

“Dispersed Workforce”

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Dispersed workers, teleworking, telecommuting, and remote worker are common terms used to describe workforces that are increasing geographically dispersed and non-traditional work environment. Once limited to high level talent who are exempted, dispersed workforce models now include non-exempted workers working on their own computers to perform small and simple repetitive parts of larger tasks. Typically, the tasks involve large projects for large companies, such as document or file searches. Business models that rely on dispersed workforce face compliance technological and legal challenges.

Compliance with federal employment laws is challenging when the workforce is geographically dispersed because the federal, state and municipal levels can often differ from one another. International and multi-state employers must pay attention to the laws in the state they are headquarters and the states where they have satellite offices or employees who work in non-traditional workspaces. Wage and hour issues are one type of legal challenges faced by employers of dispersed workforce. Below are some of the common wage and hour problems that are common with dispersed workforce.

1. Minimum wage and Dispersed Workforce

The federal Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, exempt status, and record keeping. Many states and municipalities have higher standards that are different from each other and the federal laws.

For example, the FLSA 29 U.S.C. § 206(a) mandates a minimum wage of \$7.25 per hour. California, however, has a minimum wage of \$10.00 per hour (2016). Colorado's is \$9.30 per hour (2017). **Oregon's minimum wage is \$9.75 (2017)**. Over the past year, an unprecedented number of cities and counties have moved to adopt higher local minimum wages.

Emeryville, CA \$15.00 (by 2018)	Los Angeles County, CA \$15.00 (by 2020-21)
Los Angeles, CA \$15.00 (by 2020)	Mountain View, CA \$15.00 (by 2018)
Portland, ME \$10.68 (by 2017)	Sacramento, CA \$12.50 (by 2020)
Kansas City, MO \$13.00 (by 2020)**	Lexington, KY \$10.10 (by 2018)**
Birmingham, AL \$10.10 (by 2017) ***	Tacoma, WA \$12.00 (by 2018)
St. Louis, MO \$11.00 (by 2018)**	Bangor, ME \$9.75 (by 2019)
Palo Alto, CA \$11.00 (by 2016)	El Cerrito, CA \$15.00 (by 2019)
Johnson County, IA \$10.10 (by 2017)	Santa Clara, CA \$11.00 (by 2016)

