UNITED STATES DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
Washington, DC 20210

WAGE AND HOUR DIVISION

August 24, 2020

FIELD ASSISTANCE BULLETIN No. 2020-5

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Cheryl M. Stanton
Administrator

SUBJECT: Employers' obligation to exercise reasonable diligence in tracking teleworking employees' hours of work.

This Field Assistance Bulletin (FAB) provides guidance regarding employers' obligation under the Fair Labor Standards Act (FLSA or Act) to track the number of hours of compensable work performed by employees who are teleworking or otherwise working remotely away from any worksite or premises controlled by their employers. In a telework or remote work arrangement, the question of the employer's obligation to track hours actually worked for which the employee was not scheduled may often arise. While this guidance responds directly to needs created by new telework or remote work arrangements that arose in response to COVID-19, it also applies to other telework or remote work arrangements.

An employer is required to pay its employees for all hours worked, including work not requested but suffered or permitted, including work performed at home. *See* 29 C.F.R. § 785.11-12. If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked. An employer may have actual or constructive knowledge of additional unscheduled hours worked by their employees, and courts consider whether the employer should have acquired knowledge of such hours worked through reasonable diligence. *See Allen v. City of Chicago*, 865 F.3d 936, 945 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1302 (2018). One way an employer may exercise such diligence is by providing a reasonable reporting procedure for non-scheduled time and then compensating employees for all reported hours of work, even hours not requested by the employer. *Id*. If an employee fails to report unscheduled hours worked through such a procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours. *Id.* However, an employer's time reporting process will not constitute reasonable diligence where the employer either prevents or discourages an employee from accurately reporting the time he or she has worked, and an employee may not waive his or her rights to compensation under the Act. *Id.* at 939; *see also Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 388 (6th Cir. 2016).

Background

The FLSA generally requires employers to compensate their employees for all hours worked, including overtime hours. As the Department's interpretive rules explain, "[w]ork not requested but suffered or permitted is work time" that must be compensated. 29 C.F.R. § 785.11. This principle applies equally to work performed away from the employer's worksite or premises, such as telework performed at the employee's home. *Id.* § 785.12. "If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked." *Id.* Employers are required to exercise control to ensure that work is not performed that they do not wish to be performed. *Id*. § 785.13.

While it may be easy to define what an employer actually knows, it may not always be clear when an employer "has reason to believe that work is being performed," particularly when employees telework or otherwise work remotely at locations that the employer does not control or monitor. This confusion may be exacerbated by the increasing frequency of telework and remote work arrangements since the Department issued the above interpretive rules in 1961. The Bureau of Labor Statistics estimated in 2019 that roughly 24 percent of working Americans performed some work at home on an average day (https://www.bls.gov/news.release/atus.t06.htm). And these arrangements have expanded even further in 2020 in response to the COVID-19 pandemic. Accordingly, WHD believes it is appropriate to clarify this issue.

Employer Must Pay for All Hours Worked that it Knows or Has Reason to Believe Was Performed

The FLSA requires an employer to "exercise its control and see that the work is not performed if it does not want it to be performed." 29 C.F.R. § 785.13. The employer bears the burden of preventing work when it is not desired, and "[t]he mere promulgation of a rule against such work is not enough. Management has the power to enforce the rule and must make every effort to do so." *Id.*; *see Hellmers v. Town of Vestal, N.Y.*, 969 F. Supp. 837, 845 (N.D.N.Y. 1997).[1] Work that an employer did not request but nonetheless "suffered or permitted" is therefore compensable. *Id*. § 785.11; *see also* 29 U.S.C. § 203(g). "Employers must, as a result, pay for all work they know about, even if they did not ask for the work, even if they did not want the work

[1] The phrase "must make every effort" in 29 C.F.R. § 785.13, however, does not mean that the "duty of the management to exercise its control" to prevent unwanted work is unlimited. *Hellmers*, 969 F. Supp. at 845-46 ("However, the duty [under 29 C.F.R. § 785.13] is not unlimited[.] … The question then is whether an employer's inquiry was reasonable in light of the circumstances surrounding the employer's business, including existing overtime policies and requirements."); *see also Chao v. Gotham Registry, Inc*., 514 F.3d 280, 291 (2d Cir. 2008) (explaining that "the law does not require [an employer] to follow any particular course to forestall unwanted work, but instead to adopt all possible measures to achieve the desired result").

done, and even if they had a rule against doing the work." *Allen v. City of Chicago*, 865 F.3d 936, 938 (7th Cir. 2017) (citations omitted).

