

Labor and Employment Alert: Are Your Employees Still Working Remotely? Beware the Continuous Workday Rule

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“WFH” – short for “work from home” – is an acronym nearly all employers have become familiar with since the COVID-19 pandemic began. As WFH has evolved from an emergency reaction at the onset of the pandemic to a way of conducting business over the long term, the question is whether your wage and hour policies have also evolved.

In short, out of sight (except on Zoom) cannot mean out of mind, particularly with respect to employees entitled to a minimum wage and overtime under the law. While WFH may imply that it is up to the employee to set his or her schedule, such an approach runs directly into the wage and hour rule known as the “continuous workday.” This principle, adopted by the U.S. Department of Labor (USDOL), presumes that once the workday starts, an employee performs compensable work throughout the rest of the day until the employee completes his or her final primary activity. Unless the employee affirmatively records a break during this span of time, hourly pay is due for the entire span, regardless of whether or not the employee actually performs work throughout that entire period, and those hours count toward determining whether weekly overtime is due. (Complicating matters is that “short breaks,” even if recorded, are still compensable (the USDOL defines “short breaks” as usually lasting about 5 to 20 minutes)).

The USDOL relaxed the rule for COVID-related WFH (a.k.a. teleworking) in recognition of the fact that the continuous workday rule can be exceedingly unfair to employers who accommodate employees with WFH. However, the Families First Coronavirus Response Act expired on December 31, 2020 and along with it went the USDOL’s relaxation of the continuous workday rule.

If you are an employer with a workforce still on WFH it is time to re-examine your wage and hour policies to guard against being bitten by the continuous workday rule. Please contact any of our Labor and Employment attorneys below for assistance:

Anthony Rainone, Member and Co-Chair, [Labor and Employment Practice](#), at arainone@bracheichler.com or 973-364-8372

Matthew Collins, Member and Co-Chair, [Labor and Employment Practice](#), at mcollins@bracheichler.com or 973-403-3151

Jay Sabin, Counsel, [Labor and Employment Practice](#), at jsabin@bracheichler.com or 917-596-8987