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Employment Law: The Modern Mobile Workforce

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I.
INTRODUCTION

It is beyond the scope of this paper to detail the technological advances (*e.g.*, widespread broadband coverage, mobile broadband availability, VoIP, high-definition teleconferencing), economic conditions (*e.g.*, corporate budgets, worker expectations, increased transportation costs), and social factors (*e.g.*, changes in work-life balance expectations, environmental awareness) that are combining to prompt companies to examine work from home solutions as a means of attracting and retaining talent, maximizing productivity, and minimizing cost. Rather, this paper focuses on some of the employment-related, legal implications associated with employing dispersed, mobile workforces.

II.
EMPLOYMENT LAW ISSUES

A. Paying What You Owe – Wage and Hour Issues

1. The Fair Labor Standards Act

The Fair Labor Standards Act (FLSA)—the federal law requiring that all non-exempt employees be paid at least minimum wage for all "hours worked" and overtime for all hours worked over 40 in a workweek—applies to work performed from home.[1] Yet application of the 1937 law to today's mobile and remote workers presents unique legal questions that are not easily resolved by the statute or the regulations and have not yet been addressed by the courts. Although many mobile and remote workers will be "exempt" from the minimum wage and overtime requirements of the FLSA,[2] as the mobile and remote workforce continues to grow, more and more non-exempt employees are likely to be working from home, requiring employers of mobile and remote workers to plan for common FLSA concerns related to compensation for travel time, break time, and preliminary and postliminary activities.

Although initially adopted to address home-at-work rather than work-at-home, the Department of Labor (DOL) regulations surrounding the FLSA acknowledge some of the difficulties associated with an employee who works and resides in the same location:

> An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and

[1] 29 C.F.R. § 785.12 ("The rule is also applicable to work performed away from the premises or the job site, or even at home. If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked.").

[2] *See* Ashley M. Rothe, *Blackberrys and the Fair Labor Standards Act: Does a Wireless Ball and Chain Entitle White-Collar Workers to Overtime Compensation?,* 54 St. Louis University Law Journal 709, 723 (2010).

> other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home.[3]

As the regulations acknowledge, measuring the "exact" hours worked can be difficult when the employee work and lives in the same place.[4] This difficulty, however, does not excuse an employer's obligation to record and compensate all hours worked by a remote or mobile non-exempt employee.

a. *"Hours worked"*

Under the FLSA and its regulations, an employer must record and pay non-exempt employees for all hours "suffered or permitted to work," without regard for the reason for the work.[5] Hours worked includes time spent for the employer's benefit, as well as time an employee cannot otherwise effectively use as his or her own, even if the employee is not actively engaged in performing a task.[6] Moreover, there is no such thing as "unauthorized" work; if management is aware the work is being done, the employer must record the hours and compensate the non-exempt employee for same.[7]

i. The *de minimis* exception

That said, in 1946, the United States Supreme Court created a "*de minimis"* exception to the general rule that non-exempt employees must be paid for all hours worked.[8] "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded," the Court explained. "It is only when an

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[3] 29 C.F.R. § 785.23.

[4] *Id*.

[5] 29 C.F.R. § 785.11 ("Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.").

[6] 29 C.F.R. § 785.7 ("Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that 'an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer.").

[7] *Id.*

[8] *Anderson v. Mt. Clemons Pottery Co.,* 328 U.S. 680, 692 (1946); *see also* 29 C.F.R. § 785.47 ("In recording working time under the Act, 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.")

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