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Do We Have to Pay for That? Part 1—COVID-19 Vaccination, Testing, and Screening Activities

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In this blog series, we'll look at a variety of activities and discuss whether an employer has to pay its non-exempt (*i.e.*, overtime-eligible) employees for their time spent engaging in them. We'll focus on federal law, but as with all wage and hour issues, applicable state and local laws must be considered as well. Also, while we'll discuss the guiding principles, employers should always seek counsel on how to apply those principles to their specific facts.

First up—getting vaccinated against or tested for COVID-19, or participating in health screening activities (*e.g.*, answering questions, submitting to a temperature check, etc.), where the employer requires such activities as a condition of employment or entry to the workplace.

There are three different day/time scenarios to look at when considering the compensability of time spent in these activities: whether they occur (1) during regular working hours/in the middle of the workday, (2) on working days prior to the beginning of or after the completion of productive work, and (3) on off days/non-working days.

Vaccination/Testing/Screening During Working Hours

If the vaccination, test, or screening takes place during the employee's workday (*e.g.*, after the employee has engaged in other compensable work activities and prior to the end of the workday), it is likely compensable under the "continuous workday" rule in 29 C.F.R. § 790.6. Under that rule, "[p]eriods of time between the commencement of the employee's first principal activity and the completion of [the employee's] last principal activity on any workday must be included in the computation of hours worked[.]"

There are two primary exceptions to the "continuous workday" rule—bona fide meal periods (29 C.F.R. § 785.19) and other "off duty" time (29 C.F.R. § 785.16). Both exceptions, however, require that the employee be "completely relieved from duty." We'd expect employees who are required by their employer to submit to testing or screening during meal periods or other mid-day breaks to argue that they are not "completely relieved from duty," and therefore that they should be paid for the time.

In its public guidance on the issue, the U.S. Department of Labor (DOL) confirms that time spent by an employee waiting for and undergoing an onsite temperature check, completing a health screening, or being tested for COVID-19 after the employee has started work for the day and before the work day has ended must be paid. *See* USDOL, COVID-19 and the Fair Labor Standards Act Questions and Answers, at Q&A #5 ("[T]ime spent waiting for and undergoing a temperature check related to COVID-19 during the workday must be paid."), Q&A #6 ("[T]ime spent waiting for and undergoing a temperature check related to COVID-19 during the workday must be paid."), and Q&A #7 ("If my employer requires COVID-19 testing during the workday, do I need to be paid for the time spent undergoing the testing? Yes[.]").

Notably, in support of its guidance, the DOL relies not only on the "continuous workday" rule but also on the regulation addressing "medical attention" at the workplace, 29 C.F.R. § 785.43 ("Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.").

Vaccination/Testing/Screening Prior to the Beginning or After the End of a Workday

A more practical (and common) approach—particularly for screening activities—is to require that the employee engage in these activities *prior* to the beginning of any productive work on a given workday (*e.g.*, immediately before or upon entering the workplace). In this scenario, as well as for activities that take place at the end of a workday after all productive work has been completed, we must look to the rules on the compensability of time spent in "preliminary" and "postliminary" activities. Under amendments to the Fair Labor Standards Act (FLSA) in the Portal-to-Portal Act of 1947 (and codified in 29 U.S.C. § 254(a)(2)), an employer is not required to pay for time spent in:

> activities which are preliminary to or postliminary to [the] principal activity or activities [the employee is employed to perform], which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

Predictably, there has been a great deal of litigation about whether or not certain activities are "preliminary/postliminary" (and therefore not compensable). Many of those cases deal with time spent in travel to and from the workplace, as well as in donning and doffing protective gear and equipment. The Supreme Court dug into the issue most recently in its 2014 decision in *Integrity Staffing Solutions v. Busk*. In *Busk*, the plaintiffs worked in one of Amazon's shipping warehouses retrieving products from shelves and packaging those products for shipment to Amazon customers. The employees were required at the end of each workday to spend time undergoing "security screening" before they could leave the premises, and they sought compensation for the time spent in those screening activities. The Supreme Court rejected the claim, holding that time is compensable under the FLSA only if the activity at issue "is integral and indispensable to the principal activities that an employee is employed to perform"—that is, "one with which the employee cannot dispense if he is to perform his principal activities." The Court concluded that the security screenings—while required by the employer—were not "integral and indispensable" to the employees' principal activities of retrieving and packaging products.

