

2016 Mid-Year Seminar Employment Law Work Session

FLSA & Local Government

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Remote Working & the Municipal Workplace: FLSA & More

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This portion of the employment law work session at IMLA's 2016 Mid-Year Seminar provides comment and guidance on municipal employment practices involving work outside of the traditional municipal workplace.[1] This paper first addresses some selected issues or questions that might be considered as part of the process to develop, implement, or alter a program whereby municipal employees are permitted (or required) to work at home, on the road, or in other places outside of the traditional workplace.

Part 1. *Some Initial Considerations in Developing/Implementing a Remote Working / Telecommuting Plan (Not Limited to FLSA Concerns)*

Municipalities currently may utilize "remote" working to a lesser extent than do private sector employers. Nonetheless, the increasing availability and "ease-of-use" technology and infrastructure required to work in a place other than the traditional municipal worksite may lead to more municipal employees working in places other than those traditionally used in the past and currently. As the possibilities of remote working increase, municipalities face a number of issues that can be best addressed in advance with planning, technological preparation, and policy development. Some of the factors to be considered include[2]:

- *Status as employee or independent contractor*
- *Compliance with state and federal laws, possibly including other state laws where out-of-state locations might be used or when employees are traveling*
- *Work hours and productivity, including reporting, documentation, and verification*

[1] This paper and work session is not intended to directly or completely discuss or analyze situations in which an employee may be classified as "on-call." Instead, it addresses employees whose regular workplace is a place other than a traditional in-house municipal work setting. For a discussion of FLSA concerns regarding on-call employees who may be remotely "connected" to the workplace, see, e.g., Wage and Hour Division opinion letter re: on-call water treatment plant employees @ http://www.dol.gov/whd/opinion/FLSA/2008/2008_09_22_06_FLSA.pdf.
[2] These and other issues were discussed at an IMLA personnel law webinar in March 2014, which included a review of municipal security and risk management concerns presented by Lou Milrad.

- *Non-work related use of technology or contacts*
- *Employee cost reimbursement (e.g. remote location access, power, temporary worksite)*
- *Health and safety concerns for remote workplaces (e.g., ergonomics)*
- *Compliance with requirements for "breaks"*
- *Union issues*
- *Safeguarding confidential information & protecting municipal data & systems*

This paper briefly discusses some of these issues along with concerns that may arise with respect to employee compensation - with a particular focus on overtime pay.[3]

Any program of remote computing (a shorthand term used here to represent employees working away from the normal "in-house" workplace, whether it is described as telecommuting or by some other term) should be used after developing controls and management practices and policies that go beyond concern with compensation. The following chart briefly lists some of these factors:

Overall Management & Control

Employment Status;
Is "Smart Work" working smart?
Keeping Remotely-Working Employees Engaged and Actually Working & Not "Burning Out"
Communication and Speech Issues
Wage & Hour & Overtime Issues (see part 2 of this paper)
Discipline
Other Legal Concerns

[3] Though some remotely-working municipal employees currently may be exempt from overtime pay requirements under the FLSA (and similar state laws), future revisions may significantly contract the "pool" of exempt employees so as to require increased vigilance with regard to allowed and required employment practices.

A. Overall Management & Control.

(1) *Employment Status*

(2) Is "Smart Work" working smart?

(3) *Management Concerns in General*

(a) Core Competencies.

(b) Assessment/Evaluation.

(c) Trust.

B. Keeping Remote Workers Engaged & Actually Working & Avoiding "Burnout."

(1) "Always Connected."

(2) Burnout.

C. Communication and Speech Issues

(1) Means of Communicating.

(2) Speech Issues.

D. Discipline

E. New and Changed Technology & Legal Requirements (e.g. FOIA & Recordkeeping)

Part 2. *Wage & Hour & Overtime Issue*

(A) Burnout. Employee burnout may be more directly related to management and control concerns, but some mention is appropriate here, as well. Ensuring that hours of work claimed or actually performed meet workweek and workday (as appropriate) standards may assist in preventing employees over-working because they have unlimited access to the workplace. One concern, of course, is whether the employee actually is working during the time claimed. Other than instituting monitoring (possibly deemed overly invasive of employee privacy), controls might include delineation of objective standards for work product, timely and consistent review of work product, and training of supervisors and managers as to appropriate levels of supervision. Certainly, a reasonable degree of technological monitoring is appropriate, not just to monitor work hours but also to provide protection for employer systems.

