

## Back To The Office: 4 W&H Tips To Get It Right

By **Daniela Porat**

Law360 (October 14, 2022, 4:09 PM EDT) -- Employers are encouraging workers to return to the office, but they should first take steps including reviewing their timekeeping systems and their employees' classification to make sure they avoid costly wage-and-hour mistakes, attorneys told Law360.



Employers should see if any adjustments made as workers shift from remote work to life back in the office will affect their workers' overtime eligibility, attorneys said. (AP Photo/Keith Srakocic)

Some employers are luring workers back with the promise of paying for gas, while others are agreeing to hybrid work arrangements in which employees can toggle between working from home and working from the office. Each of these arrangements raises unique wage-and-hour concerns.

Don Foty, a founding partner of worker-side firm Hodges & Foty LLP, said it's important for employers to recognize that it's a new phase of COVID-19 work arrangements.

"Each of the policies that employers have to have in place have to be specific to the situation that they're applying to," he said. "Policies that are in place for employers requiring all their workers to be in the office, just like those workers performed prior to COVID, may be different from the policies for a hybrid or fully remote workplace."

Here, Law360 explores four issues employers must keep in mind as they set out to reset work practices.

### Review Employee Classifications

Workers' roles changed in the pivot to work-from-home at the beginning of the pandemic and now with the push to return to the office those roles may change again — shifts that may affect a worker's overtime eligibility.

Employers should take care to see if any of those adjustments affect their workers' overtime eligibility, attorneys said.

Under the Fair Labor Standards Act, certain white collar professionals are exempt from overtime pay if they perform certain duties.

To qualify for the **administrative exemption**, for example, an employee's so-called "primary duty" must involve office or nonmanual work related to general business operations or management and the employee must exercise "discretion and independent judgment with respect to matters of significance" as part of their main duty.

Employers should review whether any of their workers' duties changed over the course of the pandemic and the height of remote work, said Robert Hingula, a shareholder with management-side firm Polsinelli PC.

"The risks are always high because if you misclassified somebody, and they're part of a portion of your workforce ... the chances are that they're going to try to proceed as a collective action, class action, which makes the risk much higher," Hingula said.

An obvious example of how work-from-home changed classifications is the outside sales exemption, which requires an employee to be "customarily and regularly engaged 'away from the employer's place or places of business,'" according to federal regulations.

Workers who previously qualified for the exemption were now talking to clients over the phone or video conference from their homes and no longer met that exemption requirement, said Foty of Hodges and Foty.

He said employers should scrutinize any employees who are classified under the executive and administrative exemptions because their key duties may have changed or will change once they are back in the office.

For the executive exemption, for example, it might have been easier for a worker to meet the requirement of overseeing two or more employees when that worker was in the office, Foty said.

"Let's take a different situation where everybody's working remotely. Well now you have that person who is classified as a manager, but now there's an argument they're not regularly supervising those employees," Foty said. "They may have a phone call or a status call once a week, twice a week, and so does that count as actively supervising other workers when everybody's remote?"

Workers who are classified as overtime-exempt not only need to perform certain duties related to their exemption. They must also be paid on a **salary basis** — a guaranteed weekly amount that does not fluctuate on the quality or quantity of work.

Clara Acosta, an attorney with worker-side firm Lubin & Enoch PC, said employers need to remember that salaried employees must receive their full pay each week they perform any work.

"Let's say a salaried employee gets exposed [to COVID] or is sick [with] COVID and goes home, you need to have a very clear notion of whether or not they're going to do any work from home because teleworking is an option now," she said. "If there's any [work] being done from home that salaried employee needs to receive their full salary for that week."

### **Beware Of How Incentives Factor Into OT**

If employers are **considering bonuses** as ways to entice workers to come back to the office, they need to remember that nondiscretionary bonuses must be included in an employee's regular rate of pay for the purposes of calculating overtime, Polsinelli's Hingula said.

Under the FLSA, nondiscretionary bonuses, which can be predetermined by formulas or production quotas

or are otherwise promised to an employee, must be included in the regular rate of pay.

On the other hand, discretionary bonuses, which are awarded at the "sole discretion" of the employer, can be excluded.

If an employer tells its workforce upfront that they will get a \$100 bonus if they come into the office four times a week, for example, those would be considered nondiscretionary, Hingula said.

"If you're doing incentive bonuses or pay to come in and work out of the office ... ensure that you have some type of end date," he said. "So that when you calculate and have to figure it into the regular rate that you know what you're figuring it into, it's not either in perpetuity, or you're trying to guess."

But discretionary, one-time bonuses may be the least headache-inducing path forward for employers. Anyone who has had to retroactively factor in nondiscretionary bonuses into the regular rate for overtime "knows it's a pain," Hingula said.

Reimbursements for mileage or a stipend for lunch to encourage workers to come into the office would generally not be considered wages and therefore don't need to be included in the regular rate, but employers still need to be cautious, Hingula said.

"Where a company needs to be careful is to make sure that these quote unquote stipends or reimbursements or something like that are not so over a reasonable amount that somebody could argue well, yeah, you say it's a stipend, but really, it's a bonus," Hingula said.

### **Err On The Side Of Compensability**

One of the biggest **employment law questions** during the pandemic for those workers who could not work remotely was whether time spent through health screenings, such as temperature checks, is compensable.

Health screenings and mandated COVID-19 testing will likely be a feature of return to work programs, Acosta said

"The safest bet for all of that would be to pay your employees when they do that," she said.

If the employer requires its workers to undergo testing or a screening, it should be compensable time, Foty said.

"The employer is requiring the workers to undergo the test ... it's mandatory, they all have to do it," Foty said. "And the reason why the employer is doing it, it's for the employer's benefit, so that the workers are able to show up and the company is able to operate. You can see how when you're evaluating that scenario, employers should likely provide compensation for that."

Another unresolved wage-and-hour issue from the pandemic is how employers should deal with **remote work expenses**.

The transition back to regular in-office work adds another layer of complication, particularly if the employer offers a hybrid model.

"Does that still give rise to an expense reimbursement claim when the employer says you can just come to the office and do the work at the office and use all of our equipment there?" Foty said. "I think the obligation is still on the employer to indemnify the employee because the policy allows for the employee to do the work from home."

### **Keep An Eye On The Clocking In & Out**

As schedules are readjusted and workers come in and out of the office, employers also need to think about how timekeeping practices may also need re-thinking, attorneys said.

Hingula said he would advise employers to review whether non-overtime exempt staff who are returning full time to the office need continued remote access to work systems for the employer's own protection.

"You don't want them tempted to be able to do work outside of work hours when they're not clocked in

and in a remote workforce I understand having access to stuff like that on your phone or a tablet or whatever," he said. "But if people are coming in, particularly full time, it would be really important to reevaluate whether they really need that access anymore."

It will be a challenge for employers to figure out how to allow employees to report hours worked from both in the office and from home, especially if the culture of flexibility from the pandemic persists, Acosta said.

"I think employers have to move away from assumptions that the 9 to 5 is going to resume," she said. "I think the flexibility in people's work schedules so far is going to make it more likely that people will continue to do work from home on occasion even if they're not on a hybrid schedule."

--Editing by Amy Rowe.

---

All Content © 2003-2022, Portfolio Media, Inc.