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Employee Temperature Screenings During COVID-19: What Employers Need to Know

Human Resources & Employment

Current guidance from the Equal Employment Opportunity Commission (EEOC) provides that employers may lawfully take an employee's temperature upon entering the workplace during the COVID-19 pandemic. In taking this step, however, employers must consider that the time an employee spends waiting to and actually having their temperature taken may need to be paid out.

While courts have yet to decide the specific issue of whether the time spent waiting for and undergoing a temperature check is compensable, helpful guidance is available from prior court decisions.

Wage and Hour Claims

The U.S. Supreme Court, in *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, defined the test to be used when determining if such time is compensable under federal law. There, the court found that time spent waiting to undergo and undergoing post-shift security screenings is not compensable, even where such screenings lasted approximately 25 minutes each day and were conducted to prevent employee theft.

The Fair Labor Standards Act (FLSA), as amended by the Portal-to-Portal Act, governs federal wage and hour claims. The Portal-to-Portal Act exempts employers from paying employees for those activities which are "preliminary to" or "postliminary to" an employee's principal activities. Therefore, in *Busk*, the Court outlined a two-part test to determine whether time is compensable under the FLSA:

- Is the activity a "principal activity"?
- Is the activity "preliminary to" or "postliminary to" the performance of the principal activity?

Principal Activity

Principal activities "embrace all activities which are an integral and indispensable part of the principal activities." As further defined by the Court, "an activity is integral and indispensable to the principal activities that an employee is employed to perform if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

Examples of principal activities that must be compensated include:

- Time battery-plant employees spent showering and changing clothes because the chemicals in the plant were "toxic to human beings" and the employer conceded that the changing of clothes and showering activities were indispensable to the performance of the employees work, and thus integrally related thereto
- Time meatpacker employees spent sharpening their knives because dull knives would slow down production, affect the appearance of the meat, cause waste, and lead to accidents

By contrast, the following have been held to be noncompensable activities:

- Time poultry-plant employees spent waiting to don protective gear because such waiting was two steps removed from the productive activity on the assembly line

- Time spent in a pre-shift security search of employees in a rocket-powder plant for safety reasons as well as a post-shift security search for the purpose of preventing theft

Importantly, the court confirmed that the focus is not on whether the employer *required* a particular activity. The “integral and indispensable” test is focused on the productive work the employee is employed to perform.

Preliminary and Postliminary Activities

In *Busk*, the Court found the post-shift security screenings were noncompensable postliminary activities. As the employees were employed to perform tasks such as retrieving products from warehouse shelves or packaging them for shipment, the security screenings were not “integral and indispensable” to those duties. Furthermore, and notably, is that the Court found the activity was a noncompensable postliminary activity in part because the employer could have eliminated the activity without impairing the employee’s ability to complete their work.

Temperature Checks

Without further guidance on the compensability of temperature checks, employers should carefully consider whether to pay employees for the time spent measuring their temperature. As clear from precedent, each instance is a highly fact-specific inquiry. While typically a temperature check may not likely meet the standards set for in *Busk*, it is important to consider that the federal, state, and local guidelines encouraging employee temperature checks is a factor to consider. Once again, the test of whether the time is compensable does not hinge on whether the temperature check is required by the employer, but whether it is an integral and indispensable part of the employee’s principal activities and whether it is preliminary to or postliminary to those principal activities. It is important to keep in mind that some states may have more stringent laws regarding the compensability of employee time, and employers should always consider both state and federal wage and hour laws.