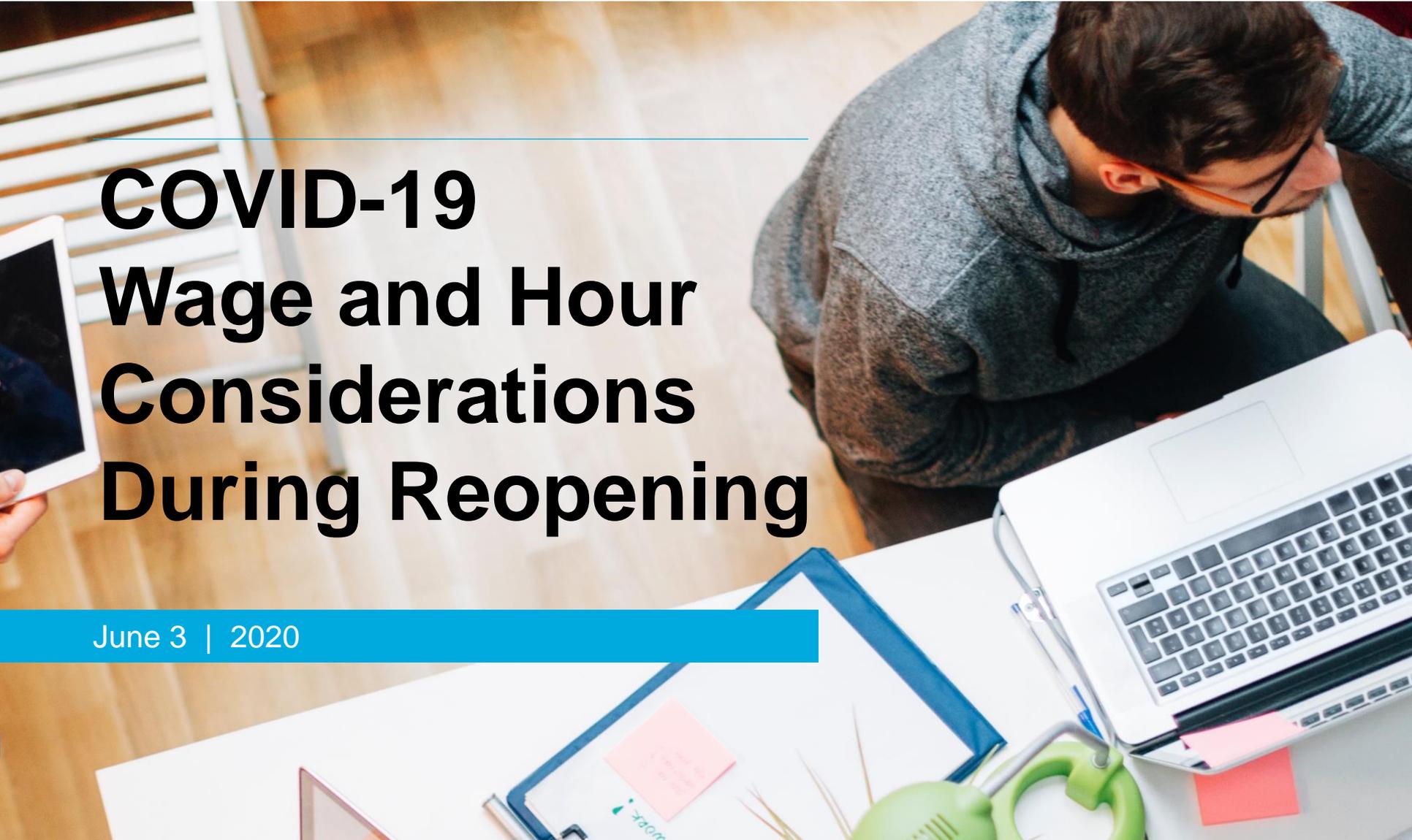


# COVID-19 Wage and Hour Considerations During Reopening

June 3 | 2020





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# Hazard pay and bonuses

## The basics

- According to a [recent survey](#), about a quarter of businesses said they planned to provide hazard pay:
  - A cash incentive that is a flat-dollar amount (9%)
  - Cash incentives tied to hours and shifts worked (8%)
  - Cash incentives that are based on a different formula, such as a percentage of salary (9%)
- Hazard pay typically is not *required* by federal or state law (except for certain government employees). However, it may be required under employment contracts or collective bargaining agreements.



