



FLSA Considerations in a Remote Work Environment

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SPEAKER BIO

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REMOTE WORK IS THE NEW NORMAL

- Remote work either in a hybrid or fully remote context benefits both employers and employees.
- Like anything new or evolving remote work environments have created additional considerations for employers.
- Ensuring that your organization complies with the Fair Labor Standards Act's overtime requirements is an important consideration.



WHAT IS THE FAIR LABOR STANDARDS ACT?

- The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, recordkeeping, and youth employment standards for full and part time employees in the United States.



UNDER FLSA EMPLOYERS ARE REQUIRED TO PAY EMPLOYEES FOR ALL HOURS WORKED

- FLSA requires that employers compensate employees for ALL hours worked.
 - This rule is applicable to work performed in a remote work environment, on site, and at other venues or events.
 - Employers must pay employees for all work they know or have reason to believe is performed including work they have not authorized.
 - The employer does NOT have to request that the employee perform the work.
 - If the work is permitted then it is considered compensable time.



WHAT IS COMPENSABLE TIME UNDER FLSA?

- Compensable time is any time an employee spends working for their employer that the employer permits or allows.



HOW HAS REMOTE WORK IMPACTED COMPENSABLE TIME?

- While certain scenarios like an employee completing a project for their employer are straightforward examples of compensable time, there are a several scenarios most employers face that are not as clear, including:
 - Travel Time
 - Meals and Breaks
 - Off-the-clock work
- Remote work has further exasperated this gray area for many employers and presents challenges to decades old FLSA doctrines.



THE CONTINUOUS WORK DAY DOCTRINE

- Historically, under FLSA, the continuous workday doctrine stipulates that the workday begins with the employee's first main job activity and ends with the last; generally, everything in between, except meal breaks, is compensable.
- The purpose was to avoid “nickel and diming” employees who took a brief break for things like getting a cup of coffee or using the restroom.



THE IMPACT OF REMOTE WORK ON THE CONTINUOUS WORK DAY DOCTRINE

- Previously, under the continuous workday doctrine, the assumption was once you began work, you continued work largely uninterrupted until the end of your shift or work hours.
- However, in a remote work environment, employees often begin work and then stop to handle personal matters like childcare, household repairs, etc.
- This new reality of comingling personal and work time has drastically impacted the applicability of the continuous workday doctrine.



HISTORICAL COMPENSABILITY OF TRAVEL TIME

- Time spent commuting to and from work *is not* compensable time.
- Time spent traveling to different worksites during regular work hours *is* compensable time.
- The fundamental principle of travel time compensability was based on the continuous work doctrine and worksite-to-worksite doctrine.
- What happens to the compensability of travel time in this new remote workspace where an employee's work and personal time are often more intertwined than separate, and the continuous work doctrine no longer seems relevant or applicable?



COMPENSABILITY OF TRAVEL TIME WITH REMOTE WORK

- The U.S. Department of Labor has provided some clarification and guidance regarding the compensability of travel time in a remote work context.
 - In one example from the DOL, an employee began working in the office, left for personal activity, and resumed working at home after a one-hour commute.
 - In another example, an employee began working from home, conducted personal activities for three hours, and resumed working from the office for the remainder of the day.
- In both of these situations, the DOL determined that the time the employee spent traveling was not compensable.



BREAK PERIODS

- As discussed previously, remote work schedules often allow employees the flexibility to take care of personal or family obligations during the workday.
- If an employee begins work and takes an hour or two to care for children or run personal errands, is that time considered compensable since it is part of the work day?
- Under FLSA, breaks of 20 minutes **or less** are compensable.
- However, prolonged breaks are not compensable. Periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for their own purposes are considered “off-duty” time and not compensable.



MEAL PERIODS

- In contrast, meals are generally not considered compensable under FLSA unless the employee works at any point during their meal break.
- This includes checking email, Slack, Teams, sitting on a Zoom call, etc.
- While some remote employees have nearly obfuscated the applicability of the continuous work doctrine by comingling their personal and work time, others, without the added distraction of co-workers and office chatter, have all but abandoned any meal or break period.
- While employers may factor a 30-minute meal period and 20-minute break into an employee's shift as non-compensable, the time is compensable if employees are "working through" their meal and break.



OFF- THE-CLOCK WORK: EARLY ARRIVALS AND LATE DEPARTURES

- Non-exempt employees who arrive early ***and*** begin working must be compensated for that time.
- This is much easier to monitor with employees on-site, but what happens if an employee decides to log on to the remote desktop to start working early or extend their work day by logging off late?
- Under FLSA, this time is compensable even if the employer did not request or authorize the additional hours worked.



OTHER COMMON SCENARIOS

- A few other common scenarios for employers regarding compensability include:
 - Lectures, training programs, and seminars
 - Special events, galas, team building exercises, an organization's parties, etc.



