



Should Employers Pay Hazard Premiums During the Pandemic?

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Some public-facing jobs have been deemed essential since the early days of the coronavirus crisis, while other jobs were put on hold or moved online. As businesses slowly reopen and employees return to public-facing roles, more business leaders may consider offering hazard pay to workers with a higher risk of exposure to the virus.

Recent guidance from the U.S. Department of Labor (DOL) clarifies that employers aren't required under federal wage and hour laws to provide hazard pay for employees who work through a pandemic. Additional pay is "usually determined privately between employers and employees or their authorized representatives," according to the DOL.

Even though hazard pay isn't mandatory under federal wage and hour laws, employers may want to consider offering it as a good will gesture to improve employee recruitment and retention, noted Matthew Simpson, an attorney with Fisher Phillips in Atlanta.

Providing such premiums can send a positive message to workers. "Hazard pay serves to motivate and reward employees for continuing to engage despite the added risks created by the pandemic," said Michael Correll, an attorney with Reed Smith in Dallas. "The result is a more engaged, stable workforce at a time when turnover is even more costly and harmful than usual."

He noted that employers in a number of industries, such as retailers and grocers, may consider paying hazard premiums during the pandemic even though their employees traditionally work in nonhazardous roles.

Some lawmakers and worker advocates say that too few grocers are paying premiums and protecting workers, and they're calling on industry leaders to do more. "Grocery store workers are putting their lives on the line every day that they walk into the store," said Sen. Kamala Harris, D-Calif., and Marc Perrone, president of the United Food and Commercial Workers International Union, in a CNN opinion piece (<https://edition.cnn.com/2020/08/06/opinions/why-grocery-store-workers-deserve-hazard-pay-harris-perrone/index.html>). "This pandemic is far from over, and the health threats that grocery workers face are just as real now as they were when this crisis began," they wrote.

SHRM RESOURCE SPOTLIGHT

Coronavirus and COVID-19 (www.shrm.org/ResourcesAndTools/Pages/communicable-diseases.aspx)

Monitor for State Law Mandates

Even though hazard pay isn't required under the federal Fair Labor Standards Act (FLSA), employers should stay updated on state and local laws as more jurisdictions consider adopting hazard-pay requirements, said Tammy McCutchen, an attorney with Littler in Washington, D.C.

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utm_source=shrm_article&utm_medium=shrm.org&utm_campaign=growth~legalnetwork~pressrelease.)]

Legislation has been introduced in multiple states, which if passed would require hazard pay for essential workers during the COVID-19 crisis, observed Lisa Reibold, an attorney with Clark Hill in Los Angeles. Lawmakers in Massachusetts, North Carolina, New York and Vermont have introduced such measures. In Pennsylvania, while hazard pay is not required, there is a state grant program to help eligible employers provide hazard pay to employees in life-sustaining occupations. Eligible jobs include those related to:

- Health care and social assistance.
- Food manufacturing.
- Food retail facilities.
- Transit and ground passenger transportation.
- Security services for certain industries.
- Certain janitorial services.

Similarly, Vermont started a state-funded grant program on Aug. 4 for covered employers to provide hazard pay to employees who work in public safety, public health, health care and human services.

Some essential workers are suing for hazard pay. For example, NPR reported (<https://www.npr.org/2020/08/07/899838196/we-re-risking-our-lives-front-line-federal-workers-sue-for-hazard-pay>) that correctional workers have filed a lawsuit against the Bureau of Prisons. The workers claim that they are due such premiums under federal law when they are exposed to "a virulent biological disease."

Creating Policies

Employers need to determine the appropriate premium to add as an incentive for employees. Some employers that are choosing to offer hazard pay have raised hourly wages by \$1.00 to \$3.00 an hour, Reibold said.

Employers that chose to add hazard pay should ensure that their policies don't run afoul of wage and hour laws. "If employers choose to offer such pay, they should consider how the pay is calculated, whether the pay will come in the form of an increased hourly rate or lump-sum bonus, and what impact the pay may have on the employee's overtime rate," Simpson noted.

Under the FLSA, nonexempt employees generally must be paid 1.5 times their regular rate of pay (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/wellness-perks-regular-rate-of-pay.aspx) for all hours worked beyond 40 in a week. But the regular rate includes more than just an employee's base hourly wage. Employers must consider "all remuneration for employment paid to, or on behalf of, the employee," except for specific categories that are excluded from the calculation.

McCutchen noted that if an employer opts to provide hazard pay, the premium must be included in the employee's the regular rate of pay when calculating overtime premiums.

So employers should craft their policies carefully. Among other things, Correll said, employers need to make sure that:

- Their hazard-pay policy is clear as to who is entitled to supplemental payments.
- Hazard pay is properly incorporated into overtime rates.
- Hazard pay is provided to employees who are exempt from overtime pay in a way that does not jeopardize the exemption.
- Premiums are provided in a manner consistent with state and local laws.

"Employers should contact labor and employment counsel to determine if a written notice to the employees with explicit terms for the hazard pay is required," Reibold said.

Visit SHRM's resource page on FLSA exemption classification (www.shrm.org/ResourcesAndTools/Pages/FLSA-Exemption-Classification.aspx).

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