Aside from some specific occupations, we'd argue that COVID-19 vaccination, testing, and screening activities—while clearly beneficial to individual and public health—are not "integral and indispensable" to most jobs, and therefore that an employee engaging in those activities prior to the beginning or after the end of the "productive" workday is not entitled to compensation for the time. Arguments aside, we are aware of no reported judicial decisions on this issue.

The DOL's guidance on the issue is less than clear-cut. Consider the following Q&A from the agency:

> *4.* My *employer requires all employees to take their temperature to try to screen for people who might have COVID-19 before entering the job site. Do I need to be paid for the time spent taking my temperature?*
>
> It depends[.] [U]nder the FLSA, your employer is required to pay you for all hours that you work, including for time before you begin your normal working hours if the task that you are required to perform is necessary for the work you do. For many employees, undergoing a temperature check before they begin work must be paid because it is necessary for their jobs. For example, if a nurse who performs direct patient care services at a hospital is required to check her temperature upon arrival at the hospital before her shift, the time that she spends checking her temperature upon entry to the worksite is likely compensable because such a task is necessary for her to safely and effectively perform her job during the pandemic. In other words, the temperature check is integral and indispensable to the nurse's job.

This Q&A is grounded in the principles in 29 U.S.C. § 254 and *Busk*, but isn't particularly helpful beyond its narrow example. The DOL speaks of a temperature screen being "necessary" for the jobs of "many employees," but then gives the specific example of a nurse (who is likely required by law and/or medical boards/authorities to be temperature-checked). The same could not be said of an office worker, and we'd argue a temperature screen is not "necessary" for many employees' jobs. Given that the DOL doesn't say it's compensable for *all* employees, or necessary to *all* jobs, it's clear there are jobs for which the agency believes it's *not* necessary (even where, as in the DOL's example, the employer "requires" it). That would seem to take the steam out of the counter-argument that it's "necessary" for all jobs simply because COVID-19 is such a significant health issue. From a legal standpoint, the analysis must go back to the "preliminary/postliminary" rules in 29 U.S.C. § 254 and *Busk*, and the question must be whether the activity is "integral and indispensable" to the employee's principal job activities—a fact-specific inquiry.

Vaccination/Testing on an Off Day

What if an employer requires an employee to be vaccinated or to undergo testing on an off day (*e.g.*, a weekend or other non-working day)? Do the preliminary/postliminary rules that apply to working days also apply to off days? A plain reading of the FLSA and its regulations suggests they don't—in other words, the preliminary/postliminary rules should only apply to activities that occur at the beginning or end of what is *otherwise* a workday. The relevant statutory provision (29 U.S.C. § 254(a)(2)) addresses "activities which are preliminary to or postliminary to [the employee's] principal activity or activities, which occur either prior to the time ***on any particular workday*** at which such employee commences, or subsequent to the time ***on any particular workday*** at which he ceases, such principal activity or activities." The FLSA regulations support the same conclusion—consider 29 C.F.R. § 790.7(c) (noting that time spent by employees who are asked to perform emergency work after they have already returned home for the day does not fall within the preliminary/postliminary rules; "whether the travel time is to be counted as worktime under the [FLSA] will continue to be determined by principles established under [the FLSA and its regulations] ***without reference to the [Portal to] Portal Act***"), and 29 C.F.R. § 790.7(c) n. 45 (noting the Senate's comment that the Portal to Portal Act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ***ordinary workday***").

The DOL's COVID-19 guidance ignores the distinction between working days and off days, and assumes the same preliminary/postliminary rules (analyzing whether the activity is "integral and indispensable" to the employee's principal job duties) apply to both scenarios:

> *8. My employer is requiring me to undergo COVID-19 testing on my day off before I can return to the jobsite. Do I need to be paid for the time spent undergoing the testing?*

> It depends[.] [U]nder the FLSA, your employer is required to pay you for all hours that you work, including for time on your vacation day if the task you are required to perform is necessary for the work you are paid to do. For many employees, undergoing COVID-19 testing may be compensable because the testing is necessary for them to perform their jobs safely and effectively during the pandemic. For example, if a grocery store cashier who has significant interaction with the general public is required by her employer to undergo a COVID-19 test on her day off, such time is likely compensable because it is integral and indispensable to her work during the pandemic. Other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.

