

Blog Post

Employees Are Responsible for Logging Remote Work Hours

September 9, 2020

Employers have struggled with identifying remote working hours for non-exempt employees juggling telework, child care and/or virtual learning during the pandemic. Employees will now bear the burden of properly recording those hours, under new [enforcement guidance](#) issued by the Department of Labor (DOL) in late August.

Under the federal Fair Labor Standards Act (FLSA), an employer has the obligation to pay non-exempt employees for hours worked that it knew or should have known about, even if the employer did not ask the employee to perform the work. It is not sufficient to simply order that employees not perform work off the clock. “The employer bears the burden of preventing work when it is not desired, and ‘the mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so,’” according to the DOL.

However, an employer does not violate the FLSA in failing to compensate an employee for unreported hours if the employer did not know about them or have reason to believe the hours were being worked. While recognizing that employers have an obligation to pay employees for all hours worked, the DOL noted that employees must bear the burden of monitoring and tracking their work hours in a remote work setting. The DOL explained that an

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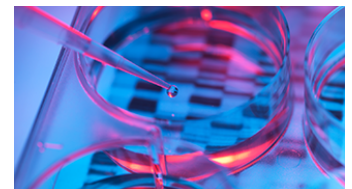
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employer who provides employees with a reasonable reporting procedure for non-scheduled time and pays employees for all hours recorded (scheduled or unscheduled) satisfies its obligation under the FLSA to track employee's work hours. Employers need not undergo "impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours."

This new guidance helps clarify when an employer may be considered to have knowledge that an employee worked unrecorded hours. When employees are working in person at the company worksite, an employer may see an employee arriving early, working during his or her lunch break, or staying late to finish a project. When an employee works remotely, the company does not have that same opportunity.

During the pandemic, some employers have worried that they may have to review an employee's virtual footprint to ensure all hours are being paid out. This is not the case. Under the DOL's new guidance, employers can rely upon employees to properly record their own hours, so long as they are given the tools to do so. Importantly, despite the fact that nearly every company uses computer-based technology to facilitate telework, employers are not required to cross-reference employees' logged hours with the records available from computer-based software. Instead, so long as an employer provides a reasonable program for reporting both scheduled and non-scheduled working time, an employer may assume its employees logged all hours work.

Note that this presumption has its limits; an employer will not be able to benefit from it if there is evidence that the employer discourages employees from reporting all hours worked.

There are a number of steps that employers can take to ensure that they are covered by the DOL's presumption:

1. Review timekeeping policies and procedures to ensure that they clearly instruct employees to log all hours worked, regardless of whether they were scheduled or unscheduled;
2. Review remote working timekeeping technology to ensure employees have access before and after their scheduled shifts;
3. Where technology does not allow an employee to easily access his or her timekeeping system to enter time worked outside of normal working hours, employers should consider an alternate timekeeping system or method for capturing those hours;
4. Provide additional training to managers responsible for non-exempt employees;
5. Provide clear guidance for employees who run into technical difficulties logging their time; and
6. Ensure that the company has a policy requiring non-exempt employees to notify management if they believe that there is an error in their paycheck, and that the company has a mechanism for correcting it.

Employers should consult legal counsel in connection with reviewing and updating all timekeeping policies, as state laws may differ from federal law. If you need assistance with timekeeping issues, contact your Akerman lawyer.

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