

HOSPITALITY EMPLOYERS: TOP TIPS TO TAKE YOUR TEAM'S TEMPERATURES

Publication
Jul 2, 2020

Hospitality employers face some of the strictest workplace safety requirements intended to address the COVID-19 pandemic under state, county, and or even city requirements. These include mandates for employee pre-shift symptom checks or even temperature checks. Even where not mandated, many guest service providers chose to adopt these procedures. Such requirements trigger a panoply of workplace legal issues.

EMPLOYEES MAY BE ENTITLED TO PAY FOR SCREENING TIME?

Non-exempt employees may be entitled to wages for time spent waiting for or undergoing temperature or symptom checks. Determining whether this is compensable time depends of analysis of federal, state, or even local laws. The overarching consideration is whether the employee's time spent waiting for and undergoing the symptom or temperature taking is considered "work" under federal or state laws.

Under the federal Fair Labor Standards Act (FLSA), there are **two key questions** to determine whether this time is compensable work time:

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?

Related People



Catharine Morisset

Partner

206.693.5076

Industry Focus

Hospitality

Regarding the first question, the answer is highly fact-specific to the employee's job and even the method of testing. For example, restaurant workers might argue that their primary activity is to serve customers safely and so passing a pre-shift COVID-19 test is "integral and dispensable" to their principal customer-facing duties and must be compensated.

Regarding the second question, the Supreme Court narrowed the definition of compensable preliminary and postliminary activities in 2014's *Integrity Staffing Solutions v. Busk when it found* that post-shift security checks for warehouse workers were not compensable time under the FLSA. The Court explained that only activities that constitute a "principal activity" must be compensated. On the other hand, activities that are "preliminary" or "postliminary" to the workday – like perhaps pre-shift symptom checks for most – need not be compensated. This argument may be even stronger where the time spent in screening is "de minimis," that is, the time spent is insignificant and not practically measured.

While the above suggests there may be arguments that pre-shift screening time is not compensable, employers **must be cautious**. The determination is fact-specific and the potential liability for unpaid wages financially significant. The federal law analysis may not matter depending on your state. Many states have broad definitions of what constitutes compensable time worked. At least two states have reached conclusions contrary to *Busk*. An analysis of state law is crucial before deciding to not pay for screening time or time

STEPS TO ENSURE MEDICAL PRIVACY

Federal guidance provides that employers can conduct temperature or symptom checks during the pandemic without violating the Americans with Disabilities Act (ADA). Yet **employers must take steps** to ensure the screenings are conducted privately and any records, such as mandatory temperature check logs, are maintained as a private medical record separate from personnel files. Your local jurisdiction may have other requirements. California, for example, requires a specific **notice** to employees prior to screening them for temperatures. All employers should consider asking employees to execute a consent to screening form,

which ideally also explains why the employer must, or has chosen to, conduct screenings.

TEMPERATURE TAKERS SHOULD BE TRAINED?

Many local jurisdictions do not allow for employee “self-checks.” Employees who administer temperatures face additional risk and should be guided in how to safely – and lawfully – conduct screenings. If your screeners will come within six feet of those being tested, OSHA recommends that this employee wear personal protective equipment (PPE) consisting of some combination of gloves, a gown, a face mask, and/or a face shield or goggles. PPE must be furnished by the employer.

The CDC also offers alternative non-contact screening procedures that would [not require PPE](#). Your screeners also need instruction on how to complete any required screening logs and how to protect employees’ private medical information. Your screener needs to understand, for example, that lining up all kitchen staff at the beginning of the shift to take their temperatures simultaneously will violate your screening protocols and medical privacy rules.

WHAT IF AN EMPLOYEE FAILS?

Under most current health authority guidance or even local mandates, employees who exhibit a temperature or other recognized [COVID-19 symptoms](#) cannot work and must be sent home. Employers should follow [CDC return to work guidelines](#) to determine how long the employee must remain out of the workplace. If an employee refuses to leave, start first with a collaborative discussion that explains why their departure is necessary and available benefits, such as employer provided paid sick leave. Only where discussions fail should you consider escalating to explaining that they are now trespassing, and you may contact law enforcement to escort them from the premises. A termination in this situation only should be a last resort.

PRACTICAL CONSIDERATIONS

To avoid legal and practical risk, consider:

- Staggering employees’ start times to prevent waiting time (even if likely non-compensable), violations of social

distancing rules, and the temptation to take multiple employee temperatures simultaneously and openly.

- Assigning a manager, rather than a shift lead or co-worker, to conduct the screenings as they may be better equipped to handle employee questions and help avoids co-workers gaining medical information about others.
- Training more than one manager or supervisor on temperature check protocols, even if not needed, to help underscore their importance.
- Even if not required by local law, clear and informative safety procedures that employees acknowledge in writing will not only demonstrate compliance, but also serve as a key employee communication tool.
- Whether it makes sense to communicate your employee-facing testing protocols to guests. It may reassure guests and bolster why you require guests to undergo similar screening.

As with all coronavirus challenges, thoughtful planning is key. Fisher Phillips attorneys are here to help. For further information, contact your Fisher Phillips attorney or any member of our [Hospitality Industry Practice Group](#).

For more information, [contact the author here](#).