This Q&A is similar to Q&A #4. But the example here, concluding that the test is "integral and indispensable" to the job, is of a "grocery store cashier who has significant interaction with the general public." While the example arguably presents a less defensible argument for compensability under *Busk* than the health care worker, it remains distinguishable from, for example, an office worker or other employee whose job does not require "significant interaction with the general public." And, as with Q&A #4, the DOL's statement that testing time may be compensable for "many employees" suggests that these are jobs for which the agency believes it's *not* necessary (even if required by the employer).

If—notwithstanding the DOL's examples—the preliminary/postliminary rules don't apply to off-day activities, the compensability of the time spent in those activities is analyzed under the other principles for determining "hours worked," which are discussed in the regulations at 29 C.F.R. Part 785. The regulation on medical attention (29 C.F.R. § 785.43), cited in the DOL's Q&As as a justification for requiring compensation for screening and testing during the workday, doesn't apply to off days by its plain language ("Time spent by an employee in waiting for and receiving medical attention ***on the premises or at the direction of the employer during the employee's normal working hours on days when he is working*** constitutes hours worked."). No other regulations in Part 785 are particularly instructive, which is not surprising given the unique circumstances of COVID-19. Indeed, as the DOL says in its introductory statement in 29 C.F.R. § 785.1, the regulations "cannot include every possible situation," and "[n]o inference should be drawn from the fact that a subject or an illustration is omitted."

As the regulations confirm (in 29 C.F.R. § 785.2), "[t]he ultimate decisions on interpretations of the [FLSA] are made by the courts." In one of the leading cases on compensability, *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, the Supreme Court held that employees subject to the FLSA must be paid for all time spent in ''physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and [its] business." (The Court later walked back the requirement of "physical or mental exertion," finding a variety of idle activities to be potentially compensable.) For mandatory vaccination, testing, or screening, the "required by the employer" prong is satisfied, but is the activity "pursued … primarily for the benefit of the employer and [its] business?" That's arguable. Both the employer and the employee benefit from such health-related activities, but a strong case can be made that the employee benefits to a greater degree.

In other sub-regulatory guidance, the DOL has addressed the compensability of time spent in "physical examinations," focusing primarily on whether the exam is for the employer's or the employee's benefit, and not distinguishing between whether the exam is during or outside normal working hours. For example, in its FLSA Hours Worked Advisor—an online tool "to help employers and employees learn more about their rights and responsibilities," the DOL notes the following:

> After being hired, employers often require their employees to take certain tests as they begin employment or on a periodic basis during their employment, such as physical examinations, fingerprinting and drug testing. Whenever you impose special tests, requirements or conditions that your employee must meet, time he or she spends traveling to and from the tests, waiting for and undergoing these tests, or meeting the requirements is probably hours worked.
>
> It does not matter whether these tests are scheduled during your employee's normal working hours or during his or her non-working hours. Time spent in these activities is time during which the employee's freedom of movement is restricted for the purpose of serving your business and during which he or she is subject to your discretion and control.

As applied to COVID-19 vaccination, testing, and screening, it remains an open question whether these activities are "for the purpose of serving [the employer's] business," although for activities engaged in away from the workplace on an off day, it would be difficult to argue that the employee is "subject to [the employer's] discretion and control."

The Bottom Line

The compensability of time spent in employer-mandated COVID-19 vaccination, testing, and screening activities outside of regular working hours remains an open question. While the DOL's Q&As on the issue don't have the force of law (and are equivocal at best), it's safe to assume that if the agency investigated a failure to pay for such activities, it would lean toward finding them compensable. Businesses that are risk-averse, or simply want to avoid the possibility of employee complaints and/or a DOL investigation, may elect to pay for the time spent in vaccination, testing, and screening activities. One reasonable approach for testing and screening is to conduct those activities on the employer's premises, during what are otherwise working hours (*e.g.*, the employee reports to work at the "normal" time and proceeds directly to the testing/screening location). In this scenario, the employer is already paying the employee for the time and no additional timekeeping or payroll work is required. Onsite testing also ensures that the test or screen is current, and that the employer will have ready access to the results. Onsite vaccination is not as practical for most employers, although the associated time—even for offsite vaccination—is considerably more limited in the long run. An employer can, for example, require employees to be vaccinated at a site close in proximity to their homes and agree to pay a reasonable fixed amount for each vaccination.

