

Publications

Paying Employees for Temperature Checks

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As jurisdictions begin to lift their COVID-19 restrictions, employers must contend with myriad issues as their businesses begin to reopen and employees return to work. A state may require or recommend that employees conduct daily COVID-19 symptom assessments, which may include taking their temperature. The question many employers are asking is whether employees must be paid for their time spent waiting for and undergoing a temperature check. Federal and state courts have not yet specifically addressed this issue. However, employers must consider the possibility that such checks may be compensable under the federal Fair Labor Standards Act (FLSA) and/or state law.

Compensability Under the Fair Labor Standards Act

Under the FLSA, whether an employee must be paid for having his or her temperature checked hinges on whether that task is part of the employee's "principal activity." In *Integrity Staffing Solutions v. Busk*, the U.S. Supreme Court unanimously ruled that time spent in post-shift security checks by Amazon warehouse employees was not compensable. The FLSA only requires that employers pay employees for time spent on "preliminary" (pre-shift) and "postliminary" (post-shift) activities that are "integral and indispensable" to the employee's principal activities. "Integral and indispensable" activities are those "necessary to the principal work performed" and "done for the benefit of the employer." Amazon's post-shift screenings were not integral and indispensable because the screenings were not "an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment" and Amazon "could have eliminated the screenings altogether without impairing the employees' ability to complete their work."

The question becomes whether *Integrity Staffing* applies to time waiting for and getting COVID-19 temperature checks. On the one hand, an employer could argue that, like security screenings, temperature checks are not a "principal activity" its employees were hired to perform and are not "integral and indispensable" to those activities. This is a legitimate argument that such checks are not compensable under the FLSA.

On the other hand, there is a significant distinction between security screenings and temperature checks that may cause courts to find that temperature checks are a compensable “principal activity.” Temperature checks, unlike security screenings, may be a mandatory part of some states’ pandemic-related return-to-work requirements. The argument would be that, because temperature checks are a state-required condition for employees, it becomes a compensable “principal activity.” Similarly, a court could find that a temperature check to protect the workplace from COVID-19 is integral and indispensable because, without it, employees are unable to work.

Once an employer has decided to treat the time getting and waiting in line for temperature checks as a “principal activity” for which employees will be paid, it has effectively conceded that the time between the temperature check and the beginning of the shift must also be paid under the FLSA’s “continuous workday” rule. The “continuous workday” rule provides that waiting time that occurs after employees commence a “principal activity” is compensable. So if an employer is paying employees for time spent getting and waiting for temperature checks, it must also pay for the time they are waiting for work to begin in the minutes between the temperature check and the start of their shift. In other words, an in-between approach (paying for checks but not for the time between the check and the start of the shift) does not work. An employer must either follow an *Integrity Staffing* approach and pay for none of this time or pay for all of it.

Compensability Under State Law

The U.S. Supreme Court’s *Integrity Staffing* decision is not binding on state courts’ interpretations of their own wage-hour laws. Moreover, employers must account for state laws that are more restrictive (more employee-friendly) than the FLSA. For example, in February 2020, the California Supreme Court found that security screenings by an employer were compensable under California law. Similarly, in 2018, a federal appeals court ruled that security screenings were compensable under Nevada and Arizona state wage-hour laws. The Pennsylvania Supreme Court is considering the same issue under the Pennsylvania Minimum Wage Act. In Colorado, COMPS Order #36 requires private employers to pay non-exempt employees for time spent undergoing safety or security screening if the screening takes longer than one minute. This means that, even if a temperature check is not compensable under the FLSA, it still could be compensable under state law.

Paying for Temperature Checks

The final, related question is how to pay employees for this time in an efficient manner. One way would be to have employees clock-in immediately before getting in line. An alternative method would be to pay all employees a set amount of extra time per day for the time it takes to wait in line, get their temperature checked, and wait for the shift to begin. Ultimately, whether and how to pay requires an individualized assessment of the employer’s operations and risk tolerance.

Conclusion

Whether employers must pay for temperature checks adds another layer of uncertainty to already uncertain times. It is likely that there will be litigation over this (and other wage-hour issues). Employers should ask: Are they willing to take the risk of being a test case under the FLSA as to whether *Integrity*

Staffing applies to COVID-19 temperature checks? And, are they willing to risk that a state court will find that temperature checks are compensable under state law? Contact your Vorys lawyer if you have questions about COVID-19 and wage-hour issues.

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Vorys COVID-19 Task Force

Outside of this new law, employers continue to face myriad issues as COVID-19 continues to spread and impact communities and workplaces (some of these issues are addressed in our prior alerts located here). We will continue to keep you posted on any important developments. In the meantime, if you have any questions regarding this new law or any other aspect of COVID-19, please contact your Vorys lawyer.

We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.