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COVID-19's Impact on Wage and Hour Practices

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At the close of 2019, the United States Centers for Disease Control and Prevention (CDC) learned that a new virus surfaced in another country. As cases began emerging across the United States in early 2020, federal and state agencies issued sweeping emergency orders. These included numerous stay-at-home orders for all nonessential workers as state governors recognized the health and safety risks to the public of continuing with "business-as-usual." Congress also passed pandemic response legislation in recognition of the dire economic straits faced by residents, businesses, and state and local governments. Throughout the course of the pandemic, employers and employees saw, and continue to see, rapid changes to workplace policies and procedures that have created fertile soil for new disputes about fair compensation for work in the age of COVID-19. While vaccination is providing employers the

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opportunity to return the workplace to some normalcy, the wage and hour issues that revealed themselves during the pandemic are likely to continue as employees expect, and the marketplace demands, flexibility for workers to perform at least part of their work remotely.

This paper explores the challenges created by COVID-19 as federal pandemic laws and adaptive work practices interact with employer obligations under the Fair Labor Standards Act (FSLA).[1] The first section discusses the start and end of certain COVID-19-related workplace protections and their continuing impact on businesses and employees. The second section analyzes potential wage and hour violations lurking in the evolving pandemic workplace.

I. Federal Pandemic Response Legislation

In response to the pandemic, the federal government enacted several stimulus laws in 2020. These laws provided mandates to employers on how to handle paid sick and family leave. In addition, they offered incentives to businesses that wished to keep their employees on the payroll during temporary closures. They also provided loans to keep small businesses viable while some or all of their employees and customers were ill or under government lockdown orders.

A. The Coronavirus Preparedness and Response Supplemental Appropriations Act

On March 4, 2020, Congress enacted the Coronavirus Preparedness and Response Supplemental Appropriations Act.[2] This legislation dedicated $8.3 billion in emergency funding for federal agencies to respond to the outbreak, largely focused on public health measures such as vaccine development and funding for medical supplies. It also included the first wave of small business loans funding.

B. The Families First Coronavirus Response Act and the Emergency Paid Sick Leave Act

Two weeks later, as shutdowns across states had begun in earnest and a national emergency was declared, Congress enacted the Families First Coronavirus Response

[1] Fair Labor Standards Act, 29 U.S.C. 201 *et seq*.

[2] Coronavirus Preparedness and Response Supplemental Appropriations Act (H.R. 6074), https://www.congress.gov/bill/116th-congress/house-bill/6074 (last visited 4/26/21).

Act on March 18, 2020.[3] At $104 billion, it provided roughly twelve times more monetary aid than the March 4, 2020 law. The FFCRA became effective on April 1, 2020 and guaranteed free COVID-19 testing and expanded unemployment insurance, food security initiatives, and Medicaid funding. It also established paid leave for time off related to the coronavirus, the most significant change to impact the FLSA in the wake of COVID-19 to date.

The FFCRA created the Emergency Paid Sick Leave Act (EPSLA), which modified the FLSA. Although the protections provided under the FFCRA/EPSLA expired on December 31, 2020, practitioners can benefit from an understanding of its provisions. This is because workers are still eligible to bring valid claims for violations that occurred prior to the Act's expiration. As is true for other FLSA violations, there is a statute of limitations of two years from the date of the violation and three years if the employee can establish the violation was willful. The fact that the FFCRA is now expired does not preclude workers from pursuing these claims in court or from filing a claim with the DOL if the violations occurred while the Act was in effect.[4]

The EPSLA provided a ten-day paid sick leave right for employees of businesses employing fewer than 500 workers. Employers with fewer than fifty employees were permitted to exempt employees if they made a designation that compliance with this law would jeopardize their businesses. Under FFCRA section 5102, EPSLA covered employees who were unable to work (or telework) because they: were under a government quarantine order; were self-quarantining at the advice of a health care provider; had symptoms of COVID-19 and were seeking diagnosis; were caring for an individual under a government or health care provider quarantine mandate; were caring for a child whose school or place of care was closed or unavailable due to COVID-19; or were experiencing similar conditions defined by the Department of Health and Human Services.[5]

Eligibility for EPSLA benefits depended on whether an employee or someone under their care was experiencing a disruption due to the coronavirus. Under FFCRA

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[3] Families First Coronavirus Response Act (H.R. 6201), https://www.congress.gov/bill/116th-congress/house-bill/6201 (last visited 6/15/2020).

[4] DOL, Families First Coronavirus Response Act: Questions and Answers, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#104 (last visited 4/26/21).

