



Home Sweet Office: The Hybrid Workplace

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Wages, Hours and Working From Home – or at Least Differently

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WAGE and HOUR BASICS - REMINDERS

- FLSA generally covers employees and employers engaged in interstate commerce
- FLSA includes pre-schools, nursing homes, and schools
- Also covers government employers
- **Does not cover independent contractors, trainees/interns or volunteers**

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WAGE and HOUR BASICS - REMINDERS

- Covered, non-exempt employees must be paid not less than the federal minimum wage for all hours worked
 - The minimum wage is \$7.25 per hour – **FOR NOW!!!!!!**
- Must also pay overtime for all hours worked in excess of 40 per workweek
- **DON'T FORGET STATE AND LOCAL LAWS**

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Independent Contractors

- Degree of control over the manner in which work is performed
- Opportunity for profit or loss
- Investment in equipment, material, labor
- Degree of skill and independent initiative required to perform work
- Permanence or duration of working relationship
- Whether service rendered is an integral part of putative employer's business

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Contractors – Common Mistakes

- Relying on consultant label or contract recitals as dispositive
- Relying on incorporation of independent business – helpful but not determinative
- Integrated workforce (e.g., employers and “consultants” work side by side performing similar tasks)
- Integrated compensation systems (e.g., “consultants” eligible for commissions or bonuses pursuant to compensation plans applicable to employees)
- Long-term or exclusive relationship
- Re-designing employees as dependent contractors as a cost-saving measure
- Retaining former employees as “consultants”

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Trump-Era DOL Regulation On the Chopping Block?

- Independent Contractor Rule issued on 1/6/21, to take effect in 60 days
 - Uses an updated economic realities test
 - Gives greatest weight to 2 core factors:
 - Nature and degree of worker's control over the work
 - Worker's opportunity for profit/loss based on personal initiative, investment
 - Three additional factors: amount of skill; permanence of relationship; whether work is integrated part of business
- Status: In doubt. Frozen by Executive Order 1/20/21
 - On 1/26/21, DOL withdrew 2 opinions letter interpreting the rule
 - On 2/8/21, DOL delayed implementation



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Perfect Time for an Interlude Expected Biden DOL Initiatives

- More aggressive enforcement of FLSA
 - "Wage theft" – e.g., minimum wage; off-the-clock; misclassification
 - Possible pursuit of pre-litigation liquidated damages by DOL
 - Debarment from federal contracts
- Eliminate non-compete agreements
- End mandatory arbitration agreements

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Interns

DOL Uses a **Six-Factor Test**

1. The internship, even though it includes actual operation of the facilities of the employer, is **similar to training which would be given in an educational environment**;
2. The internship experience is for the **benefit of the intern**;
3. The intern **does not displace regular employees**, but works under close supervision of existing staff;
4. The employer that provides the training **derives no immediate advantage from the activities of the intern**, and on occasion its operations may actually be impeded;
5. The intern is **not necessarily entitled to a job** at the conclusion of the internship; and
6. The **employer and intern understand** that the intern is not entitled to wages for the time spent in the internship.

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Interns

Practical Guidance

- Collaborate with educational institutions.
- Assign as the intern's supervisor an individual with knowledge about the substantive area that the intern is to be learning.
- Ensure that supervisors overseeing the intern understand that the intern is not to perform work that other employees would normally perform.
- Ensure that supervisors and other employees do not assign interns administrative tasks like photocopying and coffee runs that are not related to an educational benefit.
- Offer experiences to the intern that are specifically for the intern's benefit.
- Require the interns to acknowledge in writing that they understand the program is an internship, that they are not employees, that the program is for their educational benefit, and that they will not be paid.
- Set specific dates for the beginning and end of the internship program.
- Ensure that the program trains the intern regarding the business or industry generally.

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Determining Compensation

- To determine if an employee has been paid the minimum wage for all hours worked in each week, add all compensation received and divide amount by all hours worked for the week
- Payments counted towards minimum wage:
 - Wages (salary, hourly, piece rate);
 - Commissions;
 - Some bonuses;
 - Tips received by eligible employees (check state law); and
 - Reasonable cost of room, board, and other “facilities” provided by employer for employee’s benefit

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Hours Worked - Considerations

- Because the employer cannot determine the amount of money to pay an employee without knowing the number of hours worked, issues often arise regarding:
 - Suffered or Permitted
 - Waiting Time
 - On-Call Time
 - Meal and Rest Periods
 - Training Time

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Hours Worked– Suffered or Permitted

- If employer doesn't want to pay overtime, it must ensure that work is not performed
 - Simply telling employees that it is against the rules to work overtime is not good enough
 - Management has the power to enforce the rules and must make every effort to do so through discipline of employees and supervisors
- If the employer knows or has reason to believe that the work is being performed, the employer must count the time as hours worked.
- See 29 CFR 785.12, 785.13

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Waiting Time

- Counted as hours worked when
 - Employee is unable to use the time effectively for his or her own purposes; and
 - Time is controlled by the employer
- Not counted as hours worked when
 - Employee is completely relieved from duty; and
 - Time is long enough to enable the employee to use it effectively for his or her own purposes
- See 29 CFR 785.15, 785.16

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On Call Time – FROM HOME?

