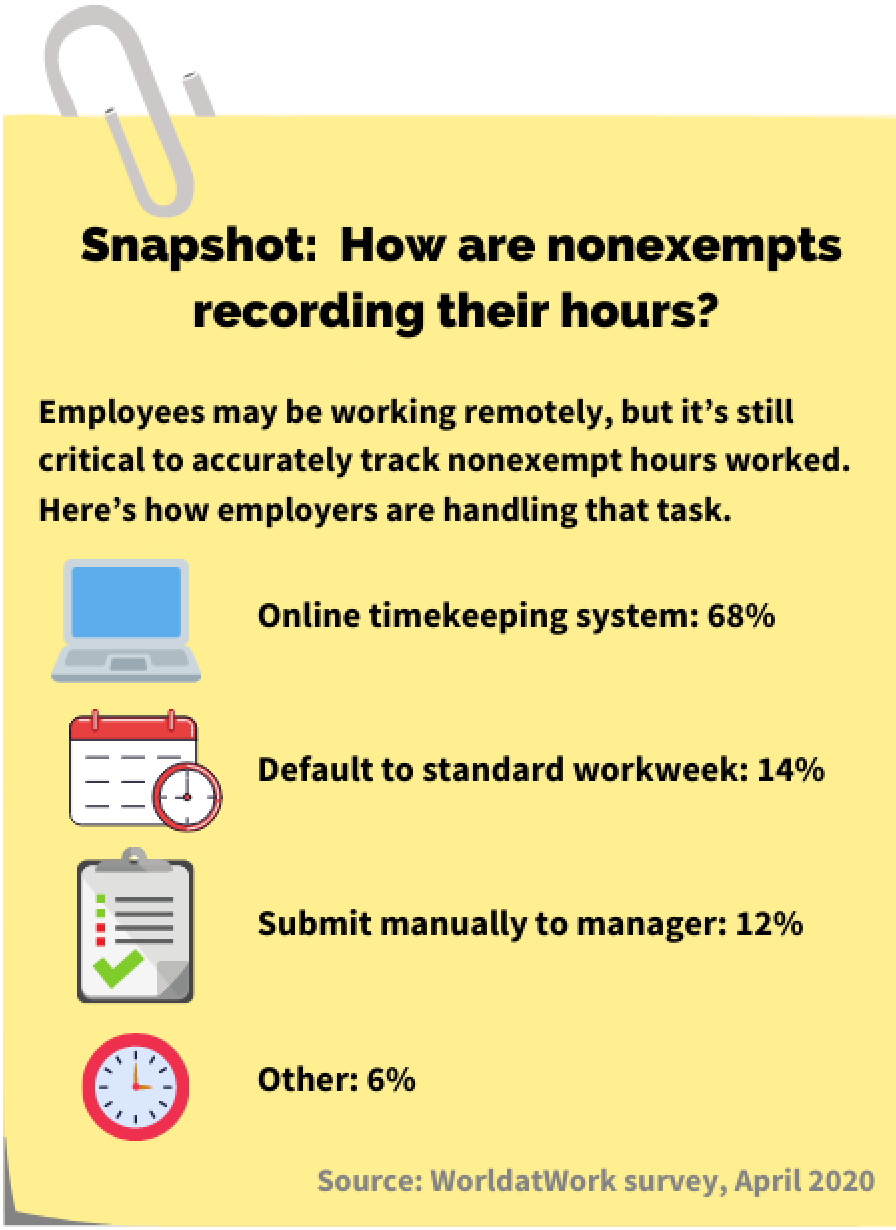
Telework and time tracking: Legal do’s and don’ts



Telework is here to stay. For employers, the biggest challenge is complying with the Fair Labor Standards Act (FLSA). Time tracking for hourly workers is crucial. But managing exempt teleworkers isn’t simple either. In fact, it’s likely at least some of your long exempt workers may no longer qualify for their exemption. And that may leave you on the hook for thousands of dollars of unpaid wages.

Even before the pandemic sent millions of office workers home to work from kitchen tables, telework was on the rise. Even so, most employees commuted to an office, retail location or other physical location. Then came the

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COVID-19 national emergency and state shutdowns of non-essential businesses. Employers who could adjust did – by immediately converting employees into temporary telecommuters. For many organizations, it was the only alternative to closing down operations entirely.

Now, as the pandemic unpredictably dictates operational changes, some employers opt to continue the telework experiment instead of rushing back. Doing so comes with FLSA risks. Here's how to mitigate those:

Telework agreement

If you were lucky back in March at the beginning of the pandemic, you already had a telework policy. But don't feel bad if you didn't. Most employers without significant numbers or remote employees didn't. Now, however, you need to adopt one that covers at least the basic FLSA requirements. A good telework policy *must* include the following:

- A statement of the work hours expected;
- Designation of core hours expected;
- A list of equipment required along with who provides it;
- An explanation of how reimbursement for job-related expenses will be handled. Be sure to check with your state labor department or attorney for what expenses you must cover;
- A clear policy on time-tracking. This should require that the employee track all hours worked and that he or she understands this will be audited;
- An acknowledgment that the employee has read the telework policy, agrees to accurate timekeeping and understands telework not guaranteed.

