

# Must Employers Pay for Employee's Temperature Screens in Light of COVID-19? Wage and Hour Laws May Impact Employer Safety Procedures

## Labor & Employment Law Update

By Sara Zorich on May 5, 2020

While some states are beginning to loosen their stay at home orders, others continue to only be open for essential business. On April 10<sup>th</sup> we reported on the relaxation of the CDC guidance for safety practices for essential workers. This included advice from the CDC that critical infrastructure workers may be permitted to continue to work, or return to work, following potential exposure to COVID-19, provided they remain asymptomatic and additional precautions are implemented by the employer including pre-screening employee's temperatures prior to starting work.

We have seen a major uptick in employers performing temperature testing on employees prior to employees starting work which most likely is prior to an employee clocking in. Thus, many employers are asking if this time is compensable under federal and state wage and hour laws. The answer – under federal law most likely not but under state wage and hour laws it depends.

### **Federal Law**

In *Integrity Staffing Solutions, Inc. v. Busk*, 135 S.Ct. 513, 517, 190 L.Ed.2d 410 (2014), the US Supreme Court held that the 25 minutes plaintiff warehouse employees spent waiting for and undergoing security screenings at the end of their shifts was not compensable under the Fair Labor Standards Act (FLSA). The Supreme Court held that it was not compensable because the employer “did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment to Amazon customers.” Based on *Integrity*, employee temperature tests are most likely not compensable under the FLSA.

## State Law

Many states, however, have their own wage and hour laws which can be more stringent and have different definitions for “hours worked” than that of the FLSA. Further, states laws like Illinois, can have significant damages for violation of wage and hour laws including interest payments, treble damages and payment of attorney’s fees. Whether a company needs to compensate employees for temperature checks or increased safety protocols occurring prior to or after the work day will need to be analyzed on a case-by-case basis. However, in general, Missouri and Indiana probably would not require compensation of the time as their state laws look to federal interpretation but most likely the time would be compensable under Illinois and Wisconsin wage and hour laws.

Employers who are requiring temperature checks (and other safety protocols) must review their practices for the testing, requirements of employees, time taken to perform testing and if the employees are required to wait in line for the test to be performed. These factors (along with state laws) will impact the compensability of the time.

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