- On-call time is hours worked when
 - Employee has to stay on the employer's premises
 - Employee has to stay so close to the employer's premises that the employee cannot use that time effectively for his or her own purposes
- On-call time is not hours worked just because:
 - Employee is required to carry a pager
 - Employee is required to leave word at home or with the employer where he or she can be reached
- See 29 CFR 785.17

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Meal and Rest Breaks – AT HOME?

- Meal periods are not hours worked when the employee is relieved of duties for the purpose of eating a meal
- Rest periods of short duration (normally 5 to 20 minutes) are counted as hours worked and must be paid
- See 29 CFR 785.18, 785.19

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Training Time

- Time employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless
 - Attendance is outside regular working hours;
 - Attendance is voluntary;
 - The course, lecture, or meeting is not job related; and
 - Employee does not perform any productive work during attendance
- See 29 CFR 785.28, 785.29, 785.30

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Training Time

- In-service training offered only after regular working hours
- Employer did not require attendance at the training; it was the employee's decision to participate
- Employer did not impose additional requirements on employee such as taking a particular course
 - Met exception from the requirement that training not be directly related to employee's job because (1) training is for benefit of employee and (2) corresponded to courses offered by independent bona fide institutions of learning
 - Employee not performing any productive work during training

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Overtime

- Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over 40 in a workweek
- Each workweek stands alone
- Holiday Hours?
- Vacation Hours?
- Other Leave?
- Regular rate
 - Payments excluded from rate
 - Payments other than hourly rates
- Deductions

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Comp Time

- Rule: there is no such thing for non-exempt employees in the private sector!
- Covers non-exempt employees working for private-sector (non-governmental) employers
 - Each workweek stands alone; cannot average multiple workweeks
 - May use for exempt employees

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Salary Basis

- General rule: employee must receive a predetermined amount of pay for every workweek in which he/she performs any work
- **Predetermined rate must be at least \$684/week; except for teachers and outside sales**
- If impermissible deductions made from weekly pay, “salary basis of pay”, requirement for exempt status will not be met

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Permissible Deductions

- Whole days missed for personal reasons
- Whole days missed for sickness or injury, if sick-pay plan exists
- First and last weeks of employment
- Unpaid disciplinary suspensions of **one or more full days** imposed in good faith for violations of major safety rules
- One of more full days imposed for violations of **workplace conduct rules**
- Amounts received as jury/witness fees or military pay
- FMLA leave
- **Whole week absences when no work is performed during the week**

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Impermissible Deductions

- Part-day absences (except if FMLA)
- Sickness or injury, if there is no sick-pay plan (except if FMLA)
- Disciplinary suspensions (**for less than a whole day**)
- Inventory or cash shortages
- **But, may deduct from leave banks**

- **NOTE:** “Isolated or Inadvertent” improper deductions will not destroy exceptions if the employer reimburses employee for deductions.

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Salary Reduction - Furlough

- Employer may reduce an exempt employee’s predetermined salary amount and hours during a business or economic slowdown without destroying the employees exempt status, if the reduction:
 - Is prospective
 - Is bona fide and not intended to evade salary basis requirements
 - Reflects long-term business needs
 - Does not bring salary below the minimum exemption threshold (\$684 per wk/\$35,568 per yr)
- **Note:** Different rules may apply to public CAAs

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Furloughs

- An exempt employee who works any part of a week must be paid for entire week
- Alternatively, an employer does not have to pay an exempt employee for a week in which no work is performed
- NOTE: You can “furlough” a non-exempt employee anytime. They are not paid for the hours they do not work.

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Furloughs cont.

