

# **Virtual** **Wage and Hour** **CLE Breakfast**

**Agile and Flexible Work**

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September 28, 2021



**The New York Times**

OPINION  
PAUL KRUGMAN

## Workers Don't Want Their Old Jobs on the Old Terms

Aug. 23, 2021

“My guess, however — and it’s just a guess, although some of the go-to experts here seem to have similar views — is that ... the pandemic disruption of work was a learning experience. Many of those lucky enough to have been able to work from home realized how much they had hated commuting...”

THE WALL STREET JOURNAL.

## Remote Work Is the New Signing Bonus

Workers are trading jobs, enticed by the guarantee of flexible schedules and continued work from home

### Bloomberg

Work

## Employees Are Quitting Instead of Giving Up Working From Home

The drive to get people back into offices is clashing with workers who've embraced remote work as the new normal.



## US Pulse Survey (Aug. 2021)

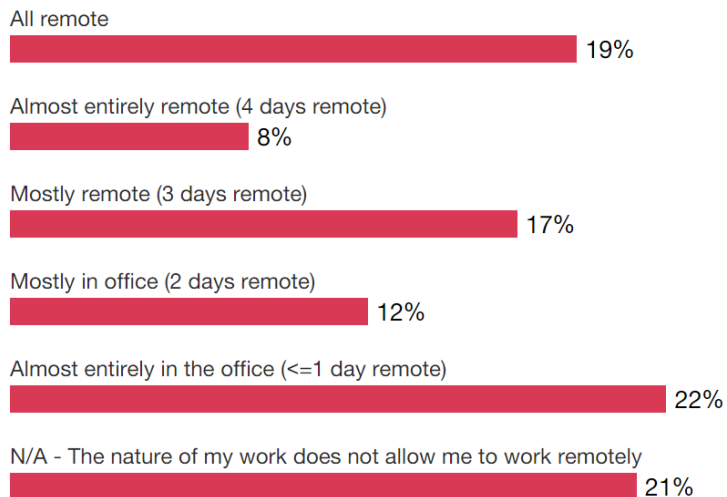
- 33% of respondents (employees) said that they would be returning to a mix of in-person, hybrid, and fully remote work environment
- 18% of respondents indicated they would be returning to a mix of in-person and hybrid work environment
- 18% of respondents indicated they would be returning to an all hybrid work environment

<https://www.pwc.com/us/en/library/pulse-survey/future-of-work.html>



## US Pulse Survey (Aug. 2021)

### Employee preferences for hybrid work are all over the map



Employee Q: If your employer allowed you to choose when you worked remotely, how often would you want to work remotely after COVID-19 is no longer a concern?  
Source: PwC US Pulse Survey, August 19, 2021: base of 1,007 full-time and part-time employees

# Agenda

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- What is agile/flexible work?
- Separating “work” from “life”—controlling the compensable workday
- Avoiding “off the clock” claims
- Commute and travel time issues in the agile/flexible workplace
- Issues particular to exempt employees
- Expenses related to remote or hybrid work
- Choice of law issues
- Documenting the agile/flexible work arrangement

# What is Agile/Flexible Work?



# What Is Agile/Flexible Work?

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- Arrangements under which employees have greater input into when, where, and how they work.
- Examples:
  - Employees are offered the ability to work remotely on a going-forward/more permanent basis.
  - Employees are expected to report to the office/employer's facilities less frequently than in the past.
  - Employees are offered the opportunity to work reduced or other flexible schedules.
- The ability to offer agile/flexible arrangements often depends on the particular roles at issue and the operational needs of the business/organization.
  - Certain roles may require an ongoing or more regular presence in the physical workspace.
- The pandemic has led to a “new normal” under which many employers now recognize that some work can be effectively performed remotely, and there is less of a need for full-time, physical presence in the office (and to incur the attendant expenses).



