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FLSA Dangers & Pitfalls in Today's Hybrid Working Environment



MOLLY WALSH KEPPLER

Agenda

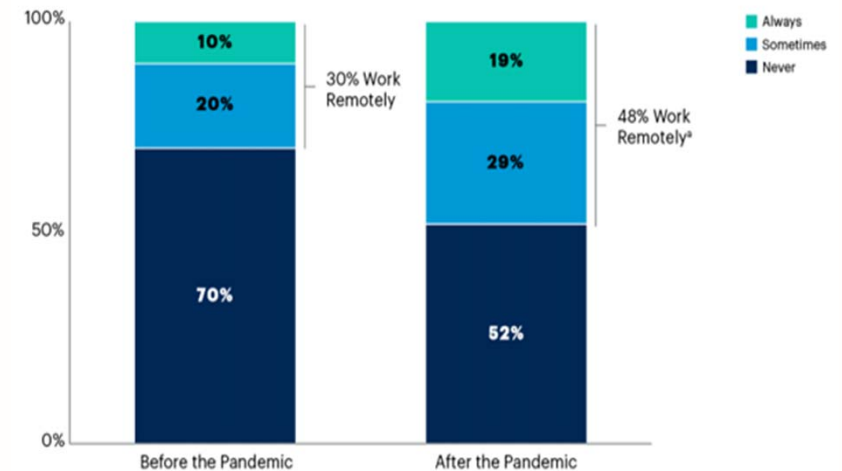
- State of remote work
- FLSA overview and basics
- FLSA specific considerations of remote work
- Other remote work considerations

State of Remote Work

Pandemic Impact on Remote Work

- Nearly half of employees worked remotely full-time during the pandemic.
- Only around 30% of employees were working remotely prior to the pandemic.
- 48% of employees have kept working remotely post pandemic.
- On average, employees would choose to spend 40% of their time working from home.
- 62% of employees expect their employers will allow them to work remotely moving forward.

Projected Percentage of Employees Working Remotely, Before and After the Pandemic



2 out of 3

people believe that the **traditional office setup** will be obsolete by **2030**.



Source: Zapier Remote Work Report

Benefits of Remote Work

- Potential for reduced overhead and office space needs.
- Remote work provides the ability to better shift and navigate difficult situations such as weather events, fire, cyberattacks, school closures, and public health emergencies.
- Employers benefit from increased employee satisfaction and retention, increased productivity, and cost savings on physical resources.
- The ability to work remotely can promote job satisfaction, better health, increased work-life balance, and reduces stress.
- Permitting employees to work remotely generally results in higher productivity levels, decreased turnover, and reduced absenteeism.

Benefits of Remote Work *(cont.)*

- Remote and hybrid work can be a powerful tool in terms of employee engagement, retention, and recruiting.
- Employers are able to hire employees from a broader geographic area, providing companies with a diverse pool of talent.
- Offering the ability to work remotely is often viewed as a valuable fringe benefit to employees.
- For many employees — and employers — flexibility is now part of the total compensation package.



24%

of remote workers reported feeling happier and more productive at their jobs compared to on-site workers

Source: Owl Labs State of Remote Work 2019

A large red geometric shape, resembling a parallelogram with a slanted top edge, serves as the background for the title text.

FLSA Overview and Remote Work Implications

Fair Labor Standard Act

THE FAIR LABOR STANDARDS ACT (FLSA) OVERVIEW

- The FLSA requires that most employees in the United States be paid at least federal minimum wage for all hours worked and employees who work over 40 hours in a workweek be paid time and a half
- Exemptions: Executive, Administrative, Professional, Certain Computer Employees, Outside Sales Employees and Highly Compensated Employees
- If none of the exemptions are met, the employee is considered “Non-Exempt”

Compensable “Work” Under the FLSA

- The FLSA does not define “work”
- Prior Supreme Court precedent broadly construed work to include:

“the statutory workweek includes all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace”

- Included preliminary activities like “walking to work on the employer’s premises” and “turning on lights and machinery”

Portal-to-Portal Act

- Congress passed the Portal-to-Portal Act which clarifies which activities constitute compensable “work” under the FLSA.
- The Portal-to-Portal Act provides that preliminary and postliminary activities are only compensable if they are integral and indispensable to an employee’s principal duties.
- To be integral and indispensable, an activity must be:
 - 1) necessary to the principal work performed, and
 - 2) done for the benefit of the employer.

Application to Remote Employees

- Since the COVID-19 pandemic, there has obviously been a significant increase in remote work by historically non-exempt employees.

EXAMPLES:

- Call Center Employees
- Assistants
- Customer Service Representatives
- Telehealth Workers
- Data Entry Employees
- Digital Marketing Representatives

Wage and Hour Issues

- Historically, employers needed to be familiar with the laws in the state in which they were located, but with remote work, employers need to be aware of the laws in the states where their employees are performing their work.
- Remote work presents the possibility that employees are working remotely from states where the employer has not previously had a physical presence.
- There can be legal significance to where the employee is located—not only where the employer is headquartered or incorporated.
- Generally focused on non-exempt employees.



State Minimum Wage and Overtime Laws

Employers should be aware of minimum wage and overtime laws across all states where it has remote workers.