- Employer may take salary deductions for one or more full days of missed work if the employer seeks volunteers to take time off due to insufficient work and an exempt employee volunteers to take days off for personal reasons (other than for sickness or disability)
- Exempt employee’s decision must be completely voluntary
- See DOL Fact Sheet #70 at <http://www.dol.gov/whd/regs/compliance/whdfs70.pdf>

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Volunteers

- Staff volunteers are only a problem for employers if the volunteers are **non-exempt** employees
 - Non-exempt employees must be paid for every “hour worked” and paid time and a half for hours worked over 40 in one week

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What is NOT Volunteering

- Time spent by non-exempt employees in work for public or charitable purposes:
 - At the employer’s request; OR
 - Under the employer’s direction or control; OR
 - While the employee is required to be on premises
- Is working time (not volunteer activity)
- And must be paid as such
- 29 CFR 785.44

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Volunteering

- But, time spent **voluntarily** in such activities (no coercion – truly voluntary)
- Outside of the non-exempt employee's normal working hours
- **And where volunteer activities are not the same or similar to compensated duties**
- Is volunteer activity and not hours worked

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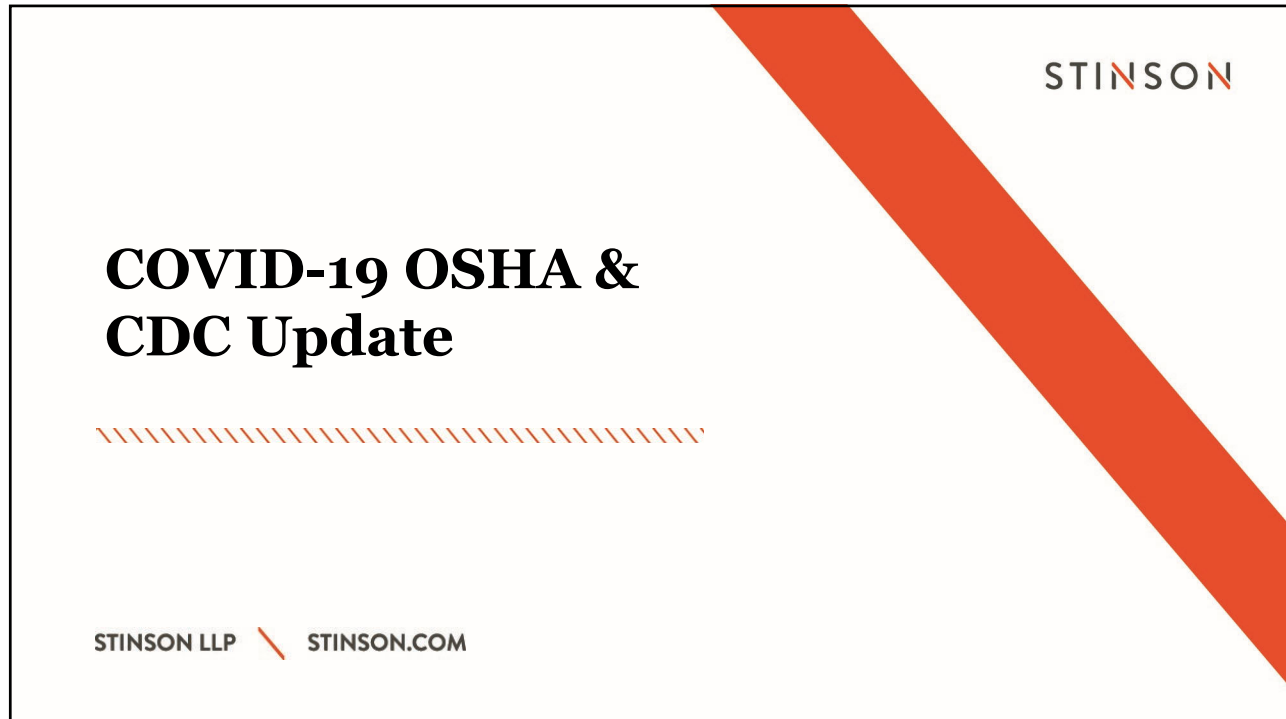
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Other Considerations

- Timekeeping from Home – for Exempt and Non-Exempt Employees
- What if the Employee is Working for Us from a Different State? Whose Law Applies?
 - Do different states have different payroll and/or wage and hour laws?

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COVID-19 OSHA & CDC Update

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General OSHA Framework

OSHA applies to employers with more than 10 employees

Requires employers to maintain a safe and healthful work environment

COVID

- Specific Standards (PPE, respiratory protection, sanitation)
- General Duty Clause
- Guidance
- Enforcement

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OSHA and COVID – Where Are We?

- Guidance issued by CDC, OSHA and local health departments
- Executive Orders issued at the state and local level
- OSHA enforcement
 - More than 70,000 Complaints to state and federal OSHA
 - Almost 7,000 state and federal inspections opened
 - More than 300 federal Citations resulting in more than \$4 million in proposed penalties

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OSHA & COVID – Where Are We Headed?