# Wage and Hour Implications

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- One primary consequence of an agile/flexible work arrangement is the lack of physical, firsthand supervision and control over an employee's day-to-day activities.
- The wage and hour laws apply with equal force regardless of the location, time, and method of work.
- Employers must take steps to ensure their agile/flexible work arrangements include policies and practices to minimize wage and hour liability.

# Separating “Work” From “Life” Controlling the Compensable Workday



# Guiding Principles Regarding Compensable Work Time

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- The following principles apply only to non-exempt (overtime-eligible) employees:
  - “Work not requested but suffered or permitted is work time.”
    - 29 C.F.R. § 785.11
  - “If the employer knows or has reason to believe that the work is being performed, it must count the time as hours worked.”
    - 29 C.F.R. § 785.12
  - “The rule is also applicable to work performed away from the premises or the job site, or even at home.”
    - 29 C.F.R. § 785.12

# The Compensable Workday

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- The compensable “workday” generally means the period between the time an employee commences his or her “principal activity or activities” and the time the employee ceases such “principal activity or activities,” excluding bona fide meal periods and “off duty” time.
  - 29 C.F.R. §§ 785.9(a), 785.19(a)

# Non-Compensable Periods

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- Under **29 C.F.R. § 785.19**, bona fide meal periods (ordinarily of 30 minutes or longer) during which an employee is completely relieved from duty are not compensable.
  - Under the rule, “[t]he employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.”
- Under **29 C.F.R. § 785.16**, periods during which employees are completely relieved from duty and which are long enough to enable them to use the time effectively for their own purposes are not hours worked.
  - Whether the time is long enough to enable them to use the time effectively for their own purposes depends upon all of the facts and circumstances of the case.

# Broader Definition of Compensable Work in Some Jurisdictions

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- Federal law sets the “floor” regarding compensable work time.
- However, some jurisdictions provide a broader definition of what constitutes compensable work.
- For example, [California](#), where compensable work time includes time during which an employee is either:
  1. Suffered or permitted to work, whether or not required to do so; and/or
  2. Subject to the control of the employer.
  - *The activity at issue need not be required or unavoidable to be compensable.*  
*See Frlekin v. Apple Inc.*, 8 Cal. 5th 1038 (Cal. 2020)

# The Compensable Workday

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- Under an agile/flexible work arrangement, employees are more heavily dependent on remote technology.
  - *E.g.*, laptop and desktop computers, landline and mobile phones, iPhones and iPads, other PDAs, Citrix, VPN, etc.
- In addition, the practical (as opposed to the legal) lines between when one's workday starts and ends can blur.
  - For example, an employee working from home may step away throughout the day for a variety of non-work related reasons.
- Regardless of where, when, or how the work is performed, you have to track all time worked so that you can properly compute and pay both straight time and overtime.
- For hourly employees, be mindful of minimum wage, agreed-upon straight time, and overtime concerns.

# The Compensable Workday

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- For salaried non-exempt employees, minimum wage and straight time are ordinarily not an issue—provided you have been clear as to how many hours the salary is intended to compensate.
  - *E.g.*, up to 40 hours of work
  - *E.g.*, 35 hours of work
- Absent evidence that a salary was intended to compensate for a lower or higher number of hours, courts have held there is a rebuttable presumption that a weekly salary covers 40 hours.
  - See, *e.g.*, *Giles v. City of New York*, 41 F. Supp. 2d 308, 317 (S.D.N.Y. 1999)
- In some states (*e.g.*, California), however, a salary can never compensate for more than 40 hours.
  - See, *e.g.*, Cal. Lab. Code § 515(d)



# Controlling the Compensable Workday

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- Employers should make clear to employees working under an agile/flexible work arrangement that:
  - They are required to comply with timekeeping policies, which apply equally to work performed outside the office.
  - They are required to record their time accurately, including when taking breaks or otherwise stepping away from work responsibilities (e.g., to attend to personal matters).
  - If they are on a fixed schedule (e.g., 35 or 40 hours per week), they should work the fixed number of hours and no more or less.
  - They should seek advance permission for overtime work, if they would have to do so if in the office.