LECTURES, TRAINING PROGRAMS, SEMINARS

- With remote work being so commonplace, many companies and organizations have permanently shifted their primary training modules to a virtual format.
- This has provided employees with the opportunity to “attend” these trainings, lectures, etc. a lot more frequently.
- Time spent attending job-related lectures or courses is compensable unless ***all*** of the following four conditions are met:
 - the course is held outside the employee’s normal working hours,
 - the course is unrelated to the employee’s job,
 - attendance is truly voluntary, and
 - no **productive work** is performed.



SPECIAL EVENTS –GALAS, TEAM BUILDING, RECEPTIONS, DINNERS, ETC.

- If the employee is required to attend the event it is compensable time.
- This also includes “virtual” events.
- The event does not have to be organized or sponsored by the employer.
- Consider that mandatory attendance at an event may trigger overtime.



WHO IS ENTITLED TO OVERTIME UNDER FLSA?



WHO IS ENTITLED TO OVERTIME?

- Almost all employees in the U.S. are entitled to receive overtime, unless they are exempt from this requirement.
- “Non-exempt” employees must receive overtime pay for all hours worked **over** 40 in one week.
- Employers cannot give employees compensatory time in lieu of overtime pay.



WHAT EMPLOYEES ARE EXEMPT?

An employee who meets all three of the criteria below is exempt:

- 1) paid on a salary basis;
- 2) meets the weekly salary threshold; and
- 3) primarily performs certain types of duties generally described as white collar.

Exceptions:

- There is a professional exemption for teachers, doctors, and lawyers, that excludes them from the salary threshold requirement.
- Computer professionals must be paid at the weekly threshold OR at least \$27.63 per hour.



SALARY BASIS

- Exempt employees must be paid the same weekly salary, regardless of how much or how little they work, or the quantity or quality of work.
- Federal law provides for a limited number of pay deductions, in **full day** increments, without loss of exemption.
 - FMLA permits partial-day deductions for intermittent leave.
- Any other deductions violate the “salary basis” requirement and cause loss of the exemption (*e.g.*, docking an exempt employee for a half-day’s absence).
- Employer Tip for Best Practice: Include a “safe harbor” provision in personnel policies that will allow you to correct improper salary deductions after an employee brings them to your attention.



MINIMUM SALARY THRESHOLD

- Federal law sets minimum wage and salary threshold.
- States may set higher minimum wages and thresholds.
- The salary threshold in New York City is \$1,125 a week or \$58,500 annually.
- The federal salary threshold is \$684 a week or \$35,568 annually.
- The professional exemption does not require a minimum salary.



“WHITE COLLAR” DUTIES

White collar professionals generally exercise discretion and independent judgement on matters of importance within the organization.

- Executive: Their primary duty is to manage the organization or a department. Regularly supervises at least 2 full-time employees. *Manages people*
- Professional: Their primary duty is the performance of work requiring advanced knowledge or artistic skill and consistent exercise of discretion and judgment. *Manages knowledge*
- Administrative: Primary duty is the performance of work directly related to general business operations of the organization involving consistent exercise of discretion and judgment in matters of significance. *Manages functions*
- Computer Professional: Primary duty is using skills of computer systems analyst, computer programmer, software engineer or other similarly skilled worker.

This list is not exhaustive but does include the most common duty analysis.



WHITE COLLAR ANALYSIS IN A REMOTE WORK CONTEXT

- Conducting this analysis for employees in a remote work environment can present some challenges.
- Employers should not only look at an employee's job description but take a practical approach in analyzing the employee's day-to-day interactions and responsibilities.
- While exempt employees' primary duties will exercise discretion and independent judgment on matters of importance, additional supplementary duties necessary to the function of their jobs will not knock them out of exempt status.



HOW IS OVERTIME CALCULATED?

- Under FLSA, overtime is paid at 1.5x the employee's regular rate of pay.



HOW IS AN EMPLOYEE'S REGULAR RATE OF PAY CALCULATED?

- The regular rate of pay is the basis for overtime pay.
- Not all compensation is included in the regular rate of pay.
- The regular rate is computed before any kind of payroll deduction is made.
 - Regular rates are not based on take-home pay.
- The regular rate of pay may be stated as a fixed hourly rate (e.g. \$15.00 per hour).
- Otherwise, the regular rate of pay is derived by dividing the compensation for the workweek by the number of hours worked.
- *Remember that the employee must receive at least minimum wage for each hour worked!*



DIFFERENT RATES OF PAY

If a non-exempt employee performs different jobs having different rates of pay during the same workweek, there are two options for computing over time pay:

- **weighted average:**
 - total earnings are computed to include compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs; OR
- **before** work is performed, agree with employee that overtime rate will be based only on the rate for the type of work he/she is performing during the overtime hours.
 - GET IT IN WRITING!
- The employee must be paid at least minimum wage for all hours worked.