[5] Families First Coronavirus Response Act (H.R. 6201), https://www.congress.gov/bill/116th-congress/house-bill/6201 (last visited 6/15/2020).

section 5110(B), EPSLA provided two paths: for those whose health was impacted by COVID-19 personally, up to 80 hours of paid sick leave for full-time employees at their regular rate of pay, with a cap of $511 per day or $5,110 for a ten-day period; or, for those who were caring for others due to COVID-19, a paid leave at two-thirds of their regular rate of pay, capped at $200 per day or $2,000 for a ten-day period.[6] For part-time employees, this was adjusted to the number of hours an employee worked, on average, during a two-week period.[7] Section 7002 of the FFCRA also extended business tax credits/refunds to fund emergency sick leave for self-employed individuals who were unable to work in the same circumstances as other employees.[8]

Employers had several responsibilities that arose from the EPSLA, including a prohibition on requiring an employee to find a replacement to cover shifts while the employee claiming coverage was out. Additionally, employers could not discharge or discipline an employee for taking emergency paid sick leave under the Act. The EPSLA tied remedies for any resulting unlawful termination or minimum wage violations to the FLSA's remedies.

We saw early enforcement of EPSLA at the DOL. For example, in May 2020, DOL's Wage and Hour Division found that an employer, Discount Tire Centers, failed to pay federally mandated sick leave owed to an employee under EPSLA.[9] The employee had taken a two-week leave because of a physician-ordered quarantine. The DOL ordered Discount Tire Centers to pay the employee's full wages of $2,606, the regular pay rate for the entire sick leave taken.

On September 11, 2020, the DOL announced revisions to the FFCRA. It made these changes in response to an August 3, 2020 district court ruling invalidating portions of the regulation.[10] According to the DOL, the revisions, which were effective September 16, 2020, did the following:

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Press Release, U.S. Dep't of Labor, Southern California Tire Company to Pay Back Wages after Denying Paid Sick Leave to Worker Whose Doctor Ordered Coronavirus Quarantine (Apr. 29, 2020), https://www.dol.gov/newsroom/releases/whd/whd20200429.

[10] *See* New York v. U.S. Dep't of Labor, 477 F. Supp. 3d 1 (S.D.N.Y. 2020), https://ag.ny.gov/sites/default/files/doc_37_opinion.pdf.

- Reaffirm[ed] and provid[ed] additional explanation for the requirement that employees may take FFCRA leave only if work would otherwise be available to them.
- Reaffirm[ed] and provid[ed] additional explanation for the requirement that an employee have employer approval to take FFCRA leave intermittently.
- Revis[ed] the definition of "healthcare provider" to include only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.
- Clarifi[ed] that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable.
- Correct[ed] an inconsistency regarding when employees may be required to provide notice of a need to take expanded family and medical leave to their employers.[11]

These changes helped with confusion that arose for employers trying to follow the new law and aided employees in understanding their rights and obligations.

C. The Coronavirus Aid, Relief, and Economic Security (CARES) Act

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was enacted on March 27, 2020.[12] At $2.2 trillion, CARES represented about half of what Congress had spent in all of 2019 and was the single largest spending bill ever enacted in American history. CARES authorized sending $1,200 to every American making $75,000 a year or less; added $600 per week to unemployment benefit recipients for

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[11] *See* Press Release, U.S. Dep't of Labor, U.S. Department of Labor Revises Regulations to Clarify Paid Leave Requirements under the Families First Coronavirus Response Act (Sept. 11, 2020), https://www.dol.gov/newsroom/releases/whd/whd20200911-2; *see also* DOL, Families First Coronavirus Response Act: Questions and Answers, https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#104 (last visited 4/26/21).

[12] CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

four months; gave $100 billion to hospitals and health providers; made $500 billion of loans or investments available to businesses, states, and municipalities; gave a $32 billion grant to the airline industry; and more. CARES also established the Paycheck Protection Program (PPP) for small businesses to receive forgivable government loans during the shutdown so long as they kept their employees on their payroll for eight weeks. And, under CARES, qualified individuals received favorable tax treatment with respect to coronavirus-related distributions from eligible retirement plans.[13]

D. The Paycheck Protection Program and Health Care Enhancement Act

The Paycheck Protection Program and Health Care Enhancement Act arrived on April 24, 2020.[14] About three-quarters of this $484 billion relief bill was allocated to replenish the exhausted PPP for struggling small businesses and their employees, with the rest going to public health measures such as hospital funding and virus testing.