# Controlling the Compensable Workday

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- Given the lack of direct, in-person supervision, an employer should make clear to employees working under an agile/flexible work arrangement that, when remote, they are expected:
  - To work a full day (*i.e.*, as if they are in the office) during regular business hours.
  - To work in a distraction-free environment that will permit them to perform their job functions in a private, safe and conducive setting.
  - To be readily reachable by phone, email, IM/text/chat, and other relevant communications channels.
  - To have all the proper equipment to effectively fulfill their job responsibilities.
  - To notify a manager or HR immediately of any situation that interferes with their ability to perform their job remotely.

# The Spectrum of Time Keeping Methods

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- The ideal time record reflects:
  - Start time
  - Time(s) out and in for breaks of at least 20 minutes
  - Time(s) in and out for bona fide meal periods uninterrupted by work
  - Time(s) in and out for other bona fide off-duty periods where no work is performed
  - Stop time
- Less than ideal (yet permissible in **most** jurisdictions):
  - Total hours and minutes worked each day, without further detail
  - Exception time reporting (e.g., only reporting hours worked in excess of a fixed/presumed schedule)
  - *Note: These methods are **not** permissible in jurisdictions that require records that capture the times work and/or meal periods begin and end (e.g., California)*

# Avoiding “Off the Clock” Claims



# “Off the Clock” Work

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- “Off the clock” work is work that an non-exempt employee performs but for which the employee is not paid.
- The rules on compensable time apply to work performed away from the office or other employer premises, including at home and on the road.
  - 29 C.F.R. § 785.12
- The potential for “off the clock” work is particularly heightened for remote workers, including because of the looser “structure” of the work day and the absence of close/in-person supervision.
- Technological advancements have increased the potential for off-the-clock work (and claims) as employees have the ability to perform work on any day, at any time.

# Key Strategies for Avoiding “Off the Clock” Claims

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- Offer letters and written policies for non-exempt employees should require entry of all time spent in the service of the employer, whether authorized or not, and should strictly prohibit any “off the clock” work.
- Sample language:
  - “You are required to accurately record the hours and minutes that you work each day, regardless of the location where the work is performed (e.g., in the office, at home, at a customer site, etc.), when the work is performed (e.g., during office hours, after hours, on weekends, etc.), or whether the time worked is part of your regular schedule or in excess of your regular schedule.”
  - “Working ‘off the clock’ is strictly prohibited—all time worked must be recorded and submitted in accordance with Company policy.”
  - “If you have any questions about whether or not to record certain time as time worked, please contact [your Human Resources representative].”

# Key Strategies for Avoiding “Off the Clock” Claims

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- Employers can and (in many cases) should require prior authorization for work outside an employee’s regular schedule.
- Employers can and (in many cases) should require prior authorization for overtime work.
- Employers can and should discipline employees who perform unauthorized “off the clock” work.
  - But, employers ordinarily will be expected to compensate for the unauthorized work nonetheless.
- The ideal time sheet contains an employee certification as to the accuracy and completeness of time recorded, and disclaims any “off the clock” work.

# Key Strategies for Avoiding “Off the Clock” Claims

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- Employers should make clear that remote workers must take required meal periods and breaks, and perform no work during those periods.
- Employers should make clear that employees who work during their meal periods should enter the time as working time.
- Managers should take special care in reviewing time sheets to ensure that all compensable time is recorded and paid for.
- Managers who permit “off the clock” work or who alter timesheets should be disciplined.
- Rounding and *de minimis* time policies should be reviewed carefully with counsel.
  - Employers should be mindful that the *de minimis* doctrine does not exist in all jurisdictions (e.g., California).



# Key Strategies for Avoiding “Off the Clock” Claims

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- Employers should be especially mindful of the risk of “off the clock” claims stemming from off-schedule, pre- and/or post-shift communications (e.g., calls, text messages, messaging applications, emails, etc.).
  - *Class and collective claims stemming from these types of activities are on the rise!*
- Policies should clarify how non-exempt employees should handle pre- or post-shift communications:
  - If employees are expected/required to review/respond, they should be instructed to record such time (and, generally, should be paid for it); or
  - Employers should instruct employees not to respond/review after hours and enforce that policy.
- Given the wage and hour risks, employers may want to take measures to limit the use of text messages or messaging applications—especially after hours.

