

Wages, COVID-19 Tests Pose Hurdles As Employers Reopen

By **Vin Gurrieri**

Law360 (May 4, 2020, 9:40 PM EDT) -- As states begin to allow businesses to unlock their doors, experts say that complying with wage-and-hour laws and administering COVID-19 tests on workers are two areas in which employers rushing to put the pandemic behind them are likely to stumble out of the gate.

Over the past week, several states have tentatively let segments of their economies reopen after weeks of restrictions that were aimed at slowing the spread of COVID-19. Those constraints forced many businesses to close or shift to telework, and left tens of millions of workers who weren't deemed essential unemployed or working off-site.

But as businesses start ramping their operations back up, management-side attorneys caution that there are potential mistakes employers might make if they try to jump-start their businesses without adequate planning.

"The challenges that employers face vary by the industry in which they operate, the nature of their business, their location geographically [and] the nature of their workforce," said David Garland, chair of Epstein Becker Green's national employment, labor and workforce management steering committee. "So much of what [employers] are focused on is dependent on those particular factors."

Changes to Exempt Status

While one of the primary issues employers faced as millions of workers shifted to telework was figuring out how to accurately record hourly workers' time for pay purposes, the return of people to physical work locations also presents challenges involving salaried workers.

"There are a whole host of compensation and compensability issues that need to be evaluated as individuals are returning," Garland said, mentioning workers' exempt or nonexempt status and the content of any employment contracts as being among the things employers need to be mindful about.

Although the Fair Labor Standards Act guarantees that most workers will receive minimum wages and overtime pay, some employees can be classified as exempt from those requirements for a variety of reasons.

As businesses restart after the pandemic, customers and even some workers who are sick or otherwise impacted by the virus could be slow to return.

But if so-called executive employees — those who primarily perform managerial duties and are exempt from overtime under the FLSA — are called upon to perform nonexempt work due to staffing issues, their exempt status may be endangered, according to Jeffrey Brecher, leader of Jackson Lewis PC's wage and hour practice.

"There's been a ton of litigation relating to managers — particularly in retail and also in hospitality — where the plaintiffs are alleging that the managers are spending too much time performing nonexempt work and therefore they're not truly managers," he said. "While under federal law while there's no percentage requirement ... you could see a situation where because they're short-staffed now, the manager now is actually spending 90% of their time doing the nonexempt work and that could jeopardize the exemption."

Brecher also noted that exempt employees could lose that status if their employer decides to no longer pay them on a salary basis and instead lets their pay fluctuate for a while based on how well business is going. He noted that most states, including New York, require that notice be given to workers if they are reclassified as nonexempt.

"It's fine to have a salary reduction — which many employers have done — and then later when the crisis is over, they increase the salary. But what the employer can't do is change the salary week-to-week based on the number of hours that the exempt employee is working," Brecher said. "And you could see maybe due to customer demand, employers who are not familiar with this might start adjusting employees' pay regularly."

Commission, Sales Exemptions May Be Lost

Another area where wage and hour problems could arise involves workers covered under the FLSA Section 7(i) overtime exemption for employees of retail or service establishments who get paid mostly on commission.

According to Brecher, employees covered under that provision must have at least half of their pay come from commissions, which could be a tough benchmark to clear if sales drop because of the havoc COVID-19 has wrought on the economy.

Another exemption under the FLSA carves out "outside sales employees" from the law's requirements. To qualify, an employee must engage in sales as their primary job responsibility and must "customarily" engage in that activity "away" from the employer's place of business, according to a U.S. Department of Labor fact sheet explaining the exemption.

However, if the worker used a fixed location, such as their home, as their headquarters or to make sales calls, that location is considered an employer's place of business even if the employer doesn't own or rent the property, according to the DOL.

Because of issues posed by COVID-19 and travel restrictions, Brecher said a lot of sales work might be done either from an individual's house or from the employer's workplace over virtual communications platforms like Zoom.

"And if that occurs, they may no longer qualify for the exemption," Brecher said. "They're not going to be outside running around meeting clients. Those meetings are going to be very circumscribed probably, and I don't think likely a Zoom meeting would probably qualify as 'outside.'"

Morgan Lewis & Bockius LLP partner Sarah Bouchard said the "best-case scenario" would be for people who work in those positions to not be working more than 40 hours per week "and implicating overtime requirements."