(B) FLSA and Related Concerns.

(1) What is Work or Employment? Initially, it should be remembered that protective labor laws, including federal wage and hour laws, apply to an employer in the usual sense of that word, but also to one who has "allowed or suffered" an individual to work. An employer who

creates a remote working system will be deemed to be in charge of the system. Thus, fairly rigid rules should be established, implemented, and observed to govern when and how an employee works remotely.[4]

Consider, for example, how an employer might fare in a wage and hour proceeding when a manager routinely opened emails in the morning to discover that an hourly employee had been sending in work that had been developed clearly after the normal workday, so that the employee's time commitments substantially exceeded a 40-hour workweek. How effective a defense would exist by claiming (a) the manager (i.e., employer) did not know the employee was working on off-duty time; or (b) that the employee working these hours was not authorized under the employer's personnel policies?

(2) Hours Worked. Unless an employee has a time clock in a remote workplace, an employer likely has little to no real control over the accurate recording of the time an employee is actually working for the employer. Private sector employers may use keystroke monitoring or other systems to record employee computer time. Such monitoring appears to be used much less frequently in the public sector. Reasons for this difference are matters upon which readers are free to speculate, but may be due, at least in part, to union objections or to privacy rights of governmental employees.

Remote working, thus, entails issues relating to accrual of unanticipated overtime. Salaried employees (who are not necessarily exempt from overtime) are particularly suited for creating possible employer liability – not just for overtime, but also for possible minimum wage violations. (See also footnote 4.)

A starting point is a clear job or position description that will define not just the work to be accomplished, but also the manner and time requirements of the position. On-line monitoring systems are readily available.[5] A major caution and concern with monitoring lies in the privacy protections afforded to public employees that appear broader than those for private sector employees.[6] Thus, any employee monitoring system must be examined for compliance with public sector employee privacy protections.

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[4] See Wage and Hour Division (WHD) Fact Sheet 13, copy included in materials for this session.

[5] Just do an internet search. A recent search (3/5/2016) using the key words "remote employee monitoring" returned about 550,000 results.

[6] Case law includes the seminal decision of *O'Connor v. Ortega*, 480 U.S. 709 (1987), and decisions such as *City of Ontario v. Quon*, 560 U.S. 746. Federal and state statutes also may protect employee privacy or speech, but detailed analysis is beyond the scope of today's session.

Attempts to limit use of employee- provided hardware (e.g., a laptop) may entail issues claimed to involve censorship or violation of public employee speech protections. The time to consider adoption of policies and procedures is prior to allowing remote working.

Work rules and practices seeking to protect an employer's hardware and data from intrusion may be easier to justify than limits on employer-provided hardware to access the Internet. Realistic risk management assessment using knowledgeable technological support is a worthy employment practice.

(3) Issues Demonstrated by Some Recent Cases. A few selected cases from the federal courts over the course of the last year or so provide some insight into issues that may arise with respect to remote working / telecommuting and overtime. This review does not cover state laws that may pose even more significant concerns due to differing requirements (e.g., daily overtime requirements instead of workweek standards under the FLSA).

Richie v. Blue Shield of California, (No. C-13-2693 EMC, 2014 WL 6982943, at *17) (N.D. Cal. Dec. 9, 2014). Here, Plaintiff sought to conditionally certify her FLSA claims alleging that Blue Shield failed to pay telecommuting claims processors for "off-the-clock" work. The alleged "off-the-clock" work was done as a result of Blue Shield (1) requiring the telecommuting claims processors to come into an office once a month for meetings without paying the telecommuters for their travel time and (2) requiring telecommuters to meet 125% of the normal production goals, effectively requiring them to work beyond an 8 hour shift. Plaintiff also seeks to certify under Rule 23 California state claims alleging that Blue Shield failed to reimburse the telecommuters for necessary business expenses — specifically costs associated with maintaining a phone in their home (as required by Blue Shield policy), mileage expenses for traveling to a Blue Shield office for required meetings, and various "home office expenses."

The employer's requirements for telecommuting workers included: a claims processor must be able to "set aside an area of the alternate work location to be used exclusively as an office" and be able to "limit access and safeguard any member personal health information from those who do not have the need or right to know" and the alternate work location must have access to high-speed internet and telephone lines.

