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*presents*

# **Wage and Hour Claims in Telecommuting and Alternative Work Arrangements**

## **Avoiding, Defending and Settling FLSA and State Law Disputes**

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

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Linda B. Hollinshead, Partner, **Duane Morris**, Philadelphia

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**Tuesday, May 25, 2010**

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**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

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# Wage and Hour Claims in Telecommuting and Alternative Work Arrangements

May 25, 2010

Presented by  
Wayne E. Pinkstone, Esq.

# Overview

- Many employers offer their employees the opportunity to work from home
- With better technology employees no longer need to be in the office to work

# Overview

- But with the increase in telecommuting has come a minefield of wage and hour issues and potential liability
- With more employees working away from the office how does an employer monitor work time and overtime exposure

# What We Will Cover Today

- Brief overview of the FLSA's requirements to track hours and pay for all hours worked
- The legal risks associated with telecommuting
- The FLSA's overtime obligation for nonexempt employees
- The FLSA's Homeworker Exception

# What We Will Cover Today

- Minimizing legal risks associated with telecommuting
- Establishing policies to deal with telecommuting
- Monitoring and maximizing employee work from home
- Employee use of blackberries and iphones and what is considered work



# What We Will Cover Today

- Defending and settling wage and hour claims
- Implementing steps to defeat class certification
- Analyzing settlement offers

# The FLSA's Requirements

- Making sure non-exempt employees have been compensated at or above minimum wage for all hours actually worked
- Making sure non-exempt employees have been compensated at one and one-half times their regular rate for any hours worked over 40 in a workweek

# The FLSA's Requirements

- Making sure employers keep accurate records of work time and compensation for all non-exempt employees
- The FLSA does not distinguish between work in the office and work away from the office – including at home (telecommuting)

# The FLSA's Requirements

- If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked
- It is the duty of management to exercise control and see that the work is not performed if it does not want it to be performed

# Tracking Hours Worked

- Employer must establish some method to track hours actually worked by a telecommuting employee
- No particular method required
- However, it must accurately record all hours worked
- Require telecommuters to record all hours worked

# Methods of Tracking Hours

- Computer or telephone tracking systems showing log-in and log-off times
  - The risk is that it does not capture hours worked while not logged on
  - Is the employee engaged in productive work?
  - Time-consuming to monitor
  - Employee morale

# Methods of Tracking Hours

- Performance based system that measures a telecommuter's productivity and performance against hours worked
- Quality of work, ability to meet deadlines, quantity of work completed
  - The risk is that it does not accurately measure hours worked?
  - Very subjective

# Methods of Tracking Hours

- Manage using the same techniques you would with employees in the office, such as morning calls or e-mails, mid-day checks/meetings, and end-of-day discussions of completed tasks and assignments
- Provide employees with clear instructions on what is expected of them through policies or even formal agreements



# Travel Time

- Generally, time spent traveling from home to work is not compensable worktime
  - But the continuous workday rule and travel to a different city for a special assignment may come into play with telecommuters
  - Whether the travel time is compensable is fact-specific

# Overtime Requirement

- Non-exempt employees who work from home must be paid for overtime
- Overtime earned in a workweek must be paid on the next regular payday for the period in which the workweek ends
- All work performed during the course of a workweek must be counted in determining whether overtime is owed

# Overtime Requirement

- Traditional non-exempt employee is paid a regular hourly rate and overtime is paid at 1½ times the regular rate
- Example:
  - Jim is paid strictly on an hourly basis at \$10 per hour. If Jim works 45 hours in a 7-day workweek, his regular pay is \$400 (40 hrs X \$10) and his overtime pay is \$75 (5 hrs X \$15)

# Overtime Requirement

- Payment by salary
- Employer must still pay a non-exempt employee for overtime
- Regular rate is determined by dividing the amount of weekly salary by the number of hours it is intended to compensate

# Overtime Requirement

- Example:
  - Jim is a non-exempt employee paid a salary of \$400 per week. He is scheduled to work 37.5 hours each week and this is the amount his salary is intended to cover. If Jim works 45 hours in a week, his regular rate is \$10.66 ( $\$400 \div 37.5$ ) and his overtime rate is \$15.99 ( $\$10.66 \times 1.5$ ). Jim's total pay for the week is \$506.35.