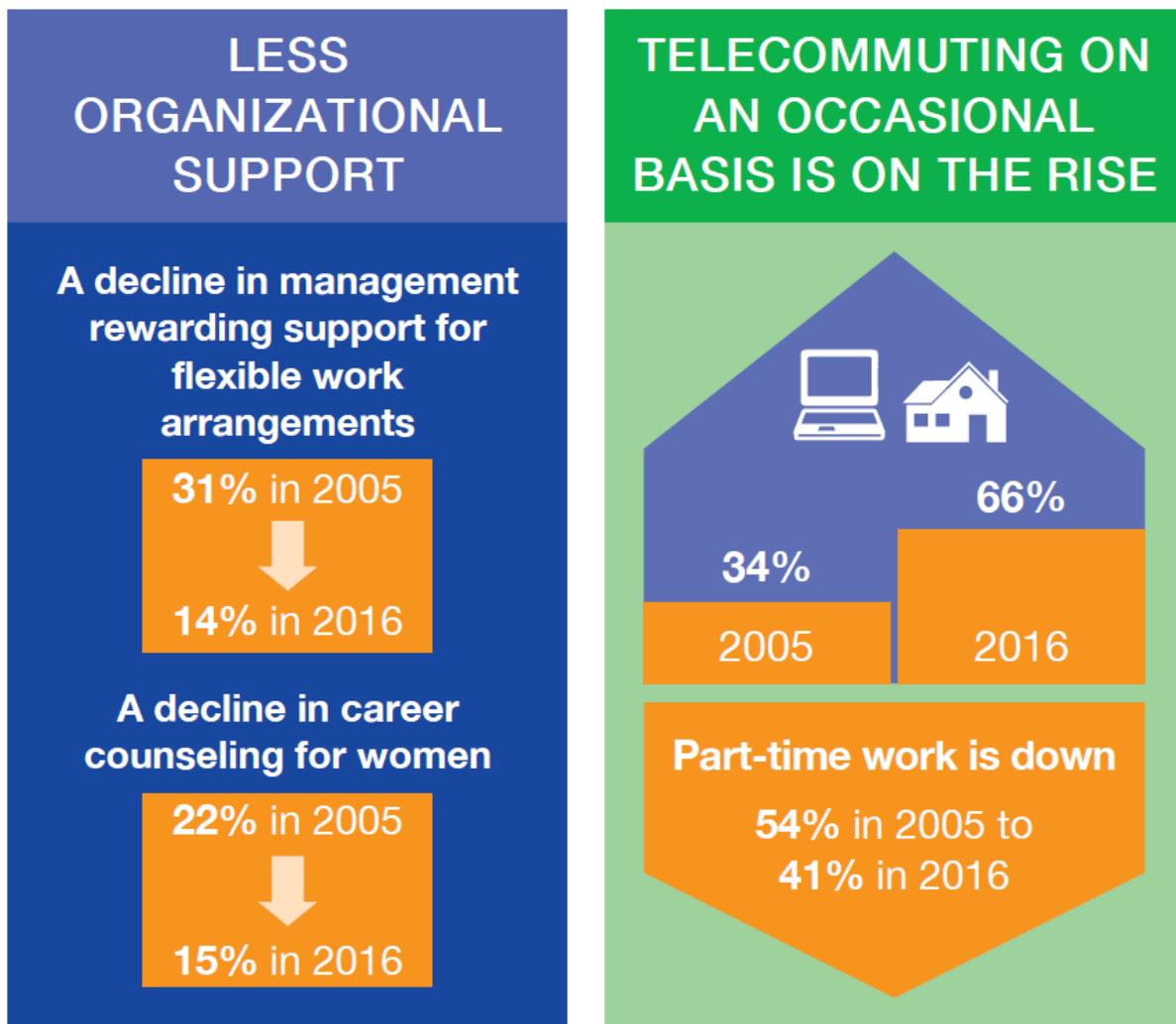
Santa Monica, CA \$15.00 (by 2020);
\$15.37 (by 2017 for hotels, motels &
businesses within)

Long Beach, CA \$13.00 (by 2019)

Many state regulations regarding non-exempt/exempt status can also differ from those established by the FLSA. If a company has a remote worker in a state or city where the wage and hour laws that are more generous than the FLSA, the worker is permitted to take advantage of the local law. In some situations, the worker may also rely on the wage and hour laws in the state where the business is located. Businesses with multi-state dispersed workers must carefully evaluate how they operates in states with differing laws.

2. Overtime and Dispersed Workers

Remote work away from the office is an increasing trend. The results of the 2016 National Study of Employers, conducted by the Society for Human Resources, shows an increase in the percentage of employers allowing (at least some) employees to work some of their regular paid hours at home on a regular basis (33% in 2012 to 40% in 2016).



<https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/National-Study-of-Employers.aspx>

3. Common Wage and Hour issues for Dispersed Workforce

A dispersed workforce comes with a less traditional method of supervision of non-exempted employees. Some non-exempt workers report to work, clock in, perform their work, clock out, and clock out at the end of the shift with little to no interaction with their supervisors. Employers face ever changing challenges in implementing ways to supervise and track activities of dispersed workforce with limited physical presence in a traditional office setting. Below are common wage and hour mistakes that are found in dispersed workforce.