With respect to the 125% productivity requirement and the assertion it required employees to work hours beyond state law-mandated 8-hour per day maximum before overtime requirements kicked in, the court denied class action certification after lengthy analysis of the

employer's explanation and the employee's claims. The court did certify a class with respect to the claims regarding payment for "required" in-house meetings and reimbursement of certain expenses.

- Municipal employers may wish to note that claims of this type may be difficult to sustain as class actions, but stringent requirements on worker remote computing, while perhaps furthering goals of productivity, may carry with it concerns over computation of working hours.

***Patel v. MetaSENSE, INC.,* Civ**. No. 15-004 (NLH/JS). (DC, NJ, February 5, 2016). Plaintiff was a salaried, non-exempt worker who worked remotely. He received overtime pay for a period, but that stopped because his employer encountered cash-flow problems. After making numerous unsuccessful complaints to his employer, he filed an FLSA claim and the employer defaulted by failing to timely file an answer. This proceeding sought to determine the amount of the default judgment (as the record could not accurately demonstrate hours worked) and the employer's attempt to dismiss the complaint based on either claim preclusion or issue preclusion. The employer's motion changed what would have been a routine hearing to determine damages to one involving assessment of the claim, applying *res judicata* premised upon a hearing conducted by a state unemployment compensation board.

The state board rulings included (1) a finding by the referee that Patel was terminated for cause and not for retaliation for requesting overtime; and (2) admissions by Patel during the hearing that he was the individual responsible for payroll and that he did not request any overtime until Mehta asked for his passwords when he was terminated. Without deciding the merits of the arguments, the court found them to be colorable affirmative defenses that, if established, would constitute a complete defense, and it vacated the default – but would not grant the motion to dismiss, instead reserving determination if a summary judgment motion were to be filed.

- Two practice pointers may be evident. (1) Default for failure to timely act is not a good practice and (2) employers should keep payroll records – reliance on a remotely working employee to do so entails risk.

Miller v. Texoma Medical Center, Inc., (No. 4:13CV32) (Dist. Court, ED Texas, Sept. 21, 2015). Plaintiff alleges a single FLSA violation, alleging he was regularly scheduled to work 40 or more hours in a workweek at the hospital. Plaintiff further argues that, in addition to his

regularly scheduled work at the hospital, he was required to be on call when he was not at the hospital, that he regularly received calls from the hospital, and that he was required to respond to those calls and perform work related to them but was not compensated for that time.

One defendant argued that Plaintiff's off-the clock claims failed as a matter of law because Plaintiff could not prove the amount and extent of the time for which he was allegedly not compensated and could not show either that it actually knew about his off-the-clock work, or that his alleged off-the-clock work should have been known as a matter of just and reasonable inference.

The court reviewed various documents and deposition testimony and ruled that Plaintiff failed to raise a genuine issue of material fact as to whether Defendant failed to compensate him for overtime work. Primarily, Plaintiff failed to establish a *prima facie* case under the FLSA. An employee bringing an action for unpaid overtime compensation must first demonstrate by a preponderance of the evidence: (1) that there existed an employer-employee relationship during the unpaid overtime periods claimed; (2) that the employee engaged in activities within the coverage of the FLSA; (3) that the employer violated the FLSA's overtime wage requirements; and (4) the amount of overtime compensation due. Recognizing that Plaintiff was compensated when required to come to work, the court then found that "Plaintiff failed to demonstrate a genuine issue of material fact regarding whether TMC knew that he was not reporting or being compensated for his off-the-clock or at-home work. Where there is no evidence to show that the employer should have known that the hours reported on an employee's time sheets were incorrect, the employee has not shown that the employer had constructive knowledge of any overtime worked or violated the FLSA by paying him only for the hours claimed on his time sheets."

- Employers can rely on records such as time sheets submitted by employees, and an FLSA claim may turn on the employer's practices in that regard. Plaintiff claimed that the employer should have been aware of his claims due to facial expressions and body language of a person with whom Plaintiff interacted, but the Court found those claims to lack the substance and detail required of an FLSA claim.

A briefly noted case:

- Remote working as a reasonable accommodation for a disability. See EEOC ***v. Ford Motor Co.***, 752 F. 3d 634 (6th Cir. 2014.)