



GBS COVID-19 Update

You Have Successfully Transitioned to Hourly Employees Working from Home - Congratulations! ...And You're Not Done Yet.

The evolution of the COVID-19 epidemic is constantly evolving. The information in this document is based on what known at this time. As things change, we will continue to update you as it affects employee benefits compliance rules.

September 1, 2020

You have jumped through hoops to make it happen. You have been able to rework your processes to allow employees to work from home, including hourly employees. These efforts have truly been heroic. Under the heading of 'no good deed goes unpunished', remember, the watchful eyes of the federal government are watching your practices of recording and tracking hours of work inside and outside the workforce. This past week the U.S. Department of Labor released a bulletin to employers, a reminder regarding obligations and rules.

The bulletin points out the regulatory measures of the Fair Labor Standards Act (FLSA) and how it applies to remote worker or telework. This reminder focuses on the requirement of all employers to compensate for any work that the organization permits. The challenge of tracking and documenting hours worked is difficult. Fuzzy phrases like 'constructive knowledge', 'believe that work is being performed' and 'work the company does not know about' are used in the analysis.

This month's bulletin reminder states that the employer should exercise 'reasonable diligence' in tracking time. This is interpreted to mean the employer has the responsibility to communicate expectations and track hours of work. Being reasonable would involve set company practices but would not require companies to cross-reference computer logins/usage or phone records. This would be unreasonable.

So, in this time of 'reminding', what should employers do to stay in compliance?

It is recommended that the employer communicate to all employees (especially hourly employees who are working remotely for the first time), a written process and procedure for timekeeping. The company should communicate scheduled hours of work and provide a process whereby employees may work unscheduled hours. The employees should then be held to the expectations of the policy or procedure.

For example, an hourly employee may be working on a time-sensitive project. Company policy may limit the employee's hours to 40 per week, however, it is clear to the employee they will need additional hours to complete the work. Following the policy, the employee must obtain written approval for the overtime work prior to completing the project. And what can the employer do if the employee exceeds 40 scheduled hours without prior

approval? First, the employer is obligated to pay for the additional time worked. The time and associated pay cannot be deducted as a consequence. The employer should then exercise disciplinary actions to communicate the negative impact and to set future expectations regarding the overtime policy and procedure. Additional infractions could result in disciplinary action up to and including termination of employment.

Now is the time to review your remote and telework policies. The company should expand language to include special considerations during the time of COVID-19 and clear expectations regarding scheduling and working hours. The company must also clarify the use of phones and computers outside of scheduled work hours and what constitutes active work. This practice should also contain guidance in the individual tracking and reporting of hours and the interval at which this tracking should take place (usually daily).

As the bulletin suggests, we should exercise reasonable diligence to ensure that all working hours are captured (whether scheduled or not) and that mechanisms are in place for tracking, reporting and requesting additional hours. We can also breathe some relief in that the DOL has spoken and stated “constructive knowledge” is not without limits. There is still some space for common sense.

This information is provided as educational material only and is not intended as legal, financial or tax advice. Consult your legal counsel for complete details on your compliance requirements for your plan(s).