# Commute and Travel Time



# Commute and Travel Time

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- For many employees in the agile/flexible workplace, commuting and travel will be more sporadic than under previous circumstances.
- Employers should have written policies or agreements in place regarding the compensability (or non-compensability) of commute time and travel time for employees who work primarily or occasionally on a remote basis.

# Commute Time: Key Principles

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- Under **29 C.F.R. § 785.35**, “normal travel from home to work” at the beginning and end of the “regular workday” is not compensable, “whether [the employee] works at a fixed location or at different job sites.”
- Under **29 C.F.R. § 785.37**, an employee who regularly works at a fixed location in one location but who is given a “special 1-day work assignment in another city” is entitled to compensation for the travel to and from the “special assignment.”
  - The regulation gives the example of an employee who works in Washington, DC, and who is given “a special assignment in New York City,” and says that the travel for that assignment “cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment” and that “[i]t was performed for the employer’s benefit and at [its] special request to meet the needs of the particular and unusual assignment.” In such circumstances, all of the travel time—except for that portion of it that would have been spent in the regular, everyday commute—is paid time.

# Commute Time: Key Strategy for Agile/Remote Workers

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- Define the semi-regular or occasional commute to the office as part of the “regular” commute.
- 29 C.F.R. § 785.35 gives us that opportunity, as it makes clear that the home-to-work travel rule applies “whether [the employee] works at a fixed location or at different job sites.”
  - *Kavanagh v. Grand Union Co.*, 192 F.3d 269, 272 (2d Cir. 1999) (the phrase “normal travel” in 29 C.F.R. § 785.35 “represents a subjective standard, defined by what is usual within the confines of a particular employment relationship”)
- Other federal courts around the country have confirmed the plain language of § 785.35 and have consistently held that travel incurred prior to commencing or subsequent to ceasing principal activities is non-compensable even if commuting time varies day-to-day.
- Sample language: “You should expect that you will have to be present in the office on certain days, and the time spent traveling to the office on those days is considered part of your regular commute. You will not be paid for commute time on days when you are working in the office.”

## Special One-Day Assignment?

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- Employees who don't live in the same city as the office and who are not regularly required/expected to come to the office may argue for the application of the “special one-day assignment” rule when they are asked to come to the office.
- To minimize this risk, it's best to confirm the possibility of having to work from the office upon request as part of the agile/flexible work arrangement.

## Mid-Day Travel: Key Principles

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- Under **29 C.F.R. § 785.38** (“Travel that is all in the day’s work”), time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked.
- Similarly, under **29 C.F.R. § 790.6**, travel time is compensable if it is part of a “continuous workday.” That is, it is compensable if it occurs after the employee begins the first principal activity on a workday and before the employee ceases the performance of the last principal activity on a workday.

## Mid-Day Travel

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- So what if the employee begins some work at home and then goes into the office?
- Does the performance of work prior to the commute make the commute compensable, under the “all in the day’s work” or “continuous workday” rules?
- *Kuebel v. Black & Decker Inc.*, 643 F.3d 252, 259 (2d Cir. 2011): The performance of work-related activities at home prior to the commute to the office (or at home after the evening commute) does not render the commute compensable.
- The time spent performing those at-home activities, however, is always compensable.



# Policy Recommendations

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- Make clear, in writing, to those employees who will be allowed to work remotely on certain days and required to report to the office on other days that:
  - Their regular worksites include both their homes (or other remote worksite) and the office;
  - On certain days, the expectation is that they will work remotely;
  - On other certain days, they will be required to work from the office;
  - The commute to the office is not considered a part of their duties; and
  - On those days in which they are required to work from the office, they will not be paid for their time spent commuting to the office.

