

Tackling Timekeeping Issues In Hybrid Remote Work Models

By **Kevin Sullivan and Jeffrey Ruzal** (July 21, 2021)

If there is one thing that we've learned from the COVID-19 pandemic, it is that workers have not stopped working.

This phenomenon is particularly prevalent among shift workers, who traditionally arrived and left the workplace at their designated shift start and end times, or thereabouts.

Working from home has altered this routine, causing rigid work shifts and schedules to blur or, in some cases, even dissolve altogether.

Why should businesses necessarily mind? More work means greater productivity, right?

Perhaps, but in the case of exempt employees, working around the clock may result in burnout, which in turn will often result in a drag on productivity.

In addition, in the case of nonexempt workers, increased work time means higher payroll, which can be a problem for cost-sensitive businesses that are not able to afford increased payroll costs.

Far from being the only challenge for businesses during the pandemic, this paradigm shift in the work day is certainly a stand-out issue.

You may be saying to yourself that this is now, or at least soon to be, a nonissue. Employees are steadily returning to the workplace, and by the fall, working from home will be a distant memory for most.

Problem solved, right?

Not necessarily for all.

Many businesses seem to be considering hybrid work setups in response to employees' demands for an option to work from home. In even more radical cases, they may be contemplating a completely remote model.

Whether it is to shrink office space to reduce or eliminate rent, or to provide employees greater flexibility with respect to their work schedules, the hybrid model can be an attractive disrupter.

Whether a permanent or hybrid work-from-home model will prove successful will depend upon myriad factors, and will be largely a business decision. There are, however, legal considerations that come into play, including potential wage and hour issues.

The foremost issue that concerns nonexempt employees is whether they are tracking time accurately and contemporaneously, which is required under the Fair Labor Standards Act and many state and local wage and hour laws.



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In an office setting, nonexempt employees typically record work time with some form of a punch/swipe clock or other digital device.

Recording work time performed remotely can be a challenge because of the absence of a sophisticated time-tracking system and enforcement mechanisms, as well as relaxed employee accountability.

Fortunately, there are solutions for these potential problems.

For one, employers should direct nonexempt employees to record their work time through a single, universal methodology.

Timekeeping should never be a patchwork endeavor, where some employees send supervisors an email with their work time, while others use pencil and paper to memorialize work time, and still others verbally report their work time to their supervisors.

Such inconsistency with respect to methodology and frequency of recording time can be particularly problematic as it could result in challenges to the accuracy and reliability of timekeeping practices, which is oftentimes the root cause of a lawsuit in which employees claim underpayment of wages.

Businesses should instead require nonexempt employees to record and report their work time through a single timekeeping mechanism on a daily basis. That way, employees will develop greater discipline in keeping track of their work time, which will likely result in greater accuracy and accountability.

Adopting a streamlined and regimented process will also help supervisors, as they will only need to look for nonexempt employees' recorded time in one place, and only once per day — which, in turn, will ensure greater timekeeping accuracy.

It will also provide supervisors with a vantage point with respect to tracking overtime hours that could be a useful data point for businesses that need to control payroll expenses.

As for timekeeping mechanisms, there are many reliable options, including smartphone or desktop apps, as well as good, old-fashioned email.

The key is that employees be required to submit a record of their own work time — ideally digitally, to ensure there is a permanent record — in order to avoid compensable work time disputes, such as off-the-clock work or meal and rest break issues that often form the basis of class and collective action claims.

Timekeeping programs that require employees to certify that the hours worked that pay period are accurate are especially helpful, as such certifications can defeat off-the-clock claims.

As the U.S. Court of Appeals for the Sixth Circuit explained in 2012 in *White v. Baptist Memorial Health Care Corp.*, when an employer establishes "a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process."^[1]

Lastly, policy and enforcement are important tools to ensure that nonexempt employees utilize the single approved time-tracking mechanism on a daily basis. Businesses should adopt and enforce strict policies that nonexempt employees are required to record and

report work time on a daily basis, and that failure to do so can result in progressive discipline, including potential termination of employment.

Unfair? Not really, especially when considering the prospect of potential class and collective action litigation that carries with it statutory liquidated damages in an amount equal to 100% of unpaid back wages and shifting attorney fees.

Consistent with accurately recording all hours worked under a hybrid model, one potentially unresolved question is: Under a hybrid work-from-home arrangement, how is time treated when an employee travels to and from the office?

In the state with arguably the strictest of standards — California — the California Supreme Court in 2000 held in *Morillion v. Royal Packing Co.* that uncontrolled time spent commuting to work is not compensable because, among other reasons:

employees who commute to work on their own decide when to leave, which route to take to work, and which mode of transportation to use. By commuting on their own, employees may choose and may be able to run errands before work and to leave from work early for personal appointments.[2]

But those conclusions were rendered in the context of employees commuting to a single location each day.

"The level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative," the California Supreme Court held in *Morillion*.

Based on that ruling, the plaintiffs bar may begin to argue that, similar to requiring attendance at a meeting outside the traditional office, in a hybrid work-from-home arrangement where the majority of time spent may be in a home office, the time spent by an employee traveling to and from the traditional office is no longer a mere commute but, instead, is time subject to the employer's control and thus should be compensated.

In response to such an argument, a potential defense may be for employers to obtain a written acknowledgment from employees that working from home is treated as a limited exception to the general rule that the employer's office is the employees' place of work, as well as an acknowledgement that time spent commuting to and from the office is still not compensable.

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[1] *White v. Baptist Mem. Health Care Corp.*, 699 F.3d 869, 876 (6th Cir. 2012) (citations omitted).

[2] *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575 (2000).