Tracking remote hours worked

The FLSA requires that workers not classified as exempt must be paid for all hours (and minutes) worked. When those employees were in the office, the store or other physical location, you likely tracked their time closely. They may have clocked in on entry. Or the software on their computers automatically began time keeping when they logged on, rounding up to accommodate start-up minutes. Workers clocked out for lunch and in after. Their employers may even have had strict rules against eating at one's desk to avoid uncompensated work. Under the FLSA, meal breaks must be fully relieved of work duties. Making employees leave their workspace accomplished that. The result was that very few workers later could claim they hadn't been paid for all time worked.

But once those hourly employees were sent home to telework, those rules fell by the wayside. Supervisors likely don't know exactly when teleworkers begin work or end for the day. Breaks may or may not be taken. The reality is also that some teleworkers are caring for children whose daycare or schools are closed. Workers may be juggling helping with online education while writing reports or running spreadsheets. They may catch up later, when the children are asleep – without ever reporting those extra minutes or hours.

It's essential that employers make a good faith effort to accurately account for all time worked despite the telework setting. Start by having hourly workers submit time sheets that include a statement that all hours reported are accurate. The form should include a statement that says "I have included all time worked for the period reported. I understand that I will be paid for all time worked even if that time was not scheduled. I have taken all breaks and meal periods required and accounted for them."

Many teleworkers start their day by logging into a computer system and end their day by logging out. Ideally, that system automatically tracks time and accounts for the time spent booting up and down. But automatic tracking does not replace self-reporting. Employers should do both and periodically reconcile the two time keeping records. When dealing with hourly teleworkers, it's wise to err on the side of overpayment rather than underpayment.

Overtime

The FLSA also requires that employers pay hourly workers, including teleworkers, time-and-a-half for hours worked over 40 in a workweek. (Some states, including California, require overtime for hours worked over 8 in a workday.) You are free to tell hourly teleworkers that they may not work overtime without prior approval. However, the penalty for working extra hours (or minutes) must *never* be not making the extra payment.

If an hourly employee performed overtime work, you must pay for it. It does not matter that the employee may have “volunteered” the extra time and work. For example, an employee unable to work efficiently because children interrupt may decide to catch up later in the day. He must be paid for that time, including overtime if over 40 hours in a workweek. Unfortunately, his employer may not know about the extra hours until much later, perhaps after the employer terminates him. That’s when all those signed time sheets will show you made good faith efforts to track time and pay accordingly.

Exempt or hourly? Classification may have changed with telework

It’s much easier managing exempt employees who telework. Just as in the office or other physical setting, employers don’t have to track all time exempt teleworkers work. The FLSA sets out standards for each exemption and as long as workers meet those, overtime is not due. Exempt workers can be made to work as long and as hard as required to get their jobs done.

It’s likely many of the workers you sent home are classified as exempt under the administrative, executive or professional exemptions. Each has slightly different requirements. These are:

Administrative:

- The employee must be compensated on a salary basis at a rate not less than $684 per week;
- The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Executive:

- The employee must be compensated on a salary basis at a rate not less than $684 per week;
- The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Learned professional:

- The employee must be compensated on a salary basis at a rate not less than $684 per week;
- The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

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Creative professional:

- The employee must be compensated on a salary basis at a rate not less than $684 per week; and
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

As long as exempt employees who telework are properly classified, sending them home to work poses no additional time-keeping problems. However, many organizations find themselves in a process of reinvention during this pandemic. The core business may be changing. Other employees may have been laid off, leaving their work to be distributed among exempt teleworkers. Supervisors may no longer supervise as many workers in their telework roles. Jobs themselves may have changed dramatically in scope and skills required.

In some cases, changes mean the pre-pandemic exempt classifications no longer describe the actual job being done. And if the teleworker is no longer exempt, then he or she is hourly. If that's the case, time records are now required and overtime must be paid. The problem, of course, is that an employer may not have tracked hours, thinking there was no need. And that may mean a lawsuit and a large backpay award.

Here's an example: Joe was classified as exempt administrative. He had supervised four workers. However, the employer removed supervision from Joe's duties when it sent him home to telework. It gave him other management assignments such as developing long-range staffing plans. But he no longer actually supervised anyone. Joe no longer fits the exemption and he must be paid for all time worked.

Employers with a workforce now teleworking should review all exempt positions. Check that the job description is up-to-date. Verify that each is classified properly. If not, calculate any pay that may be due for hours worked. Moving forward, have newly hourly teleworkers track their time accurately.

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