1. Absence of or Inadequate Time Tracking Systems

Under the FLSA, employers are required to maintain certain records for each non-exempt worker. The FLSA requires all employers to record the two pieces of information necessary to these calculations the employee's total weekly hours worked and total weekly wages earned. 29 U.S.C. § 211(c); **see Tony & Susan Alamo Found. v. Secretary of Labor**, 471 U.S. 290, 305 (1953). Specifically, any employer with employees subject to the minimum wage or overtime provisions of the FLSA must maintain and preserve records containing “[h]ours worked” each workday and workweek, and the “[t]otal daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation.” 29 C.F.R. § 516.2(a)(7)-(8). The Department of Labor has made compliance with those requirements easier by providing the necessary information in an accessible and digestible fact sheet. See Wage & Hour Div., U.S. Dep’t of Labor, **Fact Sheet #21: Record Keeping** Requirements under the Fair Labor Standards Act (FLSA)(revised July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs21.pdf>. See also <https://www.dol.gov/general/topic/wages/wagesrecordkeeping> and <https://www.dol.gov/whd/regs/compliance/wh1261.pdf>

There are many reasons to keep track of workers’ hours worked.

a) Mt. Clemens burden shifting

Employers of dispersed workers must implement time keeping technology that permit employees to remotely log their time. The other reason to keep track of hours worked by non-exempted employees are workers is to prevent the employee from subsequently challenging accuracy of those time records.

in **Anderson v. Mt. Clemens Pottery Co.**, 328 U.S. 680 (1946), the Supreme Court held that when it comes time to prove damages:

When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records. **But where the employer’s records are inaccurate or inadequate** and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by

denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. . . . In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of *just and reasonable inference*. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946) (emphasis added).

b) Permitted to Work Issues

Many employers are increasingly defending wage and hour cases by claiming that the plaintiffs have failed to establish that the employer had actual or constructive knowledge of the allegedly unpaid overtime hours

In order to prevail on an FLSA claim for unpaid overtime, an employee must prove that they “were suffered or permitted to work without compensation.” **Allen v. Board of Public Education for Bibb County**, 495 F.3d 1306, 1314 (11th Cir. 2007) (citing 29 U.S.C. § 201 **et seq.**). Courts have interpreted this to mean that an FLSA plaintiff must demonstrate that “(1) he or she worked overtime without compensation and (2) the [employer] knew or should have known of the overtime work.” **Id.** at 1314-15 (*citing Reich v. Dep’t of Conservation and Nat. Res.*, 28 F.3d 1076, 1082 (11th Cir. 1994)); see also 29 C.F.R. § 185.11 (interpreting the “suffer or permit to work” requirement to mean that an employer violates the FLSA when it “knows or has reason to believe that [an employee] is continuing to work and the time is working time.”). “Where an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer’s failure to pay for the overtime hours is not a violation of the FLSA.” **Guenzel v. Mount Olive Bd. Of Educ.**, 2011 WL 5599717, *3 (D.N.J. 2011) (**quoting Forrester v. Roth’s I.G.A. Foodliner, Inc.**, 646 F.2d 413, 414 (9th Cir.1981)); see also 29 U.S.C. § 203(g). In other words, “[t]here is no violation of the FLSA where the employee performs uncompensated work but deliberately prevents his or her employer from learning of it.” *Allen*, 495 F.3d at 1319 (citing *Forrester*, 646 F.2d at 414).

Without a record keeping system and policy in place, employers will have a harder time establishing that they did not suffered or permitted to work without compensation.¹

¹ Permitted to suffer challenges do have limits. “[A]n employer who is armed with this knowledge cannot stand idly by and allow an employee to perform overtime work without proper compensation, even if the employee does not make a claim for the overtime compensation.” **Guenzel**, 2011 WL 5599717 at *3 (**quoting Forrester**, 646 F.2d at 414). Constructive knowledge can be imputed to the employer when “it has reason to believe that its employee is working beyond his shift.” 29 C.F.R. § 785.11. Moreover, “when an employer’s actions squelch truthful reports of overtime worked, or where the employer encourages artificially low reporting, it cannot disclaim knowledge.” **Allen**, 495 F.3d at 1319 (**citing Brennan v. Gen. Motors Acceptance Corp.**, 482 F.2d 825, 828 (5th Cir. 1973)).

