Teleworking and an Employer's Woes of Record Keeping

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In this era of Covid-19, many employees who have never had the opportunity to telework are now, out of necessity, teleworking. This creates many challenges for employers – and none is more important than the employer's obligation to exercise reasonable diligence in tracking teleworking employees' hours of work.

The Wage and Hour Division of the United States Department of Labor (WHD) issued Field Assistance Bulletin 2020-5 (FAB 2020-5) today on the employer's obligation to track a teleworking employee's hours of work pursuant to the Fair Labor Standards Act (FLSA).

FAB 2020-5 acknowledges the employers' obligation to pay its employees for all hours worked – even if the work was not requested, if the employer "suffered or permitted" the employee to work. This includes work performed at home. If an employer knows or has reason to believe that an employee is performing work, the employer must count those hours as hours worked. An employers' knowledge may be either actual or constructive.

Employers may exercise reasonable diligence in tracking an employee's teleworking hours by having a reasonable reporting procedure for unscheduled time and then compensating employees' for all reported hours. An employer may not prevent or discourage employees to accurately report all hours the employee works. If the employee fails to use the reasonable procedure "the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours." If an employee fails to report unscheduled hours worked through the employer's established procedure, the employer is generally not required to investigate further to uncover unreported hours worked.

FAB 2020-5 explores when an employer has "reason to believe that an employee is performing work." An employer has actual knowledge of the employees' regularly scheduled hours, and an employer may have actual knowledge of hours worked, through employee reports or other notifications. An employer has constructive knowledge if the employer should have acquired knowledge of such hours through reasonable diligence. Reasonable diligence is defined as what the employer should have known – NOT what the employer could have known. "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." Examples given of impractical efforts included in FAB 2020-5 included sifting through CAD records and phone records to determine if an employee was working unreported hours. However, Bulletin 2020-5 does not give a definitive rule that an employer never has to consult records outside of timekeeping records, noting it depends on the circumstances, and there may be instances where an employer's non-timekeeping records may be relevant to

issue of constructive knowledge of an employee's unreported work hours.

In order for an employer to leverage the most protection from an employee seeking wages for unreported hours, an employer should:

1. Have a reasonable policy/procedure setting forth clearly that an employee is to report all hours worked, whether scheduled or unscheduled.
2. The employer should not discourage an employee from utilizing the procedure.
3. The employer should train on the policy, or otherwise assure that employees are aware of the procedure, and when to use the procedure.

If an employer undertakes these steps, and an employee fails to utilize the procedure to report unscheduled hours worked, the employer's failure to pay for the unreported hours worked should not be a violation of the FLSA.

For more information on this alert and its impact on your business, please call 405.552.2453 or email me.

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