Monday, August 31, 2020

In July, we reported on new DOL COVID-19 guidance relating to leave under the Families First Coronavirus Relief Act and the Family Medical Leave Act, as well as telework considerations governed by the Fair Labor Standards Act.

The wage and hour guidance addressed several questions, including whether an employer is obligated to pay for telework hours actually performed that were: (1) not authorized to be worked by the employer, or (2) not reported as worked by the employee. The DOL’s answer to both was yes, if the employer knew or had reason to believe that the work was performed. At the time, the DOL further noted that the employer’s payment obligations would be satisfied if it implemented “reasonable time-reporting procedures” and then paid employees for the reported hours.

Perhaps in recognition that employee remote work arrangements may continue indefinitely because of slower employer rollout of “back-to-work” policies and continued remote school learning this fall while the country continues to struggle with the pandemic, the DOL updated its telework guidance on August 24, 2020. This new guidance focuses on addressing the employer’s obligation to “exercise reasonable diligence” to track telework hours and how to determine if an employer “has reason to believe” or “constructive knowledge” that unreported hours were worked.
There is a definitive rule: The failure to compensate an employee for unreported hours that an employer does not know about and does not have a reason to believe were worked is not a violation of the FLSA. But if you were waiting for a clear rule about how to interpret “reason to believe,” take a number and grab a comfortable seat. You’ll need to wait a bit longer.

The DOL says if you have a “reasonable process” to report uncompensated work time and the employee does not report it, the employer is “generally not required to investigate further” for any unreported time. If the employer has access to electronic records that may show unreported work time (most employers will have access to email records and document management systems that reflect real-time activity), “reasonable diligence” does not require “impractical efforts” to sort through it all. However, “this is not to say that consultation of records outside of the employer’s timekeeping procedure may never be relevant. Depending on the circumstances, it could be practical for the employer to consult such records.” After all, some courts could conclude that access to such records provide constructive knowledge to the employer, “but that is not a foregone conclusion.”

Clear? Hardly.

Having a well-written and well-publicized policy to promptly report all hours worked is a baseline. If an employer is aware of an instance where hours may have been worked that were not reported, such as a major project involving many people after regular hours, but where a normal work schedule appears to have been reported, it may be “practical” to investigate electronic or other records to verify any employee unreported time.

We will continue to track the issue for any DOL clarification and provide updates accordingly.

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