- Federal minimum wage: \$7.25/hour
 - Missouri: \$12.30/hour
 - Illinois: \$14.00/hour
- Federal law says that overtime is due once an employee has worked 40 hours within a week.
 - Missouri and Illinois generally follow the federal rule.
 - In Kansas, state law says that overtime is due once an employee has worked 46 hours within a week.
 - In California, overtime is calculated according to the number of hours non-exempt employees work in a day and also within a workweek.
 - In Colorado, overtime is generally calculated for work over 40 hours per week, 12 hours per day, or 12 consecutive hours of work.
- Employers can contact Federal Wage and Hour to determine if federal laws apply to them.

State Wage Laws

- Break times and meal periods
 - Not required by federal law, but if you do provide them, compensability depends on the circumstances.
 - Illinois requires a 20 minute break for every 7.5 hours worked and a second 20 minute break if working a 12 hour shift or longer.
 - In California, a worker is entitled to an uninterrupted 30-minute unpaid meal break when working more than 5 hours in a day, and an additional 30-minute unpaid meal break when working more than 10 hours in a day. Employees are entitled to a 10-minute rest period for every 4 hours worked.
- Pay transparency laws
 - Colorado was the first to require transparency in job postings, but several states have followed suit.
 - To date, 13 states have passed pay transparency legislation that is in effect or will be going into effect next year.

Nonexempt Employees Working Remotely

- Risk: employees may work with or without the employer's knowledge.
 - The remote employee has set/scheduled hours, but they are sending work-related emails before and/or after those set hours.
 - The remote employee fears falling behind, so they read emails outside of their scheduled work hours, but wait to respond until their scheduled shift.
- Risk: potential meal and rest break violations under federal and state laws.
 - A remote employee takes their meal break, but is interrupted by a call from their supervisor while on break.
 - Remote employees fail to take meal and/or rest breaks and elect to finish their scheduled shift early instead.

73% of employees work outside their work hours as they find themselves more productive (Fuze).

Cadena v. Customer Connexx LLC

- Class action lawsuit filed by call-center employees alleging they were required to clock in and out using a computer-based timekeeping program and that they were not compensated for the time period in which it took to boot up the computer and clock in.
- Employer claimed, and the trial court agreed, the time spent booting up and down the computers were not principal activities related to answering calls and scheduling tasks and therefore not compensable.
- Ninth Circuit disagreed and held booting up the computer was an integral and indispensable to the employee performing their primary duties.

De Minimis Doctrine

- The *De Minimis Doctrine* derives from the FLSA regulations and provides that insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded.
- In applying the *De Minimis* doctrine, Courts balance three factors:
 - 1) the practical administrative difficulty of recording the additional time;
 - 2) the size of the claim in the aggregate;
 - 3) whether the employee performed the work on a regular basis.

Peterson v. Nelnet Diversified Solutions, LLC

- Class action lawsuit filed by call-center representatives for student loan servicer claiming violations of the FLSA for not paying for time it took to boot up computer prior to using computer program to clock in.
- Undisputed that the overall estimate to boot up computer was 2.27 minutes or less.
- The 10th Circuit held boot up time was integral and indispensable by stating:
“Because use of computers was integral and indispensable to the work [the employees] were employed to perform...the time devoted to preparing the computers for performance was likewise integral and indispensable.”
- Additionally, 10th Circuit also found that such amount of time was not *de minimis*.

Application to Remote Employees

- Many if not all of today's remote employees use computers to perform their remote work
- The use of virtual time clocks is widespread
- Possibility of class certification given uniform clock-in policies across an organization
- Even small amounts of time can lead to significant liability (treble damages, attorneys' fees, etc.)

The Plaintiff's Bar Has Taken Notice

- There has been a significant uptick in “working time” call center cases throughout the country
- Plaintiffs’ counsel are starting to expand to remote workers as well
 - *Christina McCune v. Faneuil Inc.*: Virginia District Court approved \$1 million dollar settlement on August 13, 2024 brought by class action of remote employees alleging failure to pay “boot up” and “boot down” time.

Wage and Hour Best Practices

- Set regular work hours for non-exempt employees.
- Reinforce meal and rest breaks. Communicate expectations for taking breaks.
- Consider giving employees flexibility in break times, but ensure the flexibility complies with applicable state laws.
- Have well established and written remote work policies and follow them. Implement training on remote work policies and expectations.
- Ensure non-exempt employees record all time worked, including overtime.

Wage and Hour Best Practices *(cont.)*

- Conduct a FLSA compliance audit of non-exempt remote and partially remote workers
- Review clock in policies and procedures including use of virtual time clocks
- Consider alternative clock-in procedures (*i.e. cell phone clock-in applications*)
- Consider FLSA compliance training
 - Managers and supervisors should be trained on the company's timekeeping and pay policies

Other Considerations

- Don't discriminate in deciding who gets to work remotely
- State anti-discrimination and leave laws
- Need to make reasonable accommodations
- Non-compete agreements
- Workers compensation
- Does employer have a sufficient business presence in new location to have business registration and/or tax obligations?

Thank You

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Molly Walsh Keppler

816.691.2633

molly.keppler@stinson.com

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