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## COVID-19, Work-from-Home Policies, and Maintaining Wage and Hour Compliance

As the number of U.S. states reporting cases of COVID-19 coronavirus increases, many employers are imposing mandatory work from home (“WFH”) policies to mitigate risk of contamination and ensure business continuity. Some employers are requiring employees who have travelled to or received visitors from mainland China (or other areas with high infection rates) and those with fever or other flu-like symptoms to remain at home for 14 days, while others are instructing half or more, up to their entire workforce, to work remotely until further notice. Whatever the form, employers enacting WFH policies need to make sure they are appropriately compensating their workers and are otherwise complying with all applicable federal, state, and local wage and hour laws.

### *Exempt Employees*

As a preliminary matter, all employees who perform work for an employer while out of the office must be paid. Other than teachers, doctors, lawyers, or employees paid on a “fee basis,” employees who are exempt from overtime must be paid for the entire workweek during which they perform any amount of work, unless the regulations authorize a deduction, such as where an exempt employee is absent from work for one or more full days for personal reasons, or for absences of one or more full days on account of sickness or disability if in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by such sickness or disability. If exempt employees perform no work in any given workweek, they need not be paid for that week of work; however, if any absences are at the employer’s direction or the operating requirements of the business, exempt employees must be paid their full weekly salaries.

In addition, it is important for employers to track the *type* of telework performed by their exempt workforce. In order to maintain exempt status, an employee must perform exempt work as his or her “primary duty.” While federal regulations do not strictly quantify the term “primary duty,” federal law views time spent as a significant factor, and California law views time as integral to that state’s exemption standard. It is therefore important that employers ensure that the nature of the tasks being performed remotely by their exempt personnel are largely exempt-qualifying.

In an actual emergency situation, however, an exempt employee does not lose exempt status by performing work of a normally non-exempt nature for a relatively limited period of time. Emergencies include those that threaten the safety of employees or a cessation of operations or serious damage to the employer's property. However, federal regulations provide that an "emergency" does not include "events that are not beyond control or for which the employer can reasonably provide in the normal course of business." As a general rule, exempt employees performing non-exempt work on a prolonged basis will jeopardize the exemption.

### *Non-Exempt Employees*

Generally, employers must pay non-exempt employees the applicable minimum wage (or promised wage, if higher) for all hours worked and at least one-half times an employee's regular rate of pay for all hours over 40 in a work week, as well as daily overtime in certain states. Similar to exempt employees, non-exempt employees paid on a "fluctuating-workweek" basis under the Fair Labor Standards Act ("FLSA") normally must receive their salary for each workweek in which they perform any work.

Employers are free to reduce their non-exempt employees' regularly scheduled hours due to temporary closures or reduced demand. However, in certain jurisdictions, if an employer sends staff home after the start of the workday, it may need to pay their workers a minimum amount of pay for that day. In New York, for example, certain non-exempt workers are entitled to "call-in" pay equal to the lesser of a specified hours of pay (four or three hours), or the hours of pay in the employee's regularly scheduled shift, at the state minimum wage rate. Thus, in New York, if an employer sends home an employee for lack of work after they have already arrived, the employee is entitled to a minimum amount of "call-in" pay for the day.

For employers considering extending their non-exempt employees' regularly scheduled hours due to increased demand, reduced staff, etc. during the coronavirus outbreak, be aware that certain state laws require extra pay. For example, in New York, employers other than those in the building service and farming industries must pay hourly, nonexempt employees whose workday begins and ends more than 10 hours (including any time off-duty) apart an extra hour of pay at a minimum wage for that day, known as a spread of hour payment.

When non-exempt employees work from home, it can be difficult for an employer to monitor their hours, thereby increasing the risk of off-the-clock and overtime claims. To ensure that non-exempt employees are paid for all time they are working outside the office, consider taking the following steps:

- Direct non-exempt employees to use software that allows them to accurately record and submit their hours remotely (and confirm in advance that the software can be accessed remotely). There are a number of easy-to-use timekeeping smartphone applications. Some are even free. In addition, have non-exempt workers agree in writing that they will use the firm-recommended software to document time spent working.

- Adopt or reiterate, as applicable, a written policy requiring all workers, including those working from home, to record all hours worked *contemporaneously*. The policy should also make clear the employer's expectations for tracking break and meal times. To that end, employers should instruct non-exempt workers not to work during any unpaid meal breaks and to record accurately all such periods. Keep in mind that any state laws requiring paid/unpaid mandatory meal and/or rest breaks (e.g., California) will apply equally to non-exempt employees working remotely in that jurisdiction.
- Encourage non-exempt workers to work their regularly scheduled hours (e.g., 9 a.m. to 5 p.m.) and instruct managers to try not to communicate requests for work to non-exempt employees outside regularly scheduled hours. Remind non-exempt employees that time spent reading and/or responding to emails constitutes "work."
- Adopt or reiterate, as applicable, a written policy prohibiting unauthorized overtime, strictly monitor for compliance with that policy, and impose discipline for any violations. While an employer may still have to pay overtime upon an employee's first infraction, if the employee continues to work overtime following discipline, the employer can credibly argue that it did not "suffer or permit" the work, so long as the employer does not simply accept the benefit of the employee's labor without promptly correcting the behavior and ensuring compliance with the timekeeping policy.
- "Test" your WFH protocols, including time-keeping software, to identify any areas for remediation or improvement.