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PERSPECTIVE

Off-the-clock work by teleworkers: wage and hour pitfalls to avoid

By **Robin E. Largent**

With businesses continuing to be shuttered, in whole or in part, in the Golden State, working remotely has become the norm for many employees. This includes hourly, nonexempt employees who, traditionally, have not been permitted to telework. The pandemic-related trend of nonexempt employees working from home presents a new legal risk for employers when it comes to ensuring that employees are compensated for all hours worked. Off-the-clock claims (i.e., claims that an employee performed work outside of scheduled working hours and was not paid for the time) are not exactly new to the field of wage and hour litigation, but remote work presents timekeeping challenges for employers that increase the risk of these claims. Helpfully, on Aug. 24, the federal Department of Labor issued guidance (Field Assistance Bulletin 2020-5) to help employers navigate this issue.

The DOL guidance explains employers' obligations when it comes to

tracking compensable hours worked by nonexempt employees who are teleworking during the pandemic. As a starting point, the guidance explains the standard for what constitutes compensable hours worked under the Fair Labor Standards Act. Under the FLSA, an employer must pay for all time that an employee is "suffered or permitted to work." This means that an employer must pay an employee not only for all hours the employee is scheduled and/or directed to work, but also for any time that an employee is permitted to perform unscheduled work. If an employee performs work outside of the employee's scheduled hours, it still must be compensated. An employer cannot refuse compensation just because the work was not authorized in advance. (However, an employer can discipline an employee for performing work outside of scheduled working hours.) Simply put, if an employer knows that work is being performed, the time must be compensated.

In a telework scenario, it is of course more challenging for employers to

truly know when work is, or is not, being performed by remote employees. The DOL guidance explains that employers must pay for all time they "know" or "should know" was worked. Actual knowledge is easy enough to understand. Actual knowledge may be derived from employees expressly reporting that they worked extra hours, or it may be obtained through other means, such as a supervisor directing or receiving work outside of an employee's scheduled work hours. If the employer has actual knowledge that work is being performed, it must be compensated (including paying any applicable overtime compensation).

The "should know" standard is less obvious, but very important for employers to understand. The DOL guidance explains that the "should know" standard means that employers must use "reasonable diligence" to determine all hours being worked by their employees. For example, an employer could provide nonexempt employees with a form explaining that they are not expected to perform work outside of their scheduled

work hours but that if they do perform such work (e.g., responding to emails, text messages, or calls), they must report it using that form so that the employee can be properly compensated. Employers also may have employees sign timekeeping certification forms, attesting that the hours recorded on each timesheet are accurate and complete, and that they did not perform any work outside of those hours. To be effective, an employer policy should explain to employees the types of work activities that are considered compensable hours worked and should provide employees a reasonable means of reporting any extra time worked.

If an employer has clearly communicated a reasonable procedure to employees to report extra time worked, and the employee does not report any such work, the employer generally will not be liable for not having paid for time that an employee later claims (i.e., in litigation) was worked off-the-clock. This is true even if the employer "could" have discovered the off-the-clock work through research. The DOL guidance

explains that the reasonable diligence standard is based on what an employer “should” know, not on what an employer “could” know. “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.”

The bottom line is that

employers must implement and communicate reasonable procedures for remote employees to report *all* hours worked. Evidence that an employer informed employees of the types of activities that are considered “work” and encouraged employees to report all such activities as hours worked, will help an employer avoid and/or successfully defend an expensive off-the-clock claim. Conversely, evidence that an employer expressly or implicitly discouraged accurate and complete reporting or told employees that work performed outside of scheduled working hours would not be compensated,

will significantly increase the risk of an off-the-clock claim. The exposure on such a claim includes not only unpaid wages, but also monetary penalties and attorneys’ fees. This potential liability is certain to dwarf the cost of simply paying for the extra time worked in a given pay period. Because of this, employers should also note that if they are faced with employees working too many hours off-the-clock (resulting in excessive overtime compensation), this problem should be addressed through discipline (up to and including termination of employment), not through denial of pay. ■

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