

HEADS, WAGE
AND HOUR &
COMPLIANCE
LITIGATION
PRACTICE GROUP

Jim Coleman,
Washington DC Metro

Ellen Kearns,
Boston, MA

EDITOR IN CHIEF

Robin Shea
Winston-Salem, NC

Susan Bassford Wilson
St. Louis, MO

Common sense prevails on pay for telework. How refreshing.

By Frank Shuster
Atlanta Office

According to the Bureau of Labor Statistics, roughly 24 percent of working Americans performed some work at home in 2019. Because of the nightmare that 2020 has become, with its pandemic, hurricanes, forest fires, and social unrest, the number of Americans currently performing remote work is likely to be much higher than it was in 2019. Although managing remote workforces creates multiple challenges for employers, the U.S. Department of Labor just provided a common-sense solution for one of those challenges – how to track and pay for remote hours actually worked by non-exempt employees *outside* their regularly scheduled hours.

It should come as no surprise to our readers that an employer must pay for all hours that it knows, or has to reason to believe, a non-exempt employee has worked. This obligation includes paying for hours that the employer did not ask or want the employee to work, and regardless of whether the employee violated a rule prohibiting employees from working outside their regularly scheduled hours. For example, if an assembly line worker scheduled to work six hours actually works eight hours, the employee must be paid for the extra hours regardless of any rule prohibiting work outside of scheduled hours, since there can be little doubt that the employer knew or should have known (from its front line supervisors) about the extra hours of work. If the employee was not authorized to work those extra hours, the employer's recourse is to discipline the employee, not dock the employee's pay.

But the law does not require an employer to pay for work it did not know about *and* had no reason to know about. The DOL's common-sense guidance relates to this "reason to know" requirement when an employee is working remotely.

According to a **Field Assistance Bulletin** issued on August 24 by the Wage and Hour Division of the DOL, the standard used by most courts for determining whether an employer should have known that its non-exempt employees were working outside of their regularly scheduled hours is "reasonable diligence." Under this standard, the DOL asks what a reasonably diligent employer *should* have known, not what it *could* have known. As explained in the Bulletin, one way an employer may exercise "reasonable diligence" to learn about its employees' unscheduled hours of work is by establishing a "reasonable process" for the employees to report those unscheduled work hours. If an employer has a reasonable process and the employee fails to use that process to report unscheduled hours worked, then the employer generally is not required to investigate further to uncover unreported hours.



August 26, 2020

Legal Bulletin #823

This is a publication of Constangy, Brooks, Smith & Prophete, LLP. The information contained in this newsletter is not intended to be, nor does it constitute, legal advice. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience. No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. This email could be considered advertising under applicable laws.

IRS Circular 230 Notice: Federal regulations apply to written communications (including emails) regarding federal tax matters between our firm and our clients. Pursuant to these federal regulations, we inform you that any U.S. federal tax advice in this communication (including any attachments) is not intended or written to be used, and cannot be used, by the addressee or any other person or entity for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.

In other words, employers generally are not required to sort through or search other records in order to determine whether employees performed work outside of their regular work hours.

This would not be the case, of course, if the employer discouraged or tried to prevent employees from reporting their unscheduled work hours.

A Field Assistance Bulletin is not binding precedent on any court, and this Bulletin recognizes that the circumstances of particular situations may require different outcomes. Nonetheless, it provides common-sense guidance for employers trying to manage and compensate employees working remotely: Employers should develop a policy and process by which non-exempt employees working remotely can report the hours they work beyond their regularly scheduled hours, and employers should not do anything to discourage the reporting of those extra hours.

Employees who fail to use the employer's procedures prevent the employer from learning of the need to pay for those hours and thwart the employer's ability to take lawful actions (such as discipline) to prevent employees from working unauthorized hours. Both should be helpful to the employer in defending against a claim for uncompensated time.

Need help with reopening?
Check out our **Coronavirus Return to Work FAQs** for the latest guidance. And more general information is available on our **Coronavirus Resource Center** page.

Constangy, Brooks, Smith & Prophete, LLP

Constangy, Brooks, Smith & Prophete offers a wider lens on workplace law. We have counseled employers exclusively since 1946. With offices in 15 states, we are one of the largest labor and employment law practices in the U.S. Constangy has been named as a top firm for women and minorities by organizations including Law360, the National Law Journal and **Vault.com**. Many of our more than 190 attorneys have been recognized by leading authorities such as Chambers & Partners, Best Lawyers in America® and Martindale Hubbell. Find out more about us online at www.constangy.com or follow us on Twitter @ConstangyLaw.

Office Locations

Alabama, Arkansas, California, Colorado, Florida, Georgia, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

