

## Measuring Worker Temperatures Could Lead To Wage And Hour Claims

4.13.20

Employers could face potential wage and hour claims under federal and state law if they do not compensate employees for time spent having their body temperatures checked. While federal COVID-19 guidance allows employers to measure employees' body temperatures without fear of violating disability law, that guidance does not address wage and hour compliance – and this is definitely new territory for the nation's employers.

While federal and state courts do not appear to have considered whether employers are required to pay employees for time spent measuring body temperatures during a pandemic, U.S. Supreme Court decisions and recent state court decisions provide some guidance on how courts may rule in a wage and hour claim for employee body temperature checks. Under federal law, there are two key questions to determine whether this time is compensable:

1. Is measuring an employee's temperature a "principal activity"?
2. Is the time employees spend waiting to have their temperatures taken a "preliminary" or "postliminary" activity?

### Is Measuring An Employee's Temperature A "Principal Activity"?

In 2014, the Supreme Court narrowed the definition of compensable preliminary and postliminary activities. In *Integrity Staffing Solutions v. Busk*, the Supreme Court held that post-shift security checks for Amazon warehouse workers was not compensable under the federal Fair Labor Standards Act (FLSA). The Court explained only activities

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that constitute a “principal activity” under the FLSA that must be compensated.

Employers must pay employees for “principal activities or activities which employees are employed to perform.” Under the statute, principal activities include all activities that are “an integral and indispensable part of the employee’s principal activities.” An activity is integral and indispensable, and thus compensable under the FLSA, if it is “an intrinsic element of the principal activities and one that the employee must do in order to perform their principal activities.”

Examples of principal activities that must be compensated:

- Time that battery-plant employees spent showering and changing clothes because the chemicals in the plant were toxic to human beings. The time spent showering and clothes changing was indispensable to the employees’ performance of their productive work and integrally related to it.
- Time that meat packer employees spent sharpening their knives because dull knives would slow down production on the assembly line, affect the appearance of the meat as well as the quality of the hides, cause waste, and lead to accidents.
- Time that poultry-plant employees spent walking between the changing area where they put on protective gear and the production area.

Whether an employer must compensate an employee for time spent measuring their temperature is a fact-specific question for each employer. Outside of the COVID-19 context, temperature checks would likely not meet the standard of a principal activity. However, within the COVID-19 context, measuring employees’ temperatures may be akin to situations where employees must put on protective gear in order to safely perform their jobs.

### **Is The Time Employees Spend Waiting For Temperature Checks A “Preliminary” Or “Postliminary” Activity?**

The critical factor in wage and hour claims is defining the beginning and end of the workday. Activities “preliminary” and “postliminary” to principal activities do not have to be compensated under the FLSA. The Department of Labor has adopted the continuous workday rule, which means that the “workday” is generally defined as “the period between the commencement and completion on the same workday of an employee’s principal activity or activities.”

The Supreme Court has said that time spent waiting to put on protective gear, if putting on protective gear is considered a principal activity, is not compensable under the FLSA. This suggests that the time employees spend waiting in line to have their temperatures checked *may* be excluded from FLSA coverage. If the waiting time is considered a preliminary or postliminary activity, then it is not compensable under the FLSA. Once again, whether the waiting time is compensable is highly fact-specific for each employer.



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### What About State Laws?

State laws vary on this issue and the scope of some states' wage laws are currently being determined by courts across the country. For example:

- On February 4, 2020, a federal court of appeals held that time spent by detention officers in pre-shift and post-shift security screenings were compensable under the FLSA and the New Mexico Minimum Wage Act.
- On February 13, 2020, the California Supreme Court held that post-shift security checks of Apple employees were compensable under state wage laws.
- The Pennsylvania Supreme Court is currently considering whether time spent on an employer's premises waiting to undergo and undergoing a mandatory security screening is compensable under the Pennsylvania Minimum Wage Act.

It is therefore crucial to consider state laws in addition to the FLSA to determine whether time employees spend waiting to have their temperatures checked is compensable. A review of the federal law is the starting point, not the ending, of your analysis.

### What Should Employers Do?

Whether you should pay your employees for the time spent measuring their temperatures and the time they spend waiting to have their temperatures measured is a highly fact-specific question that should be discussed with your employment law counsel. While the safest approach is to interpret the FLSA and state laws in a conservative manner and pay employees for time spent waiting and having their temperatures checked, this is an individualized determination each employer will need to make taking into consideration all relevant factors.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, or any member of our COVID-19 Taskforce. You can also review our nationwide Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus and our FP Resource Center For Employers, maintained by our Taskforce.

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*This Legal Alert provides an overview of a developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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