



DOL Opinion Letter: Timekeeping Policy Complied with FLSA

By Allen Smith
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Employers should ensure that their policies result in all compensable work time being tracked, including all forms of compensable telework, Paul DeCamp, former administrator of the U.S. Department of Labor (DOL) Wage and Hour Division, told *SHRM Online*.

That includes at-home training. In a recent nonadministrator DOL opinion letter, the department approved a tentative employer policy on recording nonexempt employees' compensable time during at-home online training.

Approved Policy

The policy said: "Nonexempt employees performing online training at home are responsible for keeping accurate records of all time spent performing online training. The time sheet must be used, signed by the employee's manager and turned into the department time editor, in order for the employee to be compensated for their time. It is important to note that failure of an employee to accurately record time for online training amounts to falsification of payroll records."

The proposed time sheet would require employees to record the type of training taken, the completion date, start and end times, as well as the employees' and managers' signatures. Employees would be permitted to take the training at home only with prior managerial approval.

The DOL reminded the employer that the FLSA (Fair Labor Standards Act) regulations do not specify any particular method of recording compensable time, only that the relevant information be maintained and preserved. The DOL concluded that the timekeeping policy complied with the FLSA and is "an acceptable method of capturing the employee's hours worked" ([FLSA 2008-2NA](#) (Feb. 14, 2008)).

The DOL opinion letter shows that self-reporting is no less reliable than computerized time tracking, remarked DeCamp, now an attorney with Jackson Lewis in the Washington, D.C., area. He cautioned that computerized time tracking alone will not be enough if a computer takes a few minutes to power up. "That time's working time," he explained, just as would be any time an employee waits before the computer powers down.

Employers basically have two options when considering whether to let nonexempt employees telework, DeCamp reflected. Either they can permit telework with effective policies to capture the compensable work time or they can prohibit the performance of work outside the workplace unless there is specific authorization.

Monitoring how long it takes for someone to take at-home training should be manageable with trustworthy employees, according to Bob Cartwright, president and CEO of Intelligent Compensation LLC in the Austin, Texas, area and a member of the SHRM Total Rewards/Compensation and Benefits Special Expertise Panel.

He told *SHRM Online* that an employer should inform an employee the specific amount of time it expects at-home training to take, factoring in some additional time, like "an extra half hour." If the employee ends up falsifying the time sheet and is busted, Cartwright said, the employee can be fired.

Unauthorized Work

A general ban on telework by nonexempt workers won't solve all off-the-clock problems though, because nonexempt employees often work at home without their managers' explicit authorization, even when this violates company policy. Managers might let their nonexempt employees work at home on the sly because the managers "may be more concerned with the end point than about how" the work is done and whether it is compensable time, observed Fred Leffler, a Proskauer & Rose attorney in New York, in a March, 20, 2008, interview.

"If an employer permits work to be done at home" and is aware of the work time, the employer "is on the hook for that time as compensable time," even if it has a policy requiring authorization to work overtime, he remarked.

"Most managers are challenged by these rules, particularly in today's environment where many work under budgets and their own bonuses are tied to working within the budget," he added. After reductions in force, remaining employees will have even more work to do, which will increase the temptation for managers to "conveniently turn an eye knowing that employees may do work after hours."

Employers consequently "need to be aware of the rules and enforce the rules." Leffler emphasized.

Off-the-clock issues "come up all the time," noted Joel Rice, an attorney with Fisher & Phillips in Chicago. He said that employees often seek pay for work time that was not authorized and that employers have to pay employees for unauthorized work time.

"Employers will say, 'the work was not approved. Why do I have to pay?'" He said the answer is because the FLSA requires employers to pay for all work that they know has been performed, regardless of whether the work was approved. While employers have to pay for unauthorized work, they can discipline or fire employees for working without authorization, he stated.

"Most organizations usually don't allow nonexempts to work at home because there are so many issues," Jennifer Loftus, SPHR, and president of Astron Solutions, said in a March 20 interview.

But employers may be more willing to permit nonexempt employees to telework for cyclical work or if they are concerned with retaining an employee or telework is a good fit with organizational culture. Loftus warned though that there may be morale problems when some workers are allowed to telecommute and others are not.

Employers considering telework might start with a piloting program. "Do not jump into it lightly," cautioned Loftus, who also serves on the SHRM Total Rewards/Compensation and Benefits Special Expertise Panel.

Technological Options

Off-the-clock issues, including disputes over pay for missed meals and breaks, are "a really big problem for employers" for all employees, not just telecommuters, Julie Dunne, a Littler Mendelson attorney in San Diego, told *SHRM Online*.

"The employers I know all want to pay employees," she said. But she added that a disconnect arises "when employees don't report" unauthorized work.

Dunne said the DOL opinion letter provides employers with more clarity but noted that there also are technological options available.

She pointed out that some nonexempt employees regularly work in the field and enter their time into hand-held computers (HHCs). HHCs might be set up to prompt the employees to take required meal and rest breaks and not let them clock back in until their required breaks are over. But HHCs should be set up properly, Dunne cautioned, to account for all forms of compensable time.

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