Lawsuit Alleges Healthcare Workers Should Be Paid for Mandatory Temperature Checks and Health Screenings

Insights
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A Wisconsin-based healthcare worker recently filed a proposed collective and class action complaint against an assisted living facility alleging it required all employees to undergo mandatory temperature checks and complete a COVID-19 symptom checklist before being allowed to clock in for the day, resulting in unpaid overtime. In addition to individual claims that her manager instructed her to perform off-the-clock work, she also alleges collective and class action claims that her employer improperly deducted daily 30-minute meal breaks from employees' work times when, in fact, they were not actually relieved from their job duties. What can employers learn from this pandemic-related wage and hour action?

Case Highlights

Charletta Harwell-Payne worked as a certified nursing assistant (CNA) at Cudahy Place Senior Living, located right outside Milwaukee, Wisconsin. Harwell-Payne alleges that in the spring of 2020, when the coronavirus pandemic began, her employer implemented at each of its Wisconsin facilities a new policy of mandatory temperature checks and completion of a symptom checklist before workers can punch-in for their shifts.

Harwell-Payne asserted in her class and collective action complaint filed under the Fair Labor Standards Act (FLSA) and related Wisconsin law that demonstrating to her employer that she likely was not infected with COVID-19 through the completion of the screening checklist and body temperature check was "integral and indispensable" to her principal activity of providing care to residents in a manner that safeguarded and protected their health and welfare, so that therefore "she could not perform her patient care responsibilities if there was a material risk she could transmit COVID-19 to her patients." She alleged the time spent undergoing the health screenings constituted "hours worked" under the FLSA and that she and other employees should have been paid for their time. Harwell-Payne also claims that her employer uses a rounding system, whereby employees' times are rounded to the nearest quarter hour. Thus, had the employees been allowed to clock in before the temperature check and symptom screening, this would have resulted in an additional 15 minutes of work per day and more weekly overtime pay.

Cudahy Place asked the court to dismiss Harwell-Payne's class and collective claims arguing that temperature checks and health questionnaires are not intrinsic elements of the principal activities of

the facility, and that time spent checking temperatures and completing the health questionnaire is *de minimis*. The motion is still pending before the court.

What Does the Law Say?

In 2014, the U.S. Supreme Court found that preliminary or postliminary (pre-shift or post-shift) activity was compensable under the FLSA if it was integral and indispensable to the principal activities that an employee is employed to perform. In addition, the *Integrity Staffing Solutions, Inc. v. Busk* decision held that such integral and indispensable activities must be an intrinsic element that the employee cannot dispense with if they were to perform his or her principal activities.

In establishing the definition of "intrinsic," the Supreme Court emphasized that an activity will not be considered a "principal activity" solely because an employer *requires* the activity. Therefore, the *Integrity Staffing* Court found that the time warehouse workers spent waiting to undergo and actually undergoing required security screenings at the ends of their shifts were not compensable postliminary activities because they were not the principal activity they were employed to perform (retrieving products from warehouse shelves and packaging those products for shipment).

In its motion to dismiss, Cudahy Place relies on *Integrity Staffing* to argue the temperature checks and symptom questionnaires are not integral and indispensable because they are not intrinsic to Plaintiff's principal activities. As a CNA, Harwell-Payne's primary duty was to provide care for the facility residents. Since the temperature checks were not instituted until May 2020, she was capable of performing (and historically did so) her job duties without completing a temperature check and symptom questionnaire.

Harwell-Payne opposes the motion to dismiss, of course. In her response brief, she cites to regulations and guidance from the Wisconsin Department of Health Services prohibiting employees carrying communicable diseases from working at nursing home facilities (a pre-COVID regulation) and advising all nursing homes to actively screen anyone entering the facility, whether staff or visitor, for fever and symptoms of COVID-19 or other known exposure to the disease (post-COVID guidance). She further asserts Wisconsin law imposes an affirmative obligation upon nursing home employees to protect the health and welfare of its residents. In other words, Harwell-Payne maintains she had to undergo the COVID screening protocols to demonstrate her eligibility to work at Cudahy Place (such as donning sanitary clothing to work at a food processing plant).

Harwell-Payne also relies on a 2020 case from the 10th Circuit Court of Appeals that found security screenings of prison officers were integral and indispensable to their principal activity of providing security for the prison, because the screenings increased the likelihood that weapons and other contraband would be eliminated from the prison. Thus, in that case, screening was an intrinsic element of the officers' work because the screening and the officers' work serve the same goal — to maintain a safe and secure prison environment. Harwell-Payne claims her situation is indistinguishable from the *Aguilar* case: the health screenings and temperature checks were

designed to keep COVID-19 out of the workplace, just like the *Aguilar* security screenings were intended to keep weapons and other contraband out of a prison.

Cudahy Place also asserts Harwell-Payne's collective and class claims should be dismissed because the time spent checking temperatures and completing the health questionnaires is *de minimis*. Cudahy Place cites to several appellate courts that have found daily periods of approximately 10 minutes or less to be *de minimis*, even if otherwise compensable.

Harwell-Payne responds that the defense is not available when it was administratively possible for an employer to count the amount of time, however small, that the employee spent performing compensable activities. She asserts Cudahy Place simply could have moved the time clock to the area where employees would undergo the health screening. Moreover, given the employer's rounding policy, Harwell-Payne alleges that even if her screen started at 8:07 a.m. and only took one minute (such that she clocked in at 8:08), she was credited with a start time of 8:15 a.m. Had she clocked in at 8:07 a.m. when her health screen began, her start time would have been 8:00 a.m. Thus, the 15-minute difference is not *de minimis*.

What Should Employers Do?

This is definitely a case to keep your eye on, especially for healthcare employers who not only have a duty to protect their own employees but also their patients. Where a non-healthcare employer may have an easier time arguing that such screenings are not a principal activity its employees were hired to perform and not integral and indispensable to those activities, the argument becomes more difficult for healthcare employees who were hired to treat sick or vulnerable patients. Moreover, all employers may have a difficult time avoiding compensating employees for COVID screenings where such checks are a mandatory state requirement to enter the workplace.

As we previously recommended, the safest approach would be to err on the side of caution and compensate employees for time spent in a COVID screening process (both waiting and undergoing the screening). Thus, you should consult with your counsel to determine whether implementing a system where employees can clock-in or otherwise document their time immediately upon entering the waiting line for screening is workable and necessary in your situation.

We will keep you updated on any further developments in this case or Department of Labor guidance on the subject. For further information about COVID-19-related litigation being filed across the country, you can visit our COVID-19 Employment Litigation Tracker. Our COVID-19 Employment Litigation and Class & Collective Actions section also has a listing of our litigation-related alerts and team members handling these types of cases.

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. You can

also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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

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Megan Reese U'Sellis
Partner
502.561.3963
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