

## Gavel to Gavel: Pay implications of COVID-19 decisions

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Many private employers are grappling with evolving safety guidance as community transmission levels of COVID-19 change. The possible effect of guidance on employee pay is among factors to consider.

The U.S. Department of Labor's Wage and Hour Division has published some direction, "COVID-19 and the Fair Labor Standards Act Questions and Answers." The Fair Labor Standards Act is a law requiring non-exempt employees to be paid a minimum wage and overtime for hours worked in excess of 40 in a defined workweek.

Non-exempt employees are only entitled to be paid for hours actually worked. Thus, employees, particularly those teleworking, must accurately record hours. The DOL encourages employers to work with remote employees to establish hours of work and recording procedures. Remote

or teleworking employees should also understand what expenses, if any, will be covered by their employer. As the DOL explains, an employer is not responsible for reimbursing an employee's expenses unless those expenses reduce the employee's wages below minimum wage.

For those employers considering other safety protocols, such as COVID-19 testing, the DOL makes clear that employers are required to pay for time spent "receiving medical attention" at the employer's direction and during regular work hours. Notably, the question of whether an employer must pay an employee for obtaining a COVID-19 test outside work hours is more complicated. The DOL explains, "COVID-19 testing may be compensable because the testing is necessary for an employee to perform (their) job safely and effectively. The testing will be compensable if it is integral and indispensable to (their) work during the pandemic."

Similarly, if other safety procedures are required and are integral and indispensable to an employee's work, such as putting on personal protective equipment, an employee's time spent complying counts as hours worked. By way of example, employees in the health care industry who must take time to don PPE would need to be paid for that time.

If an employer is considering a vaccine incentive program, they must consider how the structure of such a program might affect an employee's overtime rate of pay. The DOL has stated, an "employer can make payments that are gifts or in the nature of gifts for a special occasion (e.g. vaccination for COVID-19) that may be excluded from your regular rate of pay," the rate at which overtime pay is calculated.

As the above discussion suggests, many decisions around COVID-19 protocols have wage-and-hour implications that employers must consider.