E. 2021 Consolidated Appropriations Act

The 2021 Consolidated Appropriations Act (CAA) was signed into law by former President Trump and effective on December 27, 2020.[15] The CAA permitted employers to decide whether their companies would provide paid pandemic leave. If so, they would qualify for a payroll tax credit. Thus, the protections from the FFCRA that expired on December 31st were now optional to employers.

F. The American Rescue Plan Act of 2021

The American Rescue Plan Act of 2021 (ARPA) was the latest stimulus package enacted by Congress and was signed into law by President Biden on March 11, 2021.[16] The ARPA, which is also referred to as the "New FFCRA," provides $1.9 trillion in

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[13] I.R.S. Notice 2020-50, I.R.B. 2020-28, 35 (July 6, 2020), https://www.irs.gov/pub/irs-drop/n-20-50.pdf (last visited 5/2/21).

[14] Paycheck Protection Program and Health Care Enhancement Act, Pub. L. 116-139, 134 Stat. 620 (Apr. 24, 2020), https://www.congress.gov/bill/116th-congress/house-bill/266.

[15] Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182 (Dec. 27, 2020), https://www.congress.gov/bill/116th-congress/house-bill/133/text.

[16] American Rescue Plan Act of 2021, Pub. L. 117-2, 135 Stat 4 (Mar. 11 2021), https://www.congress.gov/bill/117th-congress/house-bill/1319/text.

additional relief for individuals and businesses impacted by the pandemic. While the ARPA does not require employers to provide FFCRA paid and emergency pandemic leave, it does expand the FFCRA tax credits with the goal of incentivizing small and mid-sized employers to provide paid time off in exchange for a resulting tax credit.

II. Concerns for Covid-19-Related Wage and Hour Disputes

As employers and employees have settled into a virus-conscious workplace terrain, employers have a continued duty to stay abreast of the regulatory landscape and ensure that their employees are appropriately compensated for work during and after the pandemic. This may require organizations to adapt payroll and personnel policies and procedures based on emerging workplace trends and an increasing number of employees returning to the workplace, especially once vaccinated. For example, paying additional wages may be required for time spent undergoing screenings and temperature checks, donning and doffing protective clothing and equipment, and disinfecting workspaces or handwashing—practices likely to continue in the future. Guidelines for reimbursing expenses incurred by teleworking employees have also become necessary. Companies with hourly teleworking employees are implementing policies and using software to accurately track hourly wages earned. Continued vigilance is required in defining exempt and non-exempt employees since an employee's primary duties may have shifted during the pandemic and the expectation for continued remote work may impact employee duties and classification. These are just a few concerns among many, and this subsection will explore this sampling of challenges.

A. Pay for Time Spent in Pre-Work Screenings and Temperature Checks

With so much uncertainty around who may be a viral carrier, workplaces have reasonably sought to mitigate risk by subjecting employees to routine screenings for COVID-19 symptoms. As we are well aware, according to the CDC, these symptoms include fever or chills, cough, shortness of breath, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or

vomiting, and diarrhea.[17] Employers may ask arriving employees to be screened before entering, adding wait time to employees' workday. Employers may then ask a series of questions about an employee's symptoms, and many employers commonly resort to taking employees' temperatures as an additional precaution. All these precautionary measures take time, and potential disputes about pay for accumulating precautionary minutes continue to be a risk to employers. Indeed, Walmart employees in California filed a case seeking overtime compensation for unpaid time they spent waiting for COVID-19 screenings.[18] These employees take the position that without such screenings, it would not be possible for them to perform their primary duties. Employers should keep this potential issue in mind as they consider whether to make such screenings mandatory, how much time they potentially compensate for it, and whether it is required for those who are vaccinated and/or those who are not.

B. Pay for Time Spent in Off-the-Clock Donning, Doffing, Disinfecting, and Handwashing

Workplaces present a high risk of viral spread when a contagious employee or customer is in the vicinity of others for an extended period. The CDC determined that the coronavirus spreads by person-to-person contact when people are within six feet of each other, primarily through respiratory droplets produced when an infected individual talks, sneezes, or coughs.[19] These droplets may also end up on surfaces in the environment and on hands that touch those surfaces. As a result, the CDC directed everyone to practice frequent handwashing, don various face or other protective coverings to avoid transmission of respiratory fluids, and regularly disinfect frequently touched surfaces. These directives translated to new and increasingly common workplace practices in which employees may need to take frequent breaks to wash their hands, start or end their day with workspace disinfection, pause their work to periodically disinfect a high-touch workspace area, and don or doff appropriate

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[17] CTRS. for Disease Control & Prevention, *Symptoms of COVID-19*, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last updated Feb. 22, 2021).

