

Health Checks, Worker Status Could Dominate COVID Year 3

By **Daniela Porat**

Law360 (March 10, 2022, 7:35 PM EST) -- COVID-19 has upended wage and hour law, and as the world enters the third year of the pandemic, legal questions around health screening compensability will continue to evolve, and new litigation concerning classification of remote workers and expense reimbursement will likely emerge, attorneys said.



Cases over the compensability of COVID-19 health screenings, such as fever checks, have raised legal questions that remain up in the air, attorneys said. (AP Photo/Elaine Thompson)

March 11 marks the second anniversary of the World Health Organization declaring COVID-19 a global pandemic. The **questions thrust upon employers and employees** in those early days of the pandemic — including those concerning the compensability of fever checks, business closures and **vaccine-or-test mandates** — still reverberate today, even as the contours of the pandemic have changed.

Here, Law360 explores the cases and issues to keep an eye on.

Screening Compensability Unanswered

Litigation concerning COVID-19 health screenings has focused on whether responding to questionnaires or undergoing fever checks counts as hours worked. Although **screenings these days**, if they are done at all, may consist of rapid antigen tests instead, the legal questions raised by cases filed early in the

pandemic remain up in the air, attorneys said.

Whether a pre- or post-shift activity is compensable partially hinges on whether the activity is an "integral and indispensable" part of a worker's main job duties, a standard established under the Fair Labor Standards Act as amended by the Portal-to-Portal Act of 1947 and interpreted by the U.S. Supreme Court.

In one such lawsuit, health care workers at Cudahy Place Senior Living LLC sued their employer and its owner in Wisconsin federal court for alleged meal break violations and unpaid wages stemming from time spent undergoing employer-mandated fever checks and answering health checklists.

The workers argued that the screenings should be compensable because such checks were indispensable to their work "providing care to the defendants' residents that safeguarded and protected their health and welfare," according to a second amended complaint filed in December 2021.

Amazon **has faced similar challenges**, including a case in New Jersey federal court where U.S. Magistrate Judge Tonianne J. Bongiovanni granted **warehouse workers' request** to amend their security check suit to include claims for COVID-19 screenings.

Judge Bongiovanni said that "it is clear that the mandatory pre-shift COVID-19 screenings are 'controlled or required by the employer,'" according to a March 2021 opinion.

David James, a shareholder at management-side firm Nilan Johnson Lewis PA, said that opinion in Diane Vaccaro et al. v. Amazon.com.dedc LLC is interesting because the court determined that the screenings were required by the employer despite the fact that a New Jersey executive order from October 2020 mandated daily health screenings of employees.

"I think there's a good argument [that] the screenings required by law are not primarily for the benefit of the employer," he said.

That is one of the key unanswered issues around screening, said Rafael Nendel-Flores, a member at management-side firm Clark Hill PLC.

"Is it hours worked when the time spent is mandated by the government?" he said. "Can that really be hours worked when they're complying with a regulatory mandate?"

Nendel-Flores pointed to a Ninth Circuit decision in **Cazares v. Host International Inc.**, which found that a worker for the Admirals Club in Los Angeles International Airport **did not need to be compensated for time spent** in a federally mandated Transportation Safety Administration security check.

COVID-19 screenings may fall somewhere in the middle, Nendel-Flores said, because while some might be government-mandated, it is a private employer, not an agency like the Centers for Disease Control and Prevention, conducting the actual screening.

Sally Abrahamson, a partner at worker-side firm Werman Salas PC, said it should be clear that screenings in a health care setting are integral and indispensable to a worker's job, but that logic should also extend to other places of work amid a pandemic.

"Amazon has done phenomenally well during COVID," she said. "The fact that they're going to nickel-and-dime workers to [make] sure that they aren't having COVID outbreaks in warehouses is really disturbing to me."

These screening issues might ultimately have a "shelf life," and in a year COVID-19 screening issues will be a thing of the past, said Ellen Kearns, wage and hour practice group co-chair at management-side firm Constangy Brooks Smith & Prophete LLP.

What's important, Kearns said, is when the screening activity occurs in the course of the workday, where it happens and whether it's job-related.

"I think those concepts are going to outlast this COVID situation," she said.

Misclassification, Reimbursement Suits in the Future?

The big COVID-19-related wage and hour issue on the horizon is the misclassification of remote workers

as independent contractors and the misapplication of the correct wage and hour laws, said Mark Hanna, a founding partner of worker-side firm Murphy Anderson PLLC.

"Remote work is here to stay and employers haven't thought through what it means to have employees all over the country with different wages and hour laws that apply," he said.

Abrahamson said she is concerned that employers will argue that they don't have much control over the people working from home, which could lead to misclassification.

"I think the optics of working from home may be for courts to weigh that in favor of finding that people are properly classified as independent contractors because somehow working from home then means you have a lot more discretion," she said. "I am worried about how that's going to evolve."

Other areas of potential future litigation in the age of work-from-home may deal with off-the-clock work and the risk of not properly reimbursing workers for work-related expenses, particularly in states with more stringent reimbursement statutes, James said.

Even in jurisdictions that only fall under the Fair Labor Standards Act, employers should be mindful that expenses cannot bring a worker below the minimum wage, Kearns said.

These remote work issues, however, may not lend themselves to collective or class actions, Nendel-Flores said, because they might turn on very individualized questions and there just might not be enough people to comprise a class of, for example, workers who relocated to California during the pandemic and became subject to its laws.

From a big-picture perspective, cases like those concerning health screenings might be easier to bring, he said.

"In many ways, it's really a legal issue, not a factual issue, because there's no dispute that people were subject to the screenings," he said. "Whereas with the remote work, you can file a class action on behalf of everybody who worked remotely because of COVID, but then after that point, then you get into individualized questions as to who actually did work ostensibly before they were clocked in and after they were clocked out."

COVID-19 Layoff Case Law Is Developing

In March and April 2020, businesses across the country shut their doors for what many believed would be a temporary period and laid off workers.

Since those layoffs happened at the pandemic's outset, it means there is some case law on questions that emerged concerning the Worker Adjustment and Retraining Notification Act of 1988, said Nilan Johnson's James.

The WARN Act requires employers with 100 or more employees to provide 60-day calendar notice of a mass layoff or plant closure, except in unforeseen circumstances such as a natural disaster.

An interesting question before the courts now is whether COVID-19 is a natural disaster for purposes of the WARN Act, James said.

For example, in a case involving layoffs at oil company US Well Services Inc., a Texas federal court granted workers' request for an interlocutory appeal on the question of whether the pandemic constitutes a natural disaster.

"Does the COVID pandemic fit within the natural disaster exception or does it fit within the unforeseen business circumstances exception or not? And it certainly feels like it ought to," James said. "The courts might have agreed on sort of a visceral level. ... But they weren't willing to dismiss the case on that basis."

--Editing by Abbie Sarfo.