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BLOGS

Wage & Hour

Preventing Wage and Hour Claims: Step One Are You Paying for All Hours Worked?

A basic tenant of the Fair Labor Standards Act (FLSA) is that employers are required to pay their non-exempt employees for all hours worked. While this seems simple enough, sometimes employees do not record all of their work time. Under the FLSA, employers must pay for time worked if they know or have reason to believe that the work was performed. In other words, employers have a duty to make sure that work is not performed when they do not want it to be performed. Recently, in light of the pandemic, the U.S. Department of Labor issued a [Field Assistance Bulletin \(FAB\)](#) highlighting the requirement to track and pay for all hours worked by employees working remotely.

The FAB notes that an employer may have actual or constructive knowledge of additional unscheduled hours worked by employees and that the courts have looked to see if the employer should know about that work by exercising reasonable diligence. What is reasonable diligence? The FAB notes that providing a reasonable reporting procedure for non-scheduled time and paying for that time (even if the employer did not request that the employee work that time) would be one way to exercise reasonable diligence. However, the FAB points out that a time reporting process is not sufficient if the employer prevents or discourages an employee from accurately reporting time worked.

There are many ways for an employer to have constructive knowledge that an employee is working unscheduled hours including some of the following examples:

- An employee sends emails during unscheduled time.
- An employee accesses the company computer system during unscheduled time.
- An employee seems to be able to complete large amount of work in a short period of time.

The FAB makes clear, however, that reasonable diligence does not generally require the employer to undertake impractical efforts to sort through information to determine if the employee is working unscheduled hours because the reasonable diligence standard asks whether the employer should have known and not what it could have known. However, it is clear from the FAB that the employer bears the burden of preventing unwanted work.

What can an employer do to show that it exercised reasonable diligence to track and pay for all hours worked? Here are some suggestions:

- Establish a process for employees to report unscheduled work time.
- Implement a policy that requires employees to report all unscheduled work time.
- Send reminders (particularly to those working remotely during the pandemic) that all work time must be recorded in your system.



- Review time records as promptly as possible after submission.
- Any issues that appear with respect to unauthorized work should be investigated promptly and remediated if necessary.

While the accurate tracking and payment of all hours worked is not new, the FAB is a good reminder about these obligations.