# Exempt Employees



# Exempt Employees

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- Hours worked and compensable time ordinarily are not issues for exempt employees, whose salaries are intended to compensate them for all time worked.
- Remember, however, that the salary basis test requires most exempt employees to receive, each pay period, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.
  - 29 C.F.R. § 541.602(a)
- Subject to limited exceptions, exempt employees must receive their full salary for any week in which they perform any work without regard to the number of days or hours worked.

# Exempt Employees

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- Exempt employees who work less than a full-time schedule must still receive the full minimum salary for exemption (currently \$684 per week under federal law, and higher in many states) to be exempt.
  - USDOL Op. Ltr. FLSA2008-1NA (Feb. 14, 2008)
- Proration of an exempt employee's salary for a reduced schedule in any particular week is not permitted.
  - USDOL Op. Ltr. FLSA2006-10NA (June 1, 2006)
- Week to week pay differences for exempt employees will generally raise red flags and can give rise to claims.

# Special Issues with Outside Salespersons

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- Under the FLSA regulations (29 C.F.R. § 541.500), an outside sales employee is exempt from overtime and minimum wage requirements if:
  - The employee's primary duty is making sales within the meaning of the FLSA **or** obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the client or customer; **and**
  - The employee is customarily and regularly engaged **away from the employer's place or places of business** in performing such duties.
- California law defines the outside salesperson exemption even more narrowly:
  1. It requires more than half of the employee's time be spent selling away from the employer's place or places of business; and
  2. It has a narrower definition of what constitutes "selling"

## Special Issues with Outside Salespersons

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- Under both the FLSA and California law, selling activities from the employee's home (e.g., Zoom meetings, calls, etc.) do **not** constitute work away from the employer's premises.
- Therefore, employers must be mindful about ensuring that employees who work remotely continue to primarily sell outside of their homes or, in California, spend more than 50% of their total work time away from their homes.

# Expenses



# Expenses

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- Under an agile/flexible work arrangement, employees may incur any number of work-related expenses that they would not incur if they were working exclusively from the employer's office or other premises.
  - *E.g.*, home computer, printer and paper, phone and internet service, home office supplies
- Under federal law, there is no need to reimburse work-related expenses unless the cost of such expenses cuts into the minimum wage or overtime wages required to be paid under the FLSA.
- Under the laws of many states, there is no need to reimburse work-related expenses unless (1) the cost of such expenses cuts into the minimum wage or overtime wages required to be paid under state law or (2) there is an agreement or policy requiring reimbursement.
  - *E.g.*, New York, New Jersey, Massachusetts



# Expenses

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- Under the laws of some states, there *is* an obligation to reimburse work-related expenses, regardless of the location of the work or whether any additional expense is incurred.
  - *E.g.*, California law requires reimbursement for any “**necessary** expenditures or losses incurred by the employee **in direct consequence of the discharge of his or her duties**, or of ... [the employee’s] obedience to the directions of the employer” (including cell phone data, office supplies, and, potentially, internet), even where the employee already has a phone, cell data, or Wi-Fi plan for personal use (in which case the employer is required to reimburse a reasonable percentage of the cost of the personal plan otherwise paid for by the employee).
    - Whether an expense is “necessary” depends on “the reasonableness of the employee’s choices.” *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (Cal. App. 2007).

# Key Strategies for Employee Remote Work Expenses

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- Employers should clearly communicate their expense reimbursement policies to agile/flexible workers at the outset.
- In jurisdictions where expense reimbursement is required (e.g., California), employers should determine what expenses are necessary/reimbursable.
- To mitigate potential expenses, employers may wish to consider providing certain work-related equipment directly—as opposed to having employees purchase on their own and seek reimbursement.
- Employers may want to consider expense stipends, subject to consideration of tax implications/rules.

