

It's 10:00 a.m....

Do You Know Where Your Employees Are?

Potential FLSA Issues When Non-Exempt Employees Work from Home

A 2013 survey of 190 employers revealed that 45 percent of the employers offered a full time "telework" option to its non-exempt or hourly employees.¹ Although increased work schedule flexibility and the ability to work from home more often may be a huge benefit to non-exempt employees and their employers, both hourly employees and employers need to consider how the Fair Labor Standards Act (FLSA) affects their workplace flexibility.

Under the traditional work schedule, a non-exempt employee would show up at 9:00 a.m., take a half-hour lunch break, and leave at 5:30 p.m. every Monday through Friday. The clock started when the employee arrived and stopped when the employee left. Under the FLSA, the employee was entitled to time-and-a-half for any time beyond that 40-hour work week. Pretty simple.

Allow that same employee to work from home, and compensation gets complicated. When does the employee's workday start? When does it end? If the employee is not actively engaged in a project, do they still need to be compensated? If an employer wants the employee to be responsive to calls and emails, is that employer obligated to pay the employee around the clock?

Among other provisions, the FLSA governs the treatment of "non-exempt" workers, who are generally hourly workers that do not hold a supervisory position. These workers must be paid one and one-half times their normal hourly rate for any work beyond their 40-hour work week. In order to deter employers from violating the FLSA in hopes that a few unpaid hours would go unnoticed, Congress enacted multiple enforcement mechanisms to give the FLSA some teeth. Underpayment results

in the employer paying double the unpaid wages as well as the attorneys' fees of the employee seeking payment. If the violations are found to be willful, a court may impose a fine up to \$10,000.²

To help illustrate the potential pitfalls of working from home, consider two administrative assistants, one on-site and one who works from home. The on-site assistant shows up at the office from 9:00 a.m. to 5:00 p.m. and waits for his transcription projects, as he was hired to do. If the first project of the day doesn't reach his desk until 9:30 a.m., the on-site assistant must be paid for that first half-hour. He arrived at the office and was "engaged to wait"³ during that time, which is compensable work.

Now pretend that same transcription project came to the administrative assistant working from home. If the stay-at-home worker doesn't get his first project until 9:30, does the FLSA require him to be compensated for the first half hour? Answering this question requires more information. Factors that may determine whether the stay-at-home administrative assistant must be compensated for that first half hour include:

1. Is the at-home worker required to stay by his computer beginning at 9:00 a.m.?
2. What activities was the at-home worker doing before 9:30 a.m.?
3. Is the at-home worker required to begin this first project at 9:30 a.m.?

Another common problem arises when non-exempt workers have access to email outside of normal work hours. Using the same hypothetical on-site administrative assistant described above, assume an email addressed to the administrative assistant

¹ World At Work, Survey on Workplace Flexibility 2013 (2013).

² 29 U.S.C. §216.

³ *O'Neill v. Mermaid Touring, Inc.*, 968 F.Supp.2d 572 (S.D.N.Y. Sept. 10, 2013) (relying on *Armour & Co. v.*

Wantock, 323 U.S. 126 (1944) to determine how much time Lady Gaga's 24/7 personal assistant was "working" for purposes of the FLSA).

comes to his smartphone on Saturday afternoon. The on-site administrative assistant completed his 40-hour work week as of Friday. If that assistant spends the next hour replying to his boss's email, will he be compensated at the time and a half rate required by the FLSA?

Again, the answer is not a clear "yes" or "no." If the employer is unaware the assistant connected his personal phone to his work email account and the employer does not instruct its employees to work overtime, the assistant's weekend work may not be compensable. On the other hand, if the boss requests a response right away, knowing the assistant would read the email on a Saturday, then the FLSA requires that assistant to be paid at the overtime rate.

From these cursory examples, the lesson, to both non-exempt employees and their employers is: **Make employment expectations clear!**

Working from home or working remotely is a perk more and more non-exempt employees enjoy. However, this added flexibility can generate wage and compensation disputes if the employer or the

employee (or both) don't clearly communicate their expectations or account for their activities. At the outset, at-home workers should know whether they should respond to work-related emails during their time off. For permanent work-from-home hourly employees, a policy manual that specifies the scope of their workplace flexibility should be drafted and explained to the at-home worker. Both non-exempt employees and their employers benefit from an accounting of a work-from-home employee's time and productivity.

As more employers seek to attract potential employees with work-from-home options and as more employees enjoy the benefit of workplace flexibility, hourly employees and their employers should pay attention to potential FLSA pitfalls associated with working remotely.

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