

EMPLOYMENT

How to Track a Remote Employee's Hours Worked in Compliance with the Fair Labor Standards Act

By Mordy Yankovich

The Covid-19 pandemic has compelled many employers to permit employees to work from home on a long term basis. Managing remote employees presents many challenges including tracking the hours a non-exempt employee works. While there are many computer systems/programs on the market which can function as a replacement for an on-site time clock, ensuring an employee does not work when they are "off the clock" becomes much more difficult. To provide clarity for employers regarding their obligations in compensating remote employees for all time worked, the United States Department of Labor recently issued a guidance (Field Assistance Bulletin No. 2020-5) entitled "Employers' obligation to exercise reasonable diligence

in tracking teleworking employees' hours of work."

By way of background, the Fair Labor Standards Act ("FLSA") requires employers to compensate employees for all hours worked including overtime (time and a half pay for hours over 40 in a work week), and for hours where an employer did not request that the employee work. 29 C.F.R. § 785.11. If an employer knows or has a "reason to believe" that an employee is working, even if they were instructed not to work during that time, the employer must compensate the employee for the time worked. 29 C.F.R. § 785.12. When an employer has "reason to believe" that a remote employee is working is unclear and difficult to define, which is why the DOL issued the instant guidance.



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The DOL guidance clarifies that an employer is obligated to compensate employees for work it "should have known" the employees were performing using "reasonable diligence." An employer must, thus, institute clear directives to employees as to how to report work that was not scheduled. If an employee nevertheless fails to report the hours worked, the employee does not have to compensate the employee for those hours. In addition, employers should instruct employees, that permission must be requested and granted by the employer prior to the employee working overtime hours.

However, maintaining a policy is not enough. An employer must enforce the policy. See *Hellmers v. Town of Vestal, N.Y.*, 969 F. Supp. 837, 845 (N.D.N.Y. 1997) ("[t]

he 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."). Unless an employer wants to continuously pay for employees overtime hours which were unauthorized, an employer should make it clear that such extra work is prohibited and discipline employees who fail to adhere to the policy.

Creating and issuing clear policies and enforcing such policies will make managing remote employees less onerous and less costly.

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