DORSEY
DORSEY + WHITNEY LLP

COVID-19 Safety Precautions Expose American Employers to New Wage and Hour Claims

April 28, 2021 – Cross-Border Counselor
by Aaron Goldstein and Alyson Dieckman

Two former employees of Cresco Labs have filed a collective and class action complaint in Illinois federal court, alleging that their employer failed to compensate its employees for time spent putting on and taking off personal protective equipment ("PPE"). Similarly, two employees of Walmart, Inc. filed a class and collective action complaint in California federal court alleging that the company failed to compensate employees for time spent completing pre-shift health screenings.

Canadian employers with U.S.-based operations should take special care to compensate all non-exempt employees for time spent donning and doffing required PPE and participating in mandatory pre-shift health screenings. Under the Fair Labor Standards Act ("FLSA") and state and hour laws, employees must be compensated for any activities that are integral to their principal work activities. Time spent putting on and taking off PPE and completing mandatory pre-shift health screenings is likely compensable, and employers should treat it as time worked.

I. Employers Must Compensate Employees for Time Spent Completing Donning and Doffing PPE and Mandatory Pre-Shift Health Screenings

Like many employers facing the COVID-19 pandemic, both Cresco Labs and Walmart require employees to wear PPE during their shifts and complete pre-shift health screenings. While these safety precautions are appropriate to stop the spread of COVID-19 in the workplace, employees must be compensated for their time completing mandatory safety activities.

According to the Cresco Labs complaint, employees had to report to work twelve to sixteen minutes early to complete mandatory health screenings and put on company-issued PPE. The complaint also alleges that employees spent three to five minutes after their shifts removing the PPE, including masks, hairnets, arm sleeves, gloves, scrubs, and protective shoes. While the company allowed employees to clock in five minutes early to complete the health screening and put on their PPE, the plaintiffs allege that it

Related People

- Aaron Goldstein

Related Capabilities

- Canada Cross-Border Transactions

took longer than five minutes to complete the pre-shift activities. The complaint also alleges that the company rounds employee punches to their scheduled start times, effectively eliminating their pre-shift pay. Because employees were generally scheduled to work forty hours per week, the plaintiffs also allege failure to pay overtime as required by the FLSA.

According to the complaint filed in the Walmart case, “employees are required to arrive at Walmart at least 30 minutes prior to the start of their scheduled shift so that they can complete the COVID-19 screening with enough time to clock in by the start of their scheduled shift.” The complaint alleges that employees lined up to have their temperatures taken and complete a symptom and exposure screening. Employees who passed the screening received stickers and PPE before being permitted to clock in at the other end of the store. Employees who failed the screening would be subject to a second examination before clocking in. According to the complaint, the whole process would take ten to fifteen minutes, or longer if there was a line.

Generally, employers are required to compensate non-exempt employees for all compensable time, which includes time spent on all activities integral to their work activities. Employees who are required to complete pre-shift health screenings and put on company-issued PPE must be compensated for that time because these activities are necessary for the employee to begin their shift. Likewise, employees who are required to self-report symptoms before arriving to their worksite may be entitled to pay for the time between reporting and clocking in.

II. The Dangers of Non-Compliance

Non-compliance with wage and hour laws can be dangerous for employers because it may lead to costly litigation. The FLSA contains a procedure for class certification by which a single aggrieved employee may seek to represent all similarly situated employees in a class action.

Under the FLSA, employees may collect damages equal to their unpaid wages. In addition to back pay, employees are entitled to “liquidated damages” equal to the damages for unpaid wages if the employer’s violations are found to be willful. Essentially, employees can recover double damages for unpaid wages under the FLSA. The FLSA also includes a fee-shifting provision, which requires the employer to pay the prevailing plaintiff’s attorneys’ fees. Many state laws impose additional penalties for violation of wage and hour laws.

Canadian employers with employees based in the U.S. should review their COVID-19 safety policies to confirm their compliance with the FLSA and applicable state laws. Specifically, employers should be certain that employees are compensated for all time spent complying with COVID-19 safety protocols before and after their scheduled shifts.