[18] *See* Haro v. Walmart, Civ. No. 1:21-cv-00239 (E.D. Cal. Feb. 23, 2021).

[19] CTRS. for Disease Control & Prevention, *How COVID-19 Spreads*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last updated May 10, 2021).

protective gear before, after, or during the workday. The practices are likely to persist as new variants of the virus continue to emerge.

Subsections A and B above touch on questions explored by the Supreme Court in *Integrity Staffing Solutions v. Busk* about what an employee *must* do to perform their job—and, in turn, what compensation must be provided.[20] In *Busk*, the Justices held that post-shift security checks for warehouse workers were not compensable under the FLSA because they were not the "principal activities" for which the employees were hired. "Principal activities" were defined as "integral and indispensable" activities that the employee must do in order to perform the position's primary duties.[21] Interestingly, the Court compared non-compensable security screenings in *Busk* to donning and doffing of protective gear for a battery plant worker before exposure to dangerously caustic and toxic materials or knife sharpening before a butcher cuts meat. The Court previously held in *Steiner v. Mitchell* and *Mitchell v. King Packing Co.*, that those activities *had* to be performed for the primary work duties of the plant worker or butcher to occur safely and effectively.[22]

Given the CDC's universal coronavirus guidelines for everyone in the public to monitor symptoms regularly, wear personal protective equipment (PPE), disinfect frequently touched surfaces, and observe frequent handwashing, employee advocates assert that COVID-19 has presented off-the-clock issues that may be less like *Busk* and more like the battery plant worker and/or butcher in *Steiner* or *Mitchell*.

C. Reimbursement Pay for Work-Related Purchases Made by Teleworking Employees

In light of the wage and hour challenges remote work presents, many lawyers advised against it. Since the pandemic, however, remote work has become the norm for many and likely will continue to exist in some capacity into the future. Employees working remotely may incur business expenses such as printing, internet connectivity, office supplies and equipment, smartphone usage, and more. Employers cannot require employees to bear costs associated with tools or equipment that are specifically required to perform the employer's particular work if those costs cut into the minimum or

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[20] Integrity Staffing Solutions v. Busk, 574 U.S. 27 (2014).

[21] *Id.*

[22] Steiner v. Mitchell, 350 U.S. 247, 250–53 (1956); Mitchell v. King Packing Co., 350 U.S. 260, 262–63 (1956).

overtime wages required by the FLSA.[23] This means that, for example, if an employer must purchase new laptops for remote working, the costs associated with these purchases must not cut into any employee's required minimum wage or overtime compensation.

In addition, state laws vary regarding what an employer is required to reimburse. For example, California requires employers to reimburse employees for reasonable and necessary business expenses and obligates employers to at least partially reimburse employees who work from home for their Internet access—even if employees were already paying a bill for their personal use.[24]

D. Compensating Hourly Teleworking Employees

The FLSA requirements for hourly wages and overtime pay are the same for employees who are on the jobsite as those who are teleworking.[25] However, the policies and time-tracking capabilities that employers must use to maintain FLSA compliance may be quite different depending on whether employees work remotely or on site. The coronavirus pandemic has presented employers who may not have had the policies or systems in place to support "teleworkforces" with new challenges. To avoid wage and hour disputes, some employers are opting to explore new software options that allow employees to "punch in" and "out" and to accurately record their lunch or rest breaks. One contentious area may be how to calculate an employee's time if they receive work emails outside of their agreed-upon work hours. Without a written policy that work emails should not be read or responded to during non-work hours—and even *with* such a policy—hourly employees who are effectively expected to check and/or respond to their work email during non-work hours but are not paid for it may have wage and hour claims.

On August 24, 2020, the DOL issued a Field Assistance Bulletin (FAB) providing guidance on employers' obligations under the FLSA to track and pay for the hours of

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[23] U.S. Dep't of Labor, *COVID-19 and the Fair Labor Standards Act Questions and Answers*, https://www.dol.gov/agencies/whd/flsa/pandemic (last visited 5/2/21).

[24] Cal. Labor Code §§ 2802(a), 2804.

[25] U.S. Dep't of Labor, *COVID-19 and the Fair Labor Standards Act Questions and Answers*, https://www.dol.gov/agencies/whd/flsa/pandemic (last visited 5/2/21).

compensable work performed by employees who are working remotely.[26] It has long been the rule that if the employer knows or has reason to believe that compensable work is being performed, the time must be counted as hours worked. The FAB suggests that if an employer has a time-reporting procedure in place and "an employee fails to report unscheduled hours worked through such a procedure, the employer is not required to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours."[27] However, the question is "whether an employer's inquiry was reasonable in light of the circumstances surrounding the employer's business, including existing overtime policies and requirements."[28] The guidance leaves open the potential for litigation as to what are considered reasonable efforts by the employer in that particular workplace.