"However, the FLSA stops short of requiring the employer to pay for work it did not know about, and had no reason to know about." *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 177 (7th Cir. 2011) (emphasis added). Thus, the employer's obligation under 29 C.F.R. § 785.13 to "make every effort" to prevent unwanted work being performed away from the employer's worksite or premises is not boundless. This is because an employer cannot make any effort—let alone every effort—to prevent unwanted work unless "the employer knows or has reason to believe the work is being performed." 29 C.F.R. § 785.12.

An employer's obligation to compensate employees for hours worked can therefore be based on actual knowledge or constructive knowledge of that work. For telework and remote work employees, the employer has actual knowledge of the employees' regularly scheduled hours; it may also have actual 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. *See id*. An employer may have constructive knowledge of additional unscheduled hours worked by their employees if the employer should have acquired knowledge of such hours through reasonable diligence. *Allen*, 865 F.3d at 945; *Hertz*, 566 F.3d at 782. Importantly, "[t]he reasonable diligence standard asks what the employer should have known, not what 'it could have known.'" *Allen*, 865 F.3d at 943 (quoting *Hertz*, 566 F.3d at 782). One way an employer generally may satisfy its obligation to exercise reasonable diligence to acquire knowledge regarding employees' unscheduled hours of work is "by establishing a reasonable process for an employee to report uncompensated work time." *Id.* at 938. But the employer cannot implicitly or overtly discourage or impede accurate reporting, and the employer must compensate employees for all reported hours of work. *Id.* at 939 ("[A]n employer's formal policy or process for reporting overtime will not protect the employer if the employer prevents or discourages accurate reporting in practice."); *see also Craig*, 823 F.3d at 390 (reversing summary judgment in part because employee had miscalculated the applicable hourly rate owed, and emphasizing that an employee may not waive his or her rights under the FLSA).[2]

However, if an employee fails to report unscheduled hours worked through such a procedure, the employer is generally not required to investigate further to uncover unreported hours. *Allen*, 865 F.3d at 938. Though an employer may have access to non-payroll records of employees' activities, such as records showing employees accessing their work-issued electronic devices outside of reported hours, reasonable diligence generally does not require the employer to undertake impractical efforts such as sorting through this information to determine whether its employees worked hours beyond what they reported. *See, e.g.*, *id.* at 945 (affirming that the district court reasonably found that employer did not need to cross-reference "phone records or

[2] Additionally, if an employer is otherwise notified of work performed through a reasonable method, or if employees are not properly instructed on using a reporting system, then an employer may be liable for those hours worked. *Allen*, 865 F.3d. at 946 n.5 ("One can certainly argue that an employer has not created a reasonable reporting system—has not been reasonably diligent—if its employees do not know when to use that system.").

supervisors' knowledge of overtime to ensure that its employees were reporting their time correctly"); *Hertz*, 566 F.3d at 782 ("It would not be reasonable to require that the County weed through non-payroll CAD records to determine whether or not its employees were working beyond their scheduled hours."); *Newton v. City of Henderson*, 47 F.3d 746, 749 (5th Cir. 1995) ("We hold that as a matter of law such 'access' to information [regarding activities performed by plaintiff] does not constitute constructive knowledge that Newton was working overtime.").[3]

"When the employee fails to follow reasonable time reporting procedures [he or] she prevents the employer from knowing its obligation to compensate the employee." *White v. Baptist Memorial Health Care Corp*., 699 F.3d 869, 876 (6th Cir. 2012). Moreover, where an employee does not make use of a reasonable reporting system to report unscheduled hours of work, the employer is thwarted from preventing the work to the extent it is unwanted, if the employer is not otherwise notified of the work and is not preventing employees from using the system. *Id*. at 877. And the employer could not have "suffered or permitted" work it did not know and had no reason to believe was being performed. *See* 29 C.F.R. §§ 785.11–.12. Accordingly, 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. *Id*.; *see also Forrester v. Roth's I. G. A. Foodliner, Inc*., 646 F.2d 413, 414 (9th Cir. 1981) ("[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer …, the employer's failure to pay for the overtime hours is not a [FLSA] violation.").

[3] This is not to say that consultation of records outside of the employer's timekeeping procedure may never be relevant. Depending on the circumstances it could be practical for the employer to consult such records. If so, those records would form the basis of constructive knowledge of hours worked. *Hertz*, 566 F.3d at 782 ("We do not foreclose the possibility that another case may lend itself to a finding that access to records would provide constructive knowledge of unpaid overtime work."); *see also Craig*, 823 F.3d at 392 ("Some cases may lend themselves to a finding that access to records would provide constructive knowledge of unpaid overtime work, but that is not a foregone conclusion.")