

# FYI<sup>®</sup>

## For Your Information<sup>®</sup>

### **DOL issues telework pay guidance in response to COVID-19**

On August 24, the DOL's Wage and Hour Division clarified employer pay obligations in light of the surge in telework stemming from the COVID-19 emergency. Field Assistance Bulletin 2020-5 provides guidance under the Fair Labor Standards Act on tracking compensable work hours of nonexempt employees who are teleworking or otherwise working remotely.

#### **Background**

The Fair Labor Standards Act (FLSA) generally requires employers to compensate their nonexempt employees for all hours worked, including overtime hours. As the regulations explain, “[w]ork not requested but suffered or permitted is work time” that must be compensated, regardless of whether it is performed on or away from the employer’s premises. Under the FLSA, the onus is on the employer to exercise control to prevent unwanted work from being performed. Thus, an employer that knows or has reason to believe that work is being performed — even if unauthorized — must count the time as hours worked. While employers can discipline employees for working unauthorized hours, they cannot refuse to pay for them.

#### **FAB 2020-5**

On August 24, the DOL's Wage and Hour Division (WHD) issued Field Assistance Bulletin 2020-5 (FAB 2020-5) clarifying employer pay obligations under the FLSA in light of the surge in remote work arrangements during the COVID-19 emergency. While the guidance focuses on situations stemming from the pandemic, the WHD made clear the same rules would apply to other telework or remote work arrangements as well.

FAB 2020-5 reaffirms that employers must pay workers for all hours worked remotely — whether requested or not — that they knew or had reason to believe were performed. Conversely, the FLSA does not require an employer to pay for work it did not know about and had no reason to know about.

Volume 43

Issue 55

August 27, 2020

#### **Authors**

Nancy Vary, JD

Amy J. Heinze

But when employees telework or otherwise work remotely at locations that the employer does not control or monitor, it may not always be clear whether an employer has reason to believe that work is being performed.

An employer’s obligation to compensate employees for all hours worked can be based on actual or constructive knowledge. For telework and remote work employees, the employer has actual knowledge of their regularly scheduled hours or of their hours worked through employee reports or other notifications. To determine whether companies should have known — or had reason to believe — that additional compensable work-from-home was performed, the WHD applies a “reasonable diligence standard.”

Recognizing the challenges of tracking unscheduled telework hours, FAB 2020-5 provides that one way employers may exercise reasonable diligence is by establishing a process or system for employees to report unscheduled time. Acknowledging employees’ obligation to accurately report hours worked, the guidance confirms that an employer may rely on its timekeeping procedures to prove reasonable diligence unless it prevents or discourages workers from reporting or is not otherwise notified of the work.

Reasonable diligence generally would not require an employer to undertake “impractical efforts” or additional investigations to uncover and provide compensation for unreported hours worked — even if it could access IT or other nonpayroll records that would show how long the employee spent on a work-issued laptop or other electronic device. However, as the WHD cautioned, sometimes records outside the employer’s timekeeping system may be relevant. Thus, “[d]epending on the circumstances, it could be practical for the employer to consult” them.

## In closing

FAB 2020-5 clarifies employers’ obligations under the FLSA to track — and properly pay for — compensable work performed by remote workers. While the guidance focuses on the telework surge stemming from the COVID-19 emergency, it applies to other telework or remote work arrangements as well.

### **Produced by the Compliance Consulting Practice**

The Compliance Consulting Practice is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, training, and knowledge management. For more information, please contact your account executive.

You are welcome to distribute *FYI*® publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.