Although some workplaces are reopening their premises to their workforces, there is hesitancy in many industries to return to minimal or no teleworking. This may be for reasons ranging from ongoing fears about personal health during the coronavirus to the collective recognition that remote work was not the death knell of effective work. As a result, more of the workforce is exercising remote work accommodations, which means disputes about telework expense reimbursement and fair pay for hourly teleworkers may increase in frequency.

E. Changes in Exempt Status for Employees with Shifts in Primary Duties

With the tectonic workplace shifts from COVID-19, employers have called on employees to do new or different work. For example, employers may borrow from an area of staffing surplus to cover an area in deficit, embed a manager into an active production role temporarily, ask an employee to cover for another employee who is on leave due to COVID-19, or reinvent duties for those who continue to work from home if they choose not to be vaccinated. While this may be both necessary and permissible, employers should not overlook how these deployment decisions can implicate an employee's exempt status and, therefore, overtime eligibility.

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[26] U.S. Dep't of Labor, Field Assistance Bull. 2020-5, Employers' Obligation to Exercise Reasonable Diligence in Tracking Teleworking Employees' Hours of Work (Aug. 24, 2020), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf.

[27] *Id.*

[28] *Id.* citing Hellmers v. Town of Vestal, N.Y., 969 F. Supp. 837, 845 (N.D.N.Y. 1997).

The FLSA generally requires exempt employees to primarily perform exempt duties with more than 50% of their time, while state laws tend to vary on what amount of time must be spent on exempt duties to maintain exempt classification.[29] A primary duty is work that is generally the most important or main duty an employee performs. Exempt duties under the FLSA fall into five primary categories: executive, administrative, professional, computer, and outside sales employment. As an example, an exempt executive employee must supervise two full-time employees or their equivalent and have hiring and firing power. If the supervisory role is lost because the formerly supervised employees are laid off, or if the supervisor's duties are reallocated elsewhere and they no longer provide that supervision, their exempt status may be jeopardized. Likewise, if an exempt administrative employee is asked to regularly perform non-office, manual work on a factory floor to cover for workers who are ill, their exempt status may be jeopardized. The more an employer utilizes an exempt employee's time for non-exempt duties, the more that employer risks a misclassification claim and the obligation to pay overtime compensation for the workweeks in question.

The FLSA does contemplate emergency scenarios like the pandemic. It allows for a private sector exempt employee to be *temporarily* assigned non-exempt work without jeopardizing their status. For example, the regulations note that:

> Replacing a nonexempt employee during the first day or partial day of an illness may be considered exempt emergency work depending on factors such as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly.[30]

However, when repeated temporary reassignments become the norm, such patterns may demonstrate a status reclassification was likely needed—and disputes may result.

In closing, from this discussion of the wage and hour challenges presented by COVID-19 in the workplace, it is easy to foresee a few certainties. Businesses will continue adapting to dynamic pandemic-related (tele)workplace demands with new policies and procedures while under an economic strain to do more with less. Equally certain is that employees will face these same economic strains personally while

[29] 29 C.F.R. § 541.700.

[30] 29 C.F.R. § 541.706(c).

potentially encountering changes to the kind and amount of work they do and where they do it. What is less certain is whether employers will effectively navigate the many fact-intensive—and often state-specific—wage and hour issues these challenges raise. In the age of COVID-19 and beyond, resolution of these disputes will be driven by a number of considerations: complex analyses that incorporate past analogous case law comparable to *Busk*; new rights for employees such as those under the FFCRA's EPSLA; shifts in public opinion emerging as the country lives through COVID-19 together; and the stories that discovery will tell about how an employer executed their business in light of their obligations to employees during this time.

Michele Fisher is a managing partner at Nichols Kaster, PLLP, and the Chair of the Firm's Business Development and Marketing Groups, which originate class and collective actions and market the firm. She has dedicated her career to litigating wage and hour cases in an aggressive, creative, and strategic manner. She has handled several jury trials and arbitrations in her fight for employee rights and prides herself on the firm's reputation as a leader in national wage and hour class and collective action litigation. Ms. Fisher is a speaker at PLI's Employment Law Institute 2020 and Employment Law Institute 2021 programs.