BARSAMIAN & MOODY
A Professional Corporation
Attorneys at Law
1141 West Shaw Avenue, Suite 104
Fresno, California 93711-3704
Tel: (559) 248-2360 E-mail: laborlaw@theemployerslawfirm.com Fax: (559) 248-2370

Litigation Regarding Obligation to Pay for COVID Screening Time

It has been one year since COVID-19 entered our lives and changed the way we do things, not only in our private lives but also in the realm of employment. By now everyone is familiar with COVID screening, symptom checking, and self-isolation if you have any symptoms. The Centers for Disease Control (CDC) recommends that employees self-screen prior to coming to the worksite but on-site employer conducted screenings are optional. However, many states, counties and cities have made employer led screening mandatory. Even where not mandatory, many employers have implemented pre-screening as a means to protect employees from the spread of illness and to add some sense of security for employees who may otherwise refuse to work. These screenings vary from temperature checks, and oral or written screening about symptoms, exposure to COVID, and travel. The CDC recommends that this screening be performed "before entry into the facility." Depending on the depth and extent of the screenings, and the manner of performing the screenings, it can be completed in less than 5 minutes or require employees to spend 30-40 minutes waiting and completing required screening prior to clocking in to begin work. Under California and federal law, employees must be compensated for time spent "working." Under California law, this means that employees must be paid for all time in which they are subject to the employer's control, even if it is only a minute or two. Several class action lawsuits have been filed this year alleging a failure to pay employees for time spent waiting in line and completing required screenings.

In February, employees of Walmart, Inc., filed a class action lawsuit in federal court alleging violations of federal and California state labor laws. The employees in *Haro, et al v. Walmart,* allege that they were required to report to their work location 30 minutes prior to the start of their shift to allow enough time to complete their screening and clock in on time. The process was alleged to have taken 10 to 15 minutes, or longer if there was a long line of employees. Once an employee passed the screening, they were issued their personal protective equipment, given a sticker indicating they passed the screening and were sent to clock in, often times at the other side of the facility. Walmart has issued a statement that "[a]ll hourly associates have extra COVID screening time systematically added to their daily shifts and paychecks. This is in addition to our manual process or adding extra time if there ever is a reason this additional time is not sufficient." Depending upon Walmart's actual compensation calculation practice, they may have a strong defense.

In an unusual case, *Diane Vaccaro v. Amazon.com.DEDC LLC*, filed in May 2015, Amazon employees alleged pay violations relating to meal periods and failure to pay for time spent on security screenings in violation of New Jersey state law. In June 2020, after the case was transferred to federal court, the mealtime claim was dismissed but the security screening claim was set to proceed. In March, Amazon employees were granted leave to amend a class action, wage and hour federal lawsuit to include a claim for failure

to pay for pre-shift COVID screenings. The Court noted that the employees were entitled to discovery on this claim given that the crux of the claim hinged on "whether an activity is primarily for the employer's benefit or the employee's benefit."

Most recently, in April, Victoria's Secret found itself in a wage and hour class action, alleging California wage and hour violations. The plaintiff in *Tirado v. Victoria's Secret Stores LLC, et al*., alleges that by implementing the pre-screening protocol, Victoria's Secret "knowingly and willfully require[ed] plaintiff and class members to perform work and/or remain on duty for the benefit of defendants while off the clock."

These cases, just a few of the many similar cases being filed in California and across the United States, are representative of what employers may be up against as the uncertainty of COVID wears off. While the ultimate outcomes in these cases have yet to be determined, employers need to be conscious of this issue.

What This Means for Employers:

To take the safest course of action, and avoid potential litigation, employers should ensure that their policies compensate employees for time spent waiting and completing screening procedures. This includes the time employees spend waiting to begin the screening (such as standing in line), the actual screening, and any follow-up screening. Employers should also look back at their policies in place from the start of the pandemic to ensure that employees were being compensated for the actual time spent waiting in line to check in, washing hands, having their temperature checked, and completing written or oral screening questions. Employers who want to take an aggressive approach can rely on the argument that the screening is primarily for the employee's benefit, and therefore is not work and not compensable time. If employers have questions about whether their policy is compliant, or have determine that their policies were not adequate, they should contact the attorneys at Barsamian & Moody at (559) 248-2360 to determine the best strategy moving forward.