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TIMEKEEPING FOR TELEWORK

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For many employers, the telework experiment necessitated by COVID-19 has been a surprising success. Many are considering whether to continue the telework option for at least a portion of their workforce. One of the lingering concerns, however, is how best to track time for non-exempt workers who are away from the physical workplace.

Under the Fair Labor Standards Act, employers are obligated to pay non-exempt employees for all time worked even if the work was not requested by the employer or even if performed against the employer's express direction (such as a no overtime rule). If the employee does not report the time (such as by a timecard), but the employer has "reason to know" of the work, the employer must still pay for the time.

This month, the Department of Labor issued a Field Assistance Bulletin (guidance for its enforcement investigators) setting out its position on unreported time by teleworking employees. An employer must pay for any time of which it has actual or constructive knowledge. For telework and remote work employees, the employer has actual knowledge of the employees' regularly scheduled hours; it may also have actual knowledge of hours worked through employee reports or other notifications.

An employer may have "constructive knowledge" of additional unscheduled hours worked by their employees if the employer should have acquired knowledge of such

hours through reasonable diligence. One way an employer generally may satisfy its obligation to exercise reasonable diligence is by establishing a reasonable process for an employee to report uncompensated work time. For this to be reasonable, the employer cannot discourage or impede accurate reporting and the employer must compensate employees for all reported hours of work.

Here is where DOL offers employers some peace of mind. If an employee fails to report unscheduled hours worked through such a procedure, you are generally not required to investigate further to uncover unreported hours. 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.

While you cannot turn a blind eye to signs the employee is working unreported time, you need not comb through their electronic trash to determine whether they are. To take advantage of this presumption, however, you must have a reasonable process for reporting the unscheduled time.