Nonexempt + telecommuting = FLSA lawsuits? Not necessarily by Maureen Minehan

Eighty-two percent.

That's the percentage of executives recently surveyed by staffing firm OfficeTeam who said that they expect that the number of employees working off-site or from remote locations to increase in the next five years. Already a majority of employers allow some sort of telecommuting--57% of participants in the Society for Human Resource Management's 2008 Benefits Survey said that they have a telecommuting program.

Exempt vs. nonexempt

A key question for employers interested in increasing telecommuting opportunities is whether to make telecommuting arrangements available to nonexempt employees. The benefits to this arrangement are just the same, but the risks of wage-and-hour violations can be higher when nonexempt employees work from home.

“Keeping an accurate record of all hours worked sounds simple, but it's the root of a lot of Fair Labor Standards Act (FLSA) litigation. At home, it's even harder,” says Lawrence McGoldrick, of counsel at Fisher & Phillips in Atlanta.

Monitor overtime

Take overtime. Already challenging to manage in busy environments, it's even harder when employees are working off-site and the natural rhythms that define the work day, such as shift changes or specific closing times, may be missing.

The solution is to develop strict overtime policies for nonexempt telecommuting workers. “When non-exempt employees telecommute, it's critical for employers to monitor and control overtime expenditures. Employees need to log their time and hours just as they would if they were office employees. They need to get advance authorization for overtime. And, if they're found to be working unauthorized overtime, they need to be disciplined,” says Enzo Der Boghossian, an associate at Proskauer Rose in Los Angeles.

Employers also must understand what time must be counted as work time under federal and state wage-and-hour laws. For example, health insurance provider Cigna was sued by telecommuting claims adjusters who argued that the time required for travelling back and forth to mandatory in-office meetings should be compensable.
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Enforce breaks

Meal and rest breaks are another potential trouble spot. Just as with overtime, the solution is a strict policy, careful monitoring, and continuous reinforcement of employees’ obligations to accurately report their hours.

“Meal and rest breaks are harder to enforce. Employers should require employees to punch in and out for breaks and make sure that when they are on a meal or rest break they are relieved of all duties, not answering the phone or checking e-mail,” Der Boghossian says.

Limit Blackberry usage

Anyone who has ever owned or spent time with someone with a Blackberry or other similar mobile communication device knows how addictive these devices seem to become. When used by nonexempt employees, they may increase the odds that work-related emails will be written or answered outside of work hours.

For this reason, Der Boghossian says, “think carefully about who you wish to have Blackberries. While there is some protection against de minimis work that is practically unreasonable for employers to control--such as the sending of a single short e-mail from a Blackberry--the courts have not created a bright line that defines what is de minimis work. To be safe, employers should monitor employees’ usage of Blackberries to make sure they aren’t using them outside of work hours.”

Telecommuting can be a win-win

Despite these challenges, McGoldrick says that employers should not automatically reject the idea of telecommuting for nonexempt employees. “It can be a good idea when done well. It's a strong recruiting and retention tool, helps balance work and family and helps save the environment and fuel. It can be win-win if done correctly.”

The secret, Der Boghossian says, is to “carefully think it through on the front end. The decision to allow nonexempt employees to telecommute is an individualized business judgment. Start with a set of strong written policies before rolling out any arrangement. Have employees sign and verify their time sheets. And, reserve the right to terminate the telecommuting arrangement at any time.”

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Points To Remember: Before allowing employees to telecommute, be sure to:

- Identify whether the workers are exempt or nonexempt from overtime compensation.
- Develop a strict overtime policy for nonexempt telecommuters so that you can properly monitor and control their work time. Make sure that they log their hours as though they were in the office. Also, require them to be preapproved for overtime. If they are working overtime without authorization, you still need to pay them for their time worked; however, you may discipline them for not following your policy.
- Enforce meal and rest breaks as best you can, and remind workers to limit the use of their Blackberries or other wireless devices for work purposes to work hours only.
- Remember that telecommuting can be a firm selling point to recruit and retain top performers. Just be sure that your overtime practices are in tip-top shape before letting nonexempt workers take advantage of the benefit.