want to consider whether business circumstances would permit the exempt employee to fully resume all exempt duties and have a non-exempt employee take on the other tasks. If this is the case, employers may want to consider whether moving the otherwise exempt employee to a non-exempt status is better.

Salary Basis. Although an exempt employee's tasks may change without losing the employee's exempt status during the COVID-19 public health emergency, the minimum salary entitlement for exempt employees may not

change without a corresponding change in status. Rather, employers must continue to satisfy the salary basis for exempt employees regardless of whether they are performing less work at home. If such an issue arises, it is best addressed in other ways, such as moving the employee to a non-exempt role.

### **Best Practices for Telework Policies**

Be intentional. If employers do not wish to implement a permanent telework or remote work policy, create a temporary policy for use only in connection with COVID-19. Make the terms of the policy straightforward and provide concrete examples. Use this as an opportunity to highlight other relevant topics, such as expected daily work schedule, performance expectations, privacy and data security requirements, anticipated duration of telework or remote work as an option, and other topics. Additionally, make certain that the policy clearly delineates expectations surrounding time spent working, including that:

- *non-exempt workers* must (a) receive prior approval for unscheduled work (if desired), and (b) report such work in accordance with the organization's timekeeping and reporting policy; and
- *exempt employees* should engage in conversations with their manager if their current work schedule is not sustainable and an agreed upon change is needed.

Over-communicate. For employees just beginning to telework or work remotely, setting a baseline expectation for robust information-sharing is critical. Additionally, this allows managers to identify if employees are struggling and need to collaborate for effective solutions.

- For *non-exempt employees*, employers should be vigilant against sending even tacit messages that could discourage employees from reporting unscheduled work they perform (e.g. a manager saying "I don't want to see any overtime, no matter how long it takes you to complete your work").
- For *exempt employees*, frequent communication allows an employer to determine whether the employee is performing the expected amount of work during expected work hours.

Be consistent yet flexible. Employers should establish a clear and consistent timekeeping and reporting policy and must enforce the policy in an unbiased manner. For example, an employer must address an employee who willingly continues to incur overtime due to unapproved, unscheduled work, which can wreak havoc on budgets. At the same time, the COVID-19 pandemic has created new stressors and some schedule disruption for a vast majority of workers, so an element of flexibility may be necessary (e.g. allowing for occasional unscheduled work time that is the result of exigent circumstances and therefore not pre-approved). This is particularly true during transitional periods where remote work arrangements may be phased out or used only occasionally.

Refresh supervisors and managers on timekeeping issues. Supervisors and/or managers are in a unique position to assist employers in complying with FLSA obligations and understanding the current status of remote work arrangements. Because managers have closer interaction with employees, they can be instrumental in managing the overall flow of work and ensuring that policies and procedures are followed.

Establish personal accountability. It's not just supervisors and managers who can help navigate timekeeping in these challenging times. The COVID-19 pandemic has caused employers to rely even more on the integrity and honesty of their workforce, and timekeeping, scheduling, and reporting is no different. Before it reaches a point

where issues arise, employers should provide encouragement and every opportunity for employees to take ownership over managing their timekeeping, scheduling, and reporting obligations.

Be diligent and responsive. While employers are not required to surveil their employees, the DOL has made clear that reasonable diligence is imperative. Employers must establish policies and processes that encourage employee compliance and must promptly investigate when concerns arise. If it appears that there is widespread non-compliance with timekeeping, scheduling, and reporting by employees, additional investigation may be warranted. In the end, an employer's failure to exercise reasonable diligence not only impacts its relationship with employees; it also exposes the employer to potential liability.

There is a silver lining. Navigating the COVID-19 pandemic has created (and will continue to create) massive challenges for employers and employees; however, it also presents them with an opportunity to reimagine the work environment. Beyond basic compliance considerations flexible work arrangements, including remote work opportunities, can provide enhancements to productivity, improve employee morale, and create favorable budgetary considerations. In some cases, employers can continue to leverage such benefits to improve the work environment long after the COVID-19 crisis ends.

### **Takeaways**

There's no doubt: ever-changing work environments and evolving employee expectations are hallmarks of the COVID-19 pandemic. Navigating these areas can feel risky for employers, and it remains to be seen whether workplaces will eventually return to pre-COVID predictability. For employers, adopting a proactive and diligent approach to managing compliance obligations under the FLSA, particularly with respect to telework and remote work arrangements, can help maintain a productive and positive employer-employee relationship during these times, which in turn helps manage compliance-related risk.

Additionally, employers can mitigate their FLSA risk exposure by performing periodic wage and hour audits to verify whether employees have been properly paid.

If you have questions about your current work from home policies, or would like to take advantage of Krieg DeVault LLP's flat fee wage and hour audit, please contact **Shelley M. Jackson**, or any other member of the Krieg DeVault LLP **Labor and Employment Law Team**.

*Disclaimer. The contents of this article should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult with counsel concerning your situation and specific legal questions you may have.*

[1] 29 C.F.R. § 785.11.

[2] 29 C.F.R. § 785.13.

[3] *Allen*, 865 F.3d at 943 (quoting *Hertz v. Woodbury Cnty.*, Iowa, 566 F.3d 775, 782 (8th Cir. 2009)).

[4] *See Allen v. City of Chicago*, 865 F.3d 936, 938 (7th Cir. 2017) (citations omitted) ("Employers must, as a result, pay for all work they know about, even if they did not ask for the work, even if they did not want the work done, and even if they had a rule against doing the work.").

[5] *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2011).