COVID-19 Testing Might Be Compensable

More issues could arise involving the emerging practice of testing employees for COVID-19. One thing employers can do is conduct temperature screenings, which many employers that have operated as "essential businesses" have already started doing. But businesses can also use COVID-19 tests that determine if a person is positive for the coronavirus, a test to which the U.S. Equal Employment Opportunity Commission recently gave its blessing.

Bouchard said businesses have been inquiring about whether temperature screenings constitute paid time, noting that the answer "really does vary by jurisdiction."

She said the issue is akin to questions of whether workers who undergo security screenings or bag checks on their way out of work should be paid for that time, an issue that has been the subject of several cases in recent years.

A seminal decision was issued by the U.S. Supreme Court in 2014 in a case called *Integrity Staffing Solutions v. Busk*. The justices held in *Busk* that temporary workers in an Amazon warehouse weren't owed pay for waiting on security lines under the Portal-to-Portal Act, which amended the FLSA to require pay only for tasks that are "integral and indispensable" to workers' main duties.

However, in 2018, the Sixth Circuit ruled that time spent undergoing security checks is likely compensable under Arizona and Nevada state law, noting that neither state had incorporated the Portal-to-Portal Act in their state statutes. The Supreme Court last year refused to hear the case.

"We are looking at [COVID-19 tests] as being security screenings under the FLSA, and in those states that follow the Portal-to-Portal Act, that's not considered compensable time," Bouchard said, while also cautioning that "there is more risk in not paying those people for the time going through those screens" in states that don't apply the Portal-to-Portal Act.

Bouchard said her firm is counseling employers to take steps to "minimize the disruption to the employee going through those temperature checks" to avoid compensable time issues, such as by staggering the times workers report or having people take their own temperature with their own thermometers to speed up the process — if that is in line with orders from state and local officials.

"I believe there's still arguments that could be made [that it's not compensable time], but you need to weigh that risk against the current state of the law in those jurisdictions," Bouchard said.

Tests Present Assortment of Obstacles

Besides the question of whether workers should be paid for going through temperature screens or COVID-19 tests, there are other potential problems that await employers when it comes to trying to identify sick workers.

"We're still a bit in the Wild West when it comes to testing," said Sharon Perley Masling of Morgan Lewis, who served for eight years as chief of staff for former EEOC commissioner Chai Feldblum.

"I think employers are still trying to figure out how they would conduct testing, who would conduct tests, which tests they would use, how they would access it, where the tests would be done and when they would actually conduct the test."

Among the concerns, Masling noted that a COVID-19 diagnostic test — a procedure she called "invasive" — only tells employers whether a person is infected at that moment and doesn't mean an individual won't catch the coronavirus later.

"A person could come to work, test negative, go to the grocery store that evening and acquire the virus, go to work the next day and expose other people," Masling said. "So I think employers are still grappling with the many, many issues of how to do tests and when."

Denise Merna Dadika, co-leader of Epstein Becker Green's health employment and labor industry group, raised a similar concern about COVID-19 testing. Employers considering such tests should be mindful of several things, including making sure they can obtain sufficient testing, making sure those who are providing the test are certified to do it, and ensuring that the tests are manufactured in a way that meets standards set by different regulatory agencies, she said.

"Then, if they're going to [use] the test, they have to ask themselves, 'What will the test show?' [and] 'How fruitful will it be?'" Dadika said.

Meanwhile, if businesses have vendors whose workers regularly come to a worksite, Dadika said it behooves employers to contact those vendors to ask that they adhere to testing guidelines for that worksite. She said that puts the onus on the vendor "to do the testing or the temperature screening" and commit to "not let any of their employees enter [a] workspace if they have either failed the test ... or they're symptomatic."

Masling said her firm has been recommending to clients that they lean toward giving workers diagnostic tests when a person shows symptoms of COVID-19 or flunks a temperature screening, as opposed to using the test as a screening tool. She added that another way employers can use the tests is by randomly testing segments of their workforce on a regular basis "to determine whether or not there are hotspots within the workplace."

"These tests are invasive; it's not a simple blood test, it's a nasal swab and doing these on a daily basis for lots and lots of employees is a real logistical challenge," Masling said.

--Editing by Kelly Duncan and Adam LoBelia.