IMPORTANT NOTE ABOUT THE 35-HOUR WORK WEEK

- Are organizations with a 35 hour work week required to pay non-exempt employees who work 36 -40 hours overtime?
- While employers are only required to pay overtime at time and half for hours worked **over** 40 that does not negate the employer's obligation to pay its employees for ALL hours worked.
- Employers should pay employees straight time at their regular hourly rate for hours 36-40.



EMPLOYERS OBLIGATIONS UNDER FLSA EXPLAINED



EMPLOYERS' OBLIGATIONS

- Pay employees for ALL hours worked.
- Exercise reasonable diligence to track compensable time.



EMPLOYERS MUST PAY EMPLOYEES FOR ALL HOURS WORKED THAT IT KNOWS OR HAS REASON TO BELIEVE WERE PERFORMED

- The employer must pay its employees for **all** hours worked even if the additional hours were unauthorized and prohibited in their organization's policy.
 - The employer bears the burden of preventing work when it is not desired.
 - The existence of a policy or a rule against unauthorized work or overtime is not enough.
 - Management has the power to enforce the rule and must make every effort to do so.
- An employer's obligation to compensate employees for hours worked can be based on actual or constructive knowledge of work.
- FLSA stops short of requiring employers to pay for work they did not know about **or** have reason to know about.



ACTUAL AND CONSTRUCTIVE KNOWLEDGE OF HOURS WORKED IN A REMOTE ENVIRONMENT

- Remote work environments create additional challenges around monitoring employees' hours worked since supervisors cannot physically monitor when an employee is at their work station and presumably working.
- However, employers have **actual** knowledge of remote employees' regularly scheduled hours.
- And the employer may also have **constructive** knowledge of hours worked through employee reports or other notifications.
- The FLSA's standard for constructive knowledge in the overtime context is whether an employer has reason to believe work is being performed.
 - For example, seeing employees email, Slack, or use Teams after scheduled work hours, or an employee's self-reported time sheets.



EMPLOYERS HAVE AN OBLIGATION TO EXERCISE REASONABLE DILIGENCE TO TRACK COMPENSABLE TIME

- Employers can satisfy their obligation to exercise reasonable diligence by providing remote employees with a reasonable procedure to report unscheduled work.
- The procedure is not reasonable if it:
 - prevents or discourages employees from reporting work time;
 - the employer does not provide proper notice or training on the procedure; or
 - requires employees to waive their right to compensation for overtime worked.
- Note: An employer instituting a mechanism for employees to report additional time worked is sufficient. The Employer is **not** required to take additional steps to “uncover” an employee’s additional time worked.
- Failure to compensate an employee for unreported hours that the employer did not know about, nor had reason to believe was being performed, does not violate the FLSA.



BEST PRACTICES FOR EMPLOYERS MANAGING REMOTE EMPLOYEES' TIME

Employers should put systems in place to facilitate accurate time keeping records for remote employees including:

- Integrate a timekeeping policy and mechanism for reporting additional hours worked in the organization's payroll practices and employee handbook.
- Implement a policy that prohibits off-the-clock work, underreporting of hours, and unauthorized overtime subject to disciplinary action.
- Train supervisors on the organization's timekeeping and pay policies, so that they can ensure that employees are not working unauthorized hours, and are recording all hours worked.
- Ensure that remote employees are aware of what time is and is not compensable.
- Include a remote work policy in the employee handbook that references the aforementioned timekeeping policy.
- Require employees to verify hours worked on a weekly basis.



HOW CAN EMPLOYERS PREVENT UNAUTHORIZED OVERTIME?



PREVENTING UNAUTHORIZED OVERTIME

- Develop and distribute clear payroll, overtime, remote work and timekeeping policies to employees.
- Train managers and supervisors to be diligent about monitoring remote employees' online activity and being mindful of their work delegation.
- Implement technological controls such as restricting access to remote work environments to “office hours” only.
- Implement disciplinary action where necessary when overtime and timekeeping policies are not followed.



RESOURCES

U.S. Department of Labor Opinion Letter FLSA 2020-19

https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_12_31_19_FLSA.pdf

U.S. Department of Labor guidelines on exemptions for employees under the FLSA:

<https://www.dol.gov/whd/overtime/final2016/index.htm>

<https://www.dol.gov/whd/#>

New York Department of Labor :

http://labor.ny.gov/workerprotection/laborstandards/labor_standards.shtm

<https://www.labor.ny.gov/legal/counsel/pdf/overtime-frequently-asked-questions.pdf>



Questions?

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