- On January 21, President Biden issued an Executive Order aimed at [Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#)
 - Issue revised guidance (required by February 4 – issued January 29)
 - Consider Emergency Temporary Standard (required by March 15, if necessary)
 - Review enforcement efforts and make changes to better protect workers
 - Launch national program to focus on OSHA enforcement efforts related to COVID-19
 - Multilingual outreach campaign to inform workers of rights
 - Coordination with states and other federal agencies



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New OSHA Guidance

COVID coordinator	Cleaning (<i>specific recommendations</i>)
Face coverings	Screening, testing
Social distancing	Reporting and recording
Hazard assessment	COVID vaccine available at no cost to eligible employees
Controls per OSHA's hierarchy of controls	Continued controls post-vaccine
Multilingual communication	Opportunities to voice health and safety concerns without retaliation
Training and education	Compliance with established OSHA standards

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What to Expect from an ETS

- Previous attempt to compel OSHA to issue an ETS denied by D.C. Circuit
- Some states already have state-wide COVID standards
- Possible components:

Preparedness and response plan requirement

Face coverings + social distancing

Exposure risk assessments

Health department coordination

Enhanced recordkeeping and reporting

Testing

Training

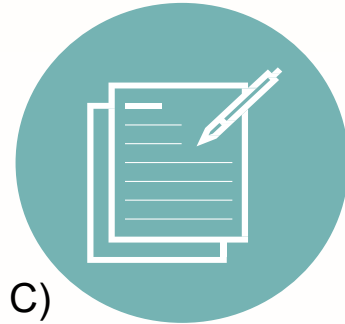
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OSHA Frequently Cited Standards

- Respiratory Protection (29 CFR 1910.134)
 - Medical evaluation
 - Fit testing
 - RPP implementation
 - Training
- Reporting/recording (29 CFR 1904, Subpart C)
- PPE requirements (29 CFR 1904.132)
- General Duty Clause (Section 5(a)(1) of OSH Act)



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An Example: OSHA 300 Logs

The standard for recording an injury has not changed

Recordable injuries still include any **work-related**:



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An Example: OSHA 300 Logs

- OSHA guidance memorandum dated May 19, 2020
 - Confirms COVID-19 is a recordable injury as long as:

- It is a “confirmed” case of COVID-19 as defined by CDC

- The case is “work-related”

- The case also meets one or more of the general recording criteria (as set forth on the previous slide)

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An Example: OSHA 300 Logs

- OSHA will exercise “discretion” in assessing employers’ efforts in making determinations of work-relatedness
- OSHA will consider:
 - The reasonableness of the employer's investigation into work-relatedness
 - The evidence available to the employer
 - The evidence that a COVID-19 illness was contracted at work

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An Example: OSHA 300 Logs

- Are there local requirements that differ?
- If an employee tests positive, but was already working from home and continues to do so without restriction, does the case have to be recorded?
- If an employee got a rapid test only, does that count as a confirmed positive case under CDC criteria?
- Do records of vaccinations count as medical records that must be kept for extended periods of time under recordkeeping requirements?



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OSHA and Working from Home

- OSHA (previous) position on home work-spaces:
 - Home-Based Worksites are “The areas of an employee's personal residence where the employee performs work of the employer.” Employers are responsible for Home-Based Worksite hazards caused by materials, equipment, or work processes which the employer provides or requires to be used in the home.
 - Home Offices are “Office work activities in a home-based worksite (e.g., filing, keyboarding, computer research, reading, writing). Such activities may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, file cabinet).”

OSHA Instruction, Home-Based Worksites (February 25, 2000)

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General OSHA Work From Home Reqs

- There are no specific OSHA work from home standards, though certain standards could be applicable (ex. Ladders, electrical equipment, etc.)
- Employers should exercise reasonable diligence to identify in advance the possible hazards associated with particular home work assignments, and should provide the necessary protection through training, personal protective equipment, or other controls appropriate to reduce or eliminate the hazard.

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General OSHA Work from Home Reqs

- OSHA recordkeeping and reporting requirements still apply if work-related illness or injury that meets general recording criteria
- How do I decide if a case is work-related when the employee is working at home?
 - Injuries and illnesses that occur while an employee is working at home, including work in a home office, will be considered work-related rather than to the general home environment or setting. ***if the injury or illness occurs while the employee is performing work for pay or compensation in the home, and the injury or illness is directly related to the performance of work***

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Work from Home & COVID-19

- OSHA encourages WFH and remote work as a COVID administrative control
- Some states have requirements particular to WFH employees (ex. California, Virginia)
- Remote Work Agreements can/should be used to create boundaries of WFH arrangement
- Workers' comp is separate analysis from OSHA work-related injury recording/reporting

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OSHA Work from Home – Considerations

- Safety check list
- Encourage breaks
- Ergonomics
- Communications
- Training
- Other state and local requirements

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