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CLIENT ALERT: U.S. Department of Labor Issues Guidance on Tracking Employee Hours as Remote Working Arrangements Remain Prevalent

On August 24, 2020, with the COVID-19 pandemic and state safety orders necessitating many employers to implement remote working arrangements, the U.S. Department of Labor's ("DOL") Wage and Hour Division ("WHD") took the opportunity to remind employers of requirements related to tracking compensable work by non-exempt employees. While this is a welcome response to the now-heightened difficulty in tracking and controlling employee hours, it is perhaps overdue; the agency last issued interpretive rules in 1961, prior to a significant increase of remote working arrangements and the corresponding difficulty in tracking and controlling employee work hours.

The WHD's guidance does not break any new ground, but instead reaffirms that the Fair Labor Standards Act ("FLSA") requires employers to pay employees for all hours worked, including those hours not requested but allowed and work performed at home. In other words, if an employer knows or has reason to believe that an employee is performing work, the time must be counted as hours worked and compensated accordingly.

Whether an employer has reason to believe that work is being performed has, understandably, become a great deal more difficult for those employers who are suddenly managing a largely remote workforce with many employees working variable schedules to balance job responsibilities with family obligations. As noted in the guidance, in determining whether the employer knows or has reason to believe that work is being performed (and therefore that the time must be counted as hours worked), courts consider whether the employer should have acquired knowledge through "reasonable diligence." While a factual analysis is required to determine whether that threshold has been met, the WHD guidance highlights that one way for employers to exercise the required diligence is by implementing a reasonable reporting procedure for non-scheduled time and ensuring employees are paid for that time. Assuming an employer implements such a procedure and does not prevent or discourage accurate reporting, if an employee fails to report unscheduled hours worked, the employer is generally "not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation" for those hours.

Employers should be aware that they are not relieved of compensation requirements by simply setting forth a general rule against the performance of unscheduled work by their non-exempt employees. For example, if an employer prohibits unscheduled work as a matter of policy, but in practice knowingly burdens a non-exempt employee with work that cannot possibly be completed during scheduled work hours, an employer may be found to have had reason to know that unscheduled work was performed. Employers who consistently communicate and enforce their reporting policy and foster open lines of communication with their employees regarding their workloads are best positioned to avoid violating the FLSA and paying a premium for unscheduled work.

While this guidance is timely in the midst of the current uptick in remote working arrangements, the law applies to all unscheduled work performed by non-exempt employees, whether remote or in-office. Employers should proactively review their time tracking policies for legal compliance both now and in their post-pandemic work environments.

Employers with questions regarding remote working arrangements or the FLSA are encouraged to consult with their MBJ attorney.

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This alert was prepared on August 31, 2020.