# Overtime Requirement

- If salary is intended to cover all hours worked, employer may pay for overtime hours worked at  $\frac{1}{2}$  the regular rate rather than  $1\frac{1}{2}$  times the regular rate
- Only permitted if:
  - There is a clear and mutual understanding between the parties
  - The employee's hours fluctuate from week to week
  - The employee receives a fixed salary not subject to deduction regardless of the number of hours worked

# Overtime Requirement

- Example:

- Jim receives a \$400 weekly guaranteed salary for a fluctuating workweek. In week one he works 45 hours and in week two he works 60 hours. His gross pay for these 2 weeks is calculated as follows:
  - Regular rate for week one is \$8.99 ( $\$400 \div 45$  hours)
  - Overtime rate for week one is \$4.44 ( $\$8.89 \times .5$ )
  - Gross pay for week one is \$422.20 ( $\$400$  salary + overtime)
  - Regular rate for week two is \$6.66 ( $\$400 \div 60$  hours)
  - Overtime rate for week two is \$3.33 ( $\$6.66 \times .5$ )
  - Gross pay for week two is \$466.60 ( $\$400$  + overtime)

# FLSA Homeworker Exception

- When an employer cannot determine the exact number of hours that employee works at home, the FLSA allows an employer to pay an employee according to any reasonable agreement of the parties which takes into consideration all of the pertinent facts



# FLSA Homeworker Exception

- Two criteria must be met for exception to apply:
  - Periods at home during the day in which the employee has complete freedom from his or her duties to the employer and can engage in normal activities of living
  - Parties must reach an agreement for the number of hours worked that considers all pertinent facts

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# Minimizing Legal Risks Associated with Telecommuting Arrangement

**By Linda Hollinshead, Esquire**

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1. Establish Policy on Telecommuting
  - a. Eligibility
    - i. General Criteria
      - a. Exempt vs. nonexempt
      - b. Department
      - c. Position

1. Establish Policy on Telecommuting
  - a. Eligibility
    - i. General Criteria
      - d. Minimum period of employment  
(not in introductory period)
      - e. Good standing (no disciplinary  
action)

# 1. Establish Policy on Telecommuting

## a. Eligibility

### ii. Specific Criteria

a. Requirements of employee's position

b. Amount of interaction with others; direct supervision required of/by position

1. Establish Policy on Telecommuting
  - a. Eligibility
    - ii. Specific Criteria
  - c. Business/operational needs
  - d. Alternative, available personnel

1. Establish Policy on Telecommuting
  - b. Establish Boundaries for Telecommuting Arrangement
    - i. Fixed vs. flexible day(s) of week
    - ii. Retain right to require employee to report to work at the office
    - iii. Limit/prohibit exchange of work at office day for work at home day



# 1. Establish Policy on Telecommuting

## c. Reservation of Employer Rights

- i. Retain discretion to determine whether employee is eligible for telecommuting arrangement
- ii. Retain discretion to suspend telecommuting arrangement due to business needs

# 1. Establish Policy on Telecommuting

## c. Reservation of Employer Rights

- i. Retain discretion to terminate telecommuting arrangement where not meeting employer's expectations
- ii. Retain at-will employment relationship

2. Monitor Work at Home Arrangement for Non-Exempt Employees
  - a. Non-exempt employees must be paid for all work at home time; time also count toward overtime calculation

2. Monitor Work at Home Arrangement for Non-Exempt Employees
  - b. Require non-exempt employees to record all time worked at home

2. Monitor Work at Home Arrangement for Non-Exempt Employees
  - c. Require non-exempt employees to record start time at beginning of day and stop time at end of day
    - i. Manual log
    - ii. Computer log on/off (preferred method)

## 2. Monitor Work at Home Arrangement for Non-Exempt Employees

### d. Prohibitions

- i. Prohibit doing work before logging in
- ii. Prohibit doing work after logging out