# Choice of Law Issues



# Whose Wage and Hour Laws Apply?

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- Employers must be mindful of the wage and hour laws of the states and cities in which flexible/agile employees are working.
- While federal law (the FLSA) applies in **all** jurisdictions, a number of states and cities have more protective wage and hour laws that must be considered.
- Generally, the laws of the state and city in which work is being performed are the ones that will govern, particularly when the work in the location is more than transient.
- Courts will engage in a choice of law analysis to determine whether to apply the laws of one jurisdiction over another.
- California has taken a particularly broad approach to application of its state's wage and hour laws:
  - *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (Cal. 2011) – California's overtime laws apply to non-resident employees working temporarily in California.
  - *Ward v. United Airlines, Inc.*, 9 Cal. 5th 732 (Cal. 2020) – California wage statement law applied to pilots, flight attendants and other interstate workers who did not perform a majority of work in any one state and who were based in California.

## Overtime Across State Lines

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- Some states (e.g., California and Colorado) – and even some cities – have specific wage and hour laws that apply to resident and/or non-resident employees working remotely in those jurisdictions.
  - E.g., California employers must pay overtime to employees who work **more than eight hours/day** and for the first eight hours on the seventh consecutive day in a workweek; California employers also must pay **double time to employees who work over 12 hours/day or more than eight hours on the seventh consecutive day in a workweek.**

# Controlling Liability from Out of State Work

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- First and foremost, employers must have an accurate record of where work is being performed by their employees.
- If employees are working remotely (partially or fully) in a state/city other than their “home office” location, employers must be aware of and comply with the other jurisdiction’s wage and hour laws.
- To avoid surprises, employers should consider:
  - Limiting the jurisdictions in which employees are permitted to work remotely; and/or
  - Requiring that employees provide advance notice and/or obtain approval before performing work remotely in certain jurisdictions.

# Documentation



# Documenting the Agile/Flexible Work Arrangement

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- Employers should have detailed arrangements in place regarding agile/flexible work, prior to the commencement of such work.
- These should include written policies and individual agreements with employees agreeing to comply with those policies.
- For non-exempt employees, policies and agreements should clearly address, among other issues:
  - When and how to record work time;
  - The importance of taking required meal periods and/or breaks; and
  - What to do with “off-hours” emails/communications (e.g., read/respond and record the time or not read/respond outside of scheduled hours).



# Sample Language For Non-Exempt Employees

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- “Regardless of your work location on any given day or week (e.g., in the office, at home, at a client site, or at any other remote location), non-exempt (overtime-eligible) employees must comply with the Company’s policy on recording working hours.”
- “This includes recording your time accurately and completely, including when taking breaks or otherwise stepping away from work responsibilities (including to attend to personal matters).”
- “Working ‘off the clock’ is strictly prohibited—all time worked must be recorded and submitted in accordance with Company policy. Please immediately contact [Name or Department] if any manager, supervisor, or co-worker suggests (directly or indirectly) that you should not report any time worked.”
- “These policies apply regardless of when work is performed (e.g., during office hours, after hours, on weekends, etc.), whether the time worked is part of your regular schedule or outside your regular schedule, or whether the time worked was authorized or not.”
- “All employees should expect that they will have to be present in the office on certain days, and the time spent traveling to the office on those days is considered part of the regular commute. Accordingly, employees will not be paid for commute time on days when they are working from a Company office.”

# Documenting the Agile/Flexible Work Arrangement

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- For both exempt and non-exempt employees, policies and agreements should clearly address, among other issues:
  - The employer's policies on expense reimbursement;
  - The employer's right to amend or terminate the agile/flexible work arrangement in its sole discretion;
  - That the granting of an agile/flexible work arrangement does not alter the employee's at-will status, terms and conditions of employment, or job responsibilities;
  - That time off policies remain in effect regardless of where the employee performs their job duties (e.g., that when remote workers are unable to work due to illness, or may need to be relieved of responsibility for work on a particular day, they must use appropriate leave);
  - The employee's obligation to report any changes in regular remote work location; and
  - Requirements regarding confidentiality and safeguarding of the employer's property and information.



# Proskauer's Global Presence



# Virtual Wage and Hour CLE Breakfast

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