Businesses that decide not to pay overtime-eligible employees for vaccination, testing, or screening outside of regular working hours should be prepared to defend the decision in what may be a case of first impression in their jurisdiction. For many employers, the costs, burdens, and disruptions of defeating a claim for compensation may well exceed the expense of paying for the time in the first instance.

Might the De Minimis Rule Apply?

The *de minimis* doctrine was first articulated by the Supreme Court in its 1946 decision in *Anderson v. Mt. Clemens Pottery Co.*, and later codified at 29 C.F.R. § 785.47. Under that rule, "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." However, as the regulation makes clear, "[t]his rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities." In the cases where courts have found time to be *de minimis* and therefore not compensable, the crucial factors were that the tasks were occasional and somewhat unpredictable, and the time was insubstantial and administratively difficult to record.

In the modern day—when many employees can enter their time remotely using technology that can track to the minute, if not the second—"de minimis" policies are not nearly as common or favored as they were when the "industrial realities" of the workplace made more precise time tracking impractical. That said, the doctrine remains alive and well (consider the Second Circuit's 1995 decision in *Reich v. New York City Transit Authority*). Would it operate to defeat a claim for non-payment of time spent in COVID-related activities? It might, depending on the facts. A temperature check or health questionnaire might take only a few seconds to complete. On the other hand, if the employee can record the time spent in that activity with the press of a thumb on an iPhone, or if the activity takes longer than a few minutes, the justification for applying a *de minimis* policy may be considerably weaker.

Paying for the Time

An employer can, of course, elect to pay employees for their time spent in vaccination, testing, and screening activities. For example, an employer can require employees to record the precise number of hours and minutes spent in such activities and pay for that time. Alternatively, as discussed above, an employer can require employees to engage in such activities at the beginning of their regularly scheduled shift or working hours, and just pay what it would normally pay for the shift or day. An employer could also adopt an exception reporting policy, under which it pays employees a certain fixed dollar amount for such activities in each pay period using a reasonable approximation of how much time the activities should take, and requires employees to report if the activities take longer than expected (so that the employer can determine whether the extra time has any impact on minimum wage or overtime pay obligations).

State Law May Provide a Different Answer

The principles discussed above focus on the FLSA, but state law may well provide a different answer or otherwise render the FLSA analysis moot.

For example, as of March 2021, New York State requires employers to provide up to four hours of paid leave, at the employee's regular rate of pay, for each COVID-19 vaccine injection. The law, codified at Labor Law § 196-c, expires by its terms on December 31, 2022.

The bottom line is that businesses must consider state and local laws, in addition to federal law, when formulating their pay policies for COVID-19 related activities.

Costs/Expenses of Vaccination, Testing, and Screening

Aside from the compensability of time spent in such activities, what about the cost of such activities? Is an employer required, for example, to reimburse an employee for the expense of a COVID-19 test administered by a third party?

Under federal law and the laws of many states (*e.g.*, New York), 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. It is arguable, of course, whether the cost of a COVID-19 test is a work-related expense, but if the employer requires the test, we would expect an employee to argue it is. That said, under federal law and in most states, the requirement to reimburse would only be an issue for employees paid at or close to the minimum wage. In other states, however—California comes to mind—the rules around employee expense reimbursement are more stringent, and must be considered.

One practical consideration is that many employees won't have to pay for a COVID-19 vaccine or test, either because of insurance coverage or free services provided by governmental or community vaccination and testing sites.

A Note on Unionized Employees

Clients with unionized employees should consider the impact of the applicable collective bargaining agreement(s) and federal labor law in determining the compensability of COVID-19 related activities, as well as the permissibility and logistics of requiring such activities in the first instance.

Under the FLSA, time spent in activities that otherwise would be non-compensable "preliminary" or "postliminary" activities may nonetheless be compensable if required by:

> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

29 U.S.C. § 254(b). While it's unlikely that any meaningful past practices exist with respect to COVID-19 related activities, the subject could be ripe for current and future contract negotiations. Employers with a unionized workforce should consult with labor counsel prior to implementing a policy requiring vaccination, testing, or health screening.

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