## 2. Monitor Work at Home Arrangement for Non-Exempt Employees

### e. Breaks

- i. Establish unpaid meal break in accordance with FLSA; state law
- ii. Require employee to log out before unpaid meal break and log in at end of meal break

## 2. Monitor Work at Home Arrangement for Non-Exempt Employees

### e. Breaks

- iii. Prohibit doing work after logging out for unpaid meal break
- iv. Prohibit doing work prior to logging back in from meal break
- v. Establish other rest breaks (generally paid) in accordance with FLSA state law



2. Monitor Work at Home Arrangement for Non-Exempt Employees
  - f. Establish maximum amount of time worked from home each day
    - i. Must pay employee if additional hours worked; however, discipline matter

## 2. Monitor Work at Home Arrangement for Non-Exempt Employees

- g. Require Employee to Report to Supervisor:
  - i. When employee performs work before logging in at start of day
  - ii. When employee performs work after logging out at end of start day
  - iii. When employee performs any work during what would have otherwise been an unpaid break

3. Maximizing Time Worked at Home
  - a. Work location
  - b. Safety issues
  - c. Reserve right to inspect home work location

3. Maximizing Time Worked at Home
  - d. Applicability of employer policies and procedures
  - e. Establish specific performance expectations (e.g. daily, weekly, etc.)
  - f. Abbreviated time period between performance review periods

## 4. Other Telecommuting Issues

### a. Compensability of time using BlackBerry/PDAs

- i. DOL's enforcement position is unclear
- ii. Are activities principal activities?
- iii. Are activities integral to principal activities

## 4. Other Telecommuting Issues

### a. Compensability of time using BlackBerry/PDAs

#### iv. Potential application of de minimis exception in some cases

- FLSA de minimis rule
- Unclear if de minimis permitted under state law

## 4. Other Telecommuting Issues

### a. Compensability of time using BlackBerry/PDAs

#### v. Policy on BlackBerry/PDA use

- Required or voluntary use
- Amount/timing of Blackberry/PDA
- Require reporting of amount of time for BlackBerry/PDA use

## 4. Other Telecommuting Issues

### b. Compensability of Travel Time

- i. Employee who works from home before going to work – potential compensability of home work and commuting time to work (continuous day rule)





## Defending and Settling Class Actions

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## Class Certification

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- Two critical moments in most wage/hour class actions:
  1. The decision about whether or not to oppose class cert; and
  2. The court's ruling on class cert.

## Defeating Class Certification

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- Frequently, the most effective defense involves exploiting material differences among the purported class re: job duties, experiences, etc
  - Plaintiffs' admissions, and crisp testimony from supervisors and the purported class members, are key components
  - Especially important in misclassification cases

## Defeating Class Certification

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- Depending on size of purported class, evidence of class member opposition to class action through sworn declarations can be influential

## Settlement Strategies

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- Virtually every wage/hour class action settles (It is not whether, but when...)
- If class cert and liability are likely, an early settlement is often the prudent course
- Where misclassification is likely, the most effective way to minimize exposure – i.e. wages, penalties, interest and fees - is to reclassify

# Settlement Strategies

## Overtime/Meal Period Cases

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- Settlement often based on assumptions re: hours worked / meals and breaks taken
- Absent time records, circumstantial evidence becomes crucial in establishing employer-favorable assumptions:
  - Supervisor and co-worker anecdotal observations
  - Facility and computer systems log-in activity
  - Email; phone logs; CRM activity; personal Internet use

## Complicating Factors with Telecommuters

- Their work is often un-tethered to company systems, making it more difficult to for supervisors to track comings and goings and activities
- Out of sight, out of mind...inherently more difficult to monitor work hours and meals/breaks for non-exempt employees

## Complicating Factors with Telecommuters

- Solutions for non-exempt telecommuters include:
  - Clear policy regarding pre-approval of overtime;
  - A watchful eye from supervisors regarding hours worked, accurate timesheets, etc.