

Remote worker classification tips and tricks

How to classify remote workers probably wasn't on your mind when governors began shutting down in the spring. If you were a so-called non-essential business, you had no choice but to send workers home. But now remote worker classification should be on your immediate agenda. Otherwise, you risk a potential wage and hour disaster – perhaps even a class action lawsuit costing you millions.

The Fair Labor Standards Act (FLSA) – passed in 1938 - doesn't take into account telework in determining overtime eligibility. And now that we're settled into the remote work model for employees who can telework, a status review is essential. So pull out those job descriptions and see if your exempt workers still are or should be reclassified as hourly. Then you have option. You can change their jobs to retain exempt status. Or you can tighten their telework rules. That way, you comply with Department of Labor (DOL) wage and hour rules on pay, timekeeping, breaks and overtime.

Remote work is here

to stay

As the COVID-19 pandemic picks up steam, most states are seeing a steady climb in cases. Winter is coming and experts predict more people inside in close proximity to one another will mean more infections. Reopened offices may create super spreader events. That's the biggest reason employers who previously predicted their remote workers would return to the office are rethinking that strategy. Big companies like Google, Microsoft, Target, Ford and the New York Times have postponed returning to the office until at least summer 2021.

Remote work is here to stay – perhaps permanently. Employers that make telework a permanent option won't be able to rely on DOL emergency flexibility. For a permanent remote workplace, the DOL Wage and Hour Division will expect employers set the ground rules to comply. Now is the time to set up those rules, reclassify as needed and educate your workforce on the new expectations.

DOL flexibility on remote worker classification

The DOL has long been flexible when emergencies make it impossible to perfectly comply with wage and hour rules. For example, in the aftermath of a weather emergency like a flood, an exempt manager likely would perform non-exempt work. She might join the cleanup crew. He might restock shelves. DOL would not use this temporary, emergency work as justification to reclassify the manager as hourly. The agency understands that there are times when exempt managers, executives and professionals have to pitch in.

At the beginning of the COVID-19 pandemic, DOL let employers do what they needed to do to address an emergency. In fact, DOL provided this guidance:

[D]uring the period of a public health emergency declared by a Federal, State, or local authority with respect to COVID-19, otherwise-exempt employees may temporarily perform nonexempt duties that are required by the emergency without losing the exemption. WHD's regulations permit an employee who otherwise qualifies for a Section 13(a)(1) exemption to perform nonexempt duties during emergencies that "threaten the safety of employees, a cessation of operations or serious damage to the employer's property" and which are beyond the employer's control and could not reasonably be anticipated. COVID-19 is a rare event affecting the public welfare of the entire nation that an employer could not reasonably anticipate and is consistent with the FLSA's

regulatory criteria for emergencies. Employees who are temporarily required to perform nonexempt duties due to COVID-19 may do so without losing the FLSA exemption, as long as they continue to be paid on a salary basis of least \$684 per week.

But that has changed as the pandemic lingers and does not necessarily apply to telework positions. That's especially true if teleworkers have seen their jobs drop duties that are essential to their exempt status. For example, the executive exemption requires that the employee customarily and regularly direct the work of at least two employees. If a teleworking executive has lost subordinates, the employee no longer qualifies for the exemption. That's a common scenario as organizations retained managers but furloughed subordinates. The DOL emergency exception outlined above excuses additional non-exempt duties. It does **not** excuse dropping duties that make the worker exempt in the first place.

Self-audit for remote status

Whether a teleworker's job has changed enough to warrant reclassification is highly dependent on the work performed and the classification. Gather up job descriptions, the latest personnel review and a list of exempt classifications. Then review the current telework position and see whether it still fits. Use the lists below for the most common exemptions as a checklist. Match up each requirement with the job **as it currently exists**. For more exemptions and exceptions to the rules below for teachers, doctors, and lawyers, see [the DOL factsheet](#).

Exempt executive: The employee must meet *all* the following criteria:

- Paid on a salary basis at not less than \$684 per week;
- Primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- Customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- 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.

Exempt administrative: The employee must meet *all* the following criteria:

- Paid on a salary basis at not less than \$684 per week;
- 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
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Exempt learned professional: The employee must meet *all* the following criteria:

- Paid on a salary basis at not less than \$684 per week;
- 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.

Exempt creative professional: The employee must meet *all* the following criteria:

- Paid on a salary basis at not less than \$684 per week;

- Primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

After the self-audit, inform teleworkers about their new or continued status. If it changed, make sure they also know the new rules. That's especially true for newly hourly teleworkers, who will have to better track their time. If you want to retain exempt status, be sure to add back in duties previously performed. You could also restructure telework positions to move them from hourly to exempt by adding responsibilities. Just make sure these are *actually* performed. The trickiest would be adding supervision responsibilities.

DOL and hourly teleworkers

The DOL has also released updated guidance on telework for hourly workers. If you find yourself having to reclassify exempt teleworkers to hourly ones, follow these rules:

Hours worked at home: The FLSA requires that hourly workers be paid for *all* time worked. It's up to the employer to track that time accurately. That can be hard when the worker has no direct supervision because he's working at home. However, DOL says home work is treated the same as if performed in an office or at another location. You can use any reasonable time tracking method to capture those hours. The best way to track time worked is through computerized time tracking. But you can also have the employee track the time.

Unauthorized hours worked: Sometimes, hourly workers don't tell their employers about extra work done. For example, a receptionist might answer the phone on her lunch break. That time spent working can add up over a year or more. The general rule is that if you knew or should have known he was working, you must pay. But for a telework, it's harder to see work performed outside approved schedules. Obviously, work performed via trackable technology such as call center work has to be paid even if not scheduled. Other work gets trickier. The key is whether you ought to have known under the circumstances. One good tactic is to *ask the employee* regularly if she's performed extra work. Get her signature acknowledging she hasn't.

Breaks in the workday: It's likely your hourly teleworker will take unexpected breaks during the day. She might, for example, answer the front door and accept a delivery. The best approach is to allow such breaks and simply pay for the time. Some teleworkers may request more flexibility. A parent may need to help a child with distance learning during a COVID-19-related school closure. Usually, all time between the performance of the first and the last task of the day is paid work time. Of course, meal breaks can be excluded. The DOL has issued special rules for telework during the pandemic which allow for breaks to supervise virtual school. DOL provides this example:

For example, assume you and your employee agree to a telework schedule of 7-9 a.m., 11:30-3 p.m., and 7-9 p.m. on weekdays. This allows your employee, for instance, to help teach their children whose schools are closed, reserving for work times when there are fewer distractions. Of course, you must compensate your employee for all hours actually worked—7.5 hours—that day, but not all 14 hours between your employee's first principal activity at 7 a.m. and last at 9 p.m.