(3) Failure to Provide Clear Guidance to Employees **on What Constitutes “Hours Worked”**

By its very nature, a dispersed workforce frequently face challenges related to wage and hour issues due to misunderstandings **what constitutes “hours worked” under the Fair Labor Standards Act.** When dispersed workforce include non -exempt employees, identifying and tracking hours worked are important for overtime calculation purposes. Since it is challenging to supervise dispersed workers, it is important that employer clearly establish **when the employee begins his or her “principal activity” and the time on that day at which he/she ceases the “principal activity.”** The DOL provides guidance on common issues related to hours worked that also appears in dispersed workforces.

“Waiting Time:

Whether waiting time is hours worked under the Act depends upon the particular circumstances. Generally, the facts may show that the employee was engaged to wait (which is work time) or the facts may show that the employee was waiting to be engaged (which is not work time). For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm is working during such periods of inactivity. These employees have been "engaged to wait."

On-Call Time:

An employee who is required to remain on call on the employer's premises is working while "on call." An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call. Additional constraints on the employee's freedom could require this time to be compensated.

Rest and Meal Periods:

Rest periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished. Bona fide meal periods (typically 30 minutes or more) generally need not be compensated as work time. The employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he/she is required to perform any duties, whether active or inactive, while eating.

Sleeping Time and Certain Other Activities:

An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other personal activities when not busy. An employee required to be on duty for 24 hours or more may agree with the employer to exclude from hours worked bona fide regularly scheduled sleeping periods of not more than 8 hours, provided adequate sleeping facilities are

furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. No reduction is permitted unless at least 5 hours of sleep is taken.

Lectures, Meetings and Training Programs:

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time only if four criteria are met, namely: it is outside normal hours, it is voluntary, not job related, and no other work is concurrently performed.

Travel Time:

The principles which apply in determining whether time spent in travel is compensable time depends upon the kind of travel involved.

Home to Work Travel:

An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One Day Assignment in Another City:

An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

Travel That is All in a Day's Work:

Time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community:

Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent

See the Wage and Hour Division's Fact Sheet # 22,
<https://www.dol.gov/whd/regs/compliance/whdfs22.htm>

Dispersed workforce requires careful evaluation of the work processes of non-exempt employees so that hours worked can be captured and compensated. This process requires that the employer **educates the employees on the company's** expectations associated with tracking, and discuss whether there are any modifications needed to time tracking when working remotely.

Ultimately, it is the employer's responsibility to keep the lines of communication open so that hours worked are tracked and ensure that break time is properly tracked while working remotely as well as at the traditional work site.

(4) Discouraging Overtime Without Adequate Safeguards

Employers that have a large number of non-exempted employees in their dispersed workforce have an interest in keeping labor cost down by limiting overtime hours and pay. Discouraging overtime can result in off the clock work by non-exempted employee and create legal exposures to the employer.

Common cost saving policies that do not work:

(a) Prohibitions against work 40 hours a week without advance written authorization while demanding work that requires over 40 hours a week to complete.

(b) Prohibitions against working off the clock or under-reporting hours worked without reducing the workload to a reasonable amount of time.

Solution- prohibitions against overtime hours or off the clock work needs to be accompanied by adjustments to the workload. Regular audits to identify off the clock work and pressure from supervisors to require non-exempted employees to work of the clock. Requiring the non-exempted employees to provide written acknowledge of the policies on overtime and reporting of overtime are good way to give the employer some deniability in event of a wage and hour lawsuit.

5) Failure to Provide Proper Notices.

Employers must provide their employees with federal, state, and local notices regarding rights. The challenge for employers is giving notice to remote workers who may not **work at a company's physical location full time. Under the right circumstances,** electronic posters may suffice. The DOL and the EEOC provides guidance on how to satisfy the required notices through electronic posters.

DOL Guidance on Electronic Posters

<https://www.dol.gov/general/topics/posters>

EEOC Guidance on EEO Posters and Electronic Poster.

<https://www1.eeoc.gov/employers/poster.cfm>