

Baird Holm Labor Law Forum Webinar Series

Session Two

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Working During the Pandemic: A New Twist on Old Wage and Hour Issues

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What we'll cover...



- Issues affecting non-exempt employees
 - Counting all hours worked
 - Automatic meal period deductions
 - What state law applies?
 - Compensability of health screenings
 - Calculating the regular rate
- Issues affecting exempt employees
 - Changes in duties
 - Salary reductions/deductions

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All Work Must Be Counted

- All work suffered or permitted
- Time spent on connectivity and other technical issues
- Work done before or after hours
- DOL guidance: set up process for employees to report time worked that wasn't scheduled
 - Work done before/after hours
 - Time spent on connectivity and other technical issues



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Beware Automatic Deductions

- Automatic deductions for meal breaks
- Tough to monitor when employees work from home

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What Law Applies?

- Where are your employees working?
- Employees who live in one state and used to commute to another: where are they working now?
- Vacation homes?
- Income taxes; labor laws



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Need to Pay for Equipment?

- Applicable state law may determine legal obligations
- Do you need to pay for work equipment teleworkers utilize?
 - High speed internet; laptop with webcam



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Is Covid-19 Screening Compensable?



- A number of states require or recommend daily health and/or temperature screenings
- Is this time compensable?
- Depends on the jurisdiction
 - Federal law may differ from state law
- And it may depend on the job

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Under the FLSA: *Busk v. Integrity Staffing Solutions* (US 2014)

- Warehouse workers undergo security screenings at end of shift
- FLSA and the Portal to Portal Act
- Integral and indispensable?
- Preliminary or postliminary?
- A good ruling for employers



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Recent cases applying *Busk*

- *Estorga v Santa Clara Transportation Auth.* (N.D. Cal. 2019) (bus drivers)
 - Time traveling to start and end of bus runs are not compensable
 - Time spent between runs is compensable
- *Llorca v. Collier County Sheriff* (11th Cir. 2018) (deputies)
 - Donning and doffing police gear at home is not compensable
 - Driving to work and monitoring roads for traffic violations in marked cars is not compensable
- *Serna v Rio Arriba County* (D. N.M. 2018) (correctional officers)
 - “15 minute” pre-shift brief is compensable
 - Knowing about prisoner conditions and behavior is a integral and indispensable to job

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Applying *Busk* To Health Screenings

- How closely are the screenings linked to employee's primary work?
- If the screenings were eliminated, would the employee still be able to perform work? (e.g., healthcare worker vs. accountant)

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Factors that may make screenings compensable

- Health care workers or similar employees?
- In states where screenings are required?
- States that do not follow *Busk*

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Recommendations

- Streamline as much as possible
- Consider paying for time
- Get documentation and employee acknowledgment

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Inclusion of new pay elements in the regular rate

- Non-discretionary bonuses
- Payments for coming into the office
- Incentive bonuses to motivate teleworkers

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Recent Amendment to Regulations on Regular Rate

- Excludable from regular rate:
 - Cost of wellness program
 - Gym access and fitness classes
 - Employee discounts
 - Payments for unused paid leave
 - Reimbursed expenses not “solely” for employee’s benefit
 - Reimbursed travel expenses

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Exempt employees performing nonexempt work

- Duties test
 - What is their “primary duty”?
- How much is too much?



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Are Outside Salespeople Still Exempt?

- To be exempt, they have to be:
 - Making sales
 - Customarily and regularly away from employer’s place of business
- What happens if outside sales come to a halt?



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Reducing Salaries of Exempt Employees

- Cannot violate salary basis test
 - No deductions for “absences occasioned by the employer or by the operating requirements of the business”
 - No deductions for “time when work is not available” if the employees is “ready, willing and able to work”



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Conflicting positions

- *Dingwall v. Friedman Fisher Assoc.* (N.D.N.Y.)
 - Reduced workweeks from 5 days to 4 with 20% salary reduction
 - Court found was a deduction
- DOL 2019 Fact Sheet #70
 - May prospectively reduce salary, provided the change is bona fide and not used to evade salary basis requirement
 - Must reflect long term business needs

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Recommendations



- Do not reduce salary for current pay period
- Determine amount in advance
- In communications, do not link the change to quality or quantity of work
- Make clear that salary is to compensate for all hours worked in any workweek
- Give sufficient written notice (in Iowa, at least one pay period prior to initiation of change)
- Once reduced, do not continue to adjust
- Wait to restore until it can be a long-term change

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Other Improper Deductions

- Partial-day absences
- For loss or damage to employer's property
- Deductions for full-day absences where absence was due to inclement weather or occasioned by the employer
- Deductions for full-day absences for jury duty
- Deductions when the employee is ready, willing, and able to work but no work is available

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Effect of Improper Deductions

- “Actual Practice”?
 - # of improper deductions
 - Time period
 - # and geographic location of employees and managers
 - Clearly communicated policy
- If actual practice, exemption lost during time period for employees in same job classification working for same managers

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Safe Harbor

- Clearly communicated policy prohibiting improper deductions and including a complaint mechanism
- Reimburses employees for any improper deductions
- Makes a good faith commitment to comply in the future
- UNLESS, continues improper deductions after receiving employee complaints

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And don't forget the new salary *threshold*

- Executive, administrative, and professional exemptions:
 - \$684 a week (\$35,568 annually)
 - 10% nondiscretionary payments allowed
 - Catch-up payments
- HCE exemption:
 - \$107,432, including at least \$684 a week paid on a salary or fee basis
- Effective January 1, 2020

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Questions?

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