

# Wage and Hour Update

2021 Edition



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## New Administration, New Priorities

- What to expect:
  - Stronger enforcement from USDOL
  - More focus on independent contractors/gig workers
  - More to come on joint employer rule
  - Efforts to increase minimum wage
  - Paid leave proposals

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## Pandemic-Related Wage and Hour Questions

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## FLSA Classification Changes?

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- Remember:
  - Generally, duties and salary basis tests must be met for executive, administrative, professional exemptions from overtime to apply
- Assess whether pandemic-related changes to primary duties could result in duties tests not being met such that reclassification is appropriate

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## What is compensable during remote work?

- Employer must pay for all hours of telework actually performed - including all reported and unreported hours of telework that employer knows or has reason to believe has been performed
  - True even for hours that employer did not request or desire or authorize, or are worked in violation of policy
  - Employer has obligation to control and prevent unauthorized/unwanted work
- But, question is what employer *should* have known, not what it *could* have known
  - For instance, generally no obligation to review employer-issued electronic devices to uncover time worked outside of scheduled work hours (but could be practical for employer to consult such records)
- Establish reasonable processes for employees to report unscheduled work time and report uncompensated work

## What is compensable during remote work?

- Mixing personal and family obligations during workday
  - If completely relieved from duty for long enough to use time effectively for own purpose, time is “off duty” and not hours worked
  - Applies regardless of whether employee/employer agree in advance on schedule or if employer allows employee flexibility to choose

## What is compensable during remote work?

COVID-19 and the Fair Labor Standards Act Questions and Answers

<https://www.dol.gov/agencies/whd/flsa/pandemic#19>

USDOL Wage and Hour Division Field Assistance Bulletin No. 2020-5

[https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab\\_20\\_20\\_5.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_20_20_5.pdf)

## Is time between home and office “work”?

- Remember:
  - Work time
    - Time spent primarily for employer’s benefit; periods when completely relieved of duties that are long enough to effectively use time for own purposes are not work time
  - Travel time
    - Time spent in normal commute or ordinary travel from home to work and vice versa is not compensable
    - Period between starting and ending work on same workday is generally compensable
    - Employee generally not “on duty” until performs first work task of day
    - Travel that is part of employee’s duties between start and end of workday is compensable

## Is time between home and office “work”?

- **Scenario:** employee chooses to telework for part of day and work in office part of day, with time to perform personal tasks in between home and office
- **Question:** is the time between home and office compensable?
- **Answer:** no
  - Choosing to perform work before traveling to office or at home after leaving office does not make the commuting time compensable when time in between is sufficient to use for own purposes
- See USDOL Wage and Hour Opinion Letter, FLSA 2020-19
  - [https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020\\_12\\_31\\_19\\_FLSA.pdf](https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_12_31_19_FLSA.pdf)

## What about time spent testing?

- If COVID-19 testing required during workday, employer must pay for time spent waiting for and receiving medical attention at employer’s direction or on its premises during normal work hours
- If testing required on day off as a condition of returning to work, pay likely required because testing necessary for safe and effective performance of job
- Check state and local laws for greater protections

## Effect of home office expenses on pay

- FLSA: employer may not require employee to pay for items that are the employer's business expenses if doing so reduces earnings below minimum wage or overtime due in any workweek
- State laws may impose broader reimbursement requirements
- Think about office supplies, utilities (internet/phone), other expenses

## Independent Contractor Rule

## Last year...

- Trump DOL:
  - January 7, 2021 - announced independent contractor rule
  - Scheduled to take effect March 8, 2021
  - New test would have made it “easier to identify employees” under FLSA and easier to support contractor classification by focusing on nature and degree of control over work and worker’s opportunity for profit/loss based on initiative and/or investment

## Now, right back to where we started from

- Biden DOL:
  - Withdrew independent contractor rule effective May 6, 2021
    - DOL: new rule was inconsistent with FLSA’s text and purpose and would have been “confusing and disruptive” to workers and businesses because of its “departure from longstanding judicial precedent”
  - Prior guidance from Obama DOL remains in effect
    - Higher likelihood of “employee” finding
    - See Wage and Hour Division Fact Sheet #13  
<https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>

## Factors

- Extent to which services are integral part of business
- Permanency of relationship
- Worker's investment in facilities/equipment
- Nature and degree of control by principal
- Worker's opportunity for profit/loss
- Worker's amount of initiative, judgment, foresight
- Degree of independent business organization/operation

## Remember...

- Only relevant to worker classification analysis under FLSA
- No impact on other tests under:
  - State laws (CA's AB 5, ABC tests, etc.)
  - Other federal laws (NLRB, IRS, etc.)
- Must consider all applicable tests, some of which may be even more likely to result in employee status



## Higher Minimum Wage for Federal Contractors

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## Federal contractors/minimum wage

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- Proposed rule published July 22, 2021
- Final regulations to be issued by November 24, 2021
- Increased minimum wages to be effective January 30, 2022

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## Federal contractors/minimum wage

- Initial minimum wage of \$15.00 per hour (with increases for inflation starting in 2023)
- Applies to:
  - Employees performing specific services provided in connection with federal government contracts or subcontracts, and employees performing other duties necessary to performance of contracts or subcontracts
  - Employees under Davis-Bacon Act construction contracts, Service Contract Act service contracts, concessions contracts, and certain contracts in connection with federal property/lands and related to offering services for federal employees or general public

## Federal contractors/minimum wage

- Impacts on tipped employees:
  - As of January 30, 2022, hourly cash wage must be at least \$10.50 per hour
  - If tipped employee's wages plus tips do not total \$15 per hour, contractor must make up difference
  - Until January 1, 2024, if minimum wage for non-tipped employees increases, minimum for tipped employees will increase by 85% of new rate
  - After January 1, 2024, tipped employees must receive same minimum base wage as non-tipped employees (no tip credit)

## Federal contractors/minimum wage

- NO impact on requirements for non-federal contractors
- Will apply to:
  - New contracts (includes contracts entered into on/after January 30, 2022)
  - Pre-existing contracts renewed/extended on/after January 30, 2022
  - Options on existing contract exercised on/after January 30, 2022
- Bids will include new wage starting in January 2022
- Does not apply to:
  - Grants; contracts with Indian Tribes under Indian Self-Determination and Education Assistance Act; manufacturing or furnishing of materials, supplies, articles or equipment sold to federal government
- IT'S COMPLICATED - consult counsel with questions

## NC Wage and Hour Act (Changes Effective July 8, 2021)

## Notice at hiring

- Must provide written notice of promised wages and day and place of payment at time of hire
  - Previously, oral notice was sufficient
  - Statute does not require any particular form of notice
  - Employee’s signature on written notice of promised wages is presumptive evidence of notification

**To do:** check offer letters/hiring paperwork

## Notice of change in pay

- Written notice of change in pay must be provided “at least one pay period” prior to the change
  - Previously, the notice period was “at least 24 hours”
  - Wages may be retroactively increased without prior notice
  - Change most important for reductions of pay

## Methods of delivering final pay

- Separated employees must be paid all wages due on or before the next regular payday either through regular pay channels or by trackable mail if requested by the employee in writing
  - Previously, final pay could be sent by mail if requested by employee
  - Now, mail must be trackable and employee must request in writing



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