# Hazard pay and bonuses

## What is hazard pay?

- US Department of Labor [non-regulatory guidance](#) defines *hazard pay* as “additional pay for performing hazardous duty or work involving physical hardship. Work duty that causes extreme physical discomfort and distress which is not adequately alleviated by protective devices is deemed to impose a physical hardship.”
- It can take many forms:
  - A shift differential / premium pay
  - A bonus
  - A temporary pay raise



# Hazard pay and bonuses

## **You must include hazard pay / shift differentials in the regular rate of pay**

- The Fair Labor Standards Act requires that premiums paid for shift differentials and hazardous, arduous or dirty work must be [included as part of a federal employee's regular rate of pay](#) when computing employees' overtime pay.
- This holds regardless of whether these payments take the form of a percent of the base rate or an addition of so many cents per hour.
- **EXAMPLE:** Jane has a base hourly rate of \$12. She is paid a hazard-pay rate of \$15 for hours during which she has increased exposure to the public. In one workweek, she worked 30 regular hours and 20 hazard-pay hours. Her total straight-time compensation is \$660 (\$360 for 30 hours @\$12/hour + \$300 for 20 hours @\$15/hour). Her regular rate of pay is \$13.20 per hour. Her overtime premium is \$66 (\$13.20 regular rate x 0.5 overtime multiplier x 10 overtime hours). Her total compensation is \$726 (\$660 straight-time pay + \$66 overtime pay).



# Hazard pay and bonuses

## **Coronavirus bonuses are probably nondiscretionary**

- *Nondiscretionary bonuses* must be included when calculating the regular rate of pay.
- These are some the questions the DOL asks to determine if a bonus was nondiscretionary:
  - Was the bonus a gift due to a holiday or special occasion (e.g., Thanksgiving turkey, holiday cash)?
  - Was the bonus calculated as a percentage of total earnings, including overtime pay?
  - Was the bonus paid for meeting or exceeding performance or production goals?
  - Was the bonus paid according to a promise, contract or announcement by the employer?
- 📌 Remember! Nondiscretionary bonuses can satisfy up to 10% of the \$35,568 standard minimum salary level.



# Hazard pay and bonuses

## Bonus calculations

- Fairly simple if the bonus is based on a workweek
- If based on a period longer than a workweek, it must be reduced to its weekly equivalent:
  - Monthly bonus - multiply by 12 then divide by 52.
  - Semi-monthly bonus - multiply by 24 then divide by 52.
  - Quarterly bonus - divide by 13
  - Annual bonus – divide by 52
- EXAMPLE: Darryl has an hourly rate of \$12. He works 50 hours in a certain workweek. He is paid a monthly bonus of \$500. \$115.38 of the bonus is attributed to the workweek ( $\$500 \times 12 \div 52$ ). His total straight-time earnings are \$715.38 (\$600 for 50 hours @ \$12/hour + \$115.38 bonus). His regular rate of pay is \$14.31 per hour. His overtime pay is \$71.55 (\$14.31 regular rate x 0.5 overtime multiplier x 10 overtime hours). His total compensation is \$786.93 (\$715.38 straight-time pay + \$71.55 overtime pay).
- ⚠️ WARNING: Look out for [flat-sum bonuses](#) in California!



# Hazard pay and bonuses, cont.

## Fluctuating workweek

- The US Department of Labor very recently issued a [final rule](#) clarifying that additional pay of any kind, including **bonuses and hazard pay**, is compatible with the [fluctuating workweek method](#) of calculating overtime.
- The DOL said it believes the new rule will help employers implement flexible work schedules as workers return to work following the coronavirus (COVID-19) pandemic:
- The new rule will take effect 60 days after it is published in the *Federal Register*.
- ⚠️ WARNING: Several states either prohibit the fluctuating workweek method (like [Alaska](#), [California](#), [Connecticut](#) (for certain retail employees and others), [New Mexico](#) and [Pennsylvania](#)) or allow it only within the narrow bounds of fluctuating workweek as it existed at a certain point in time (such as Arkansas, which refers to the federal regulations in effect in 2005).



# Hazard pay and bonuses

## Other things to consider

- [Notice requirements](#) for changes in pay
- Employees who are similarly situated employees should be treated the same. Otherwise, you risk a discrimination claim.
- If hazard pay is offered, it should be used to give employees an incentive to perform a dangerous job; it should not be used to convince the employee to do a dangerous job without OSHA-required safety precautions. For example, an employer might offer hazard pay to employees who deal with the public. It should not offer hazard pay to the team to ignore safety regulations and work without safeguards and personal protective equipment.



# Wellness and temperature checks

## Proceed with caution

- Time spent by employees in waiting for and receiving medical attention on the premises or at the direction of the employer during their normal working hours on days when they are working constitutes hours worked for which they must be paid, according to an [FLSA regulation](#). Temperature screenings may fall under this regulation since measuring an employee's body temperature is considered a medical examination under the ADA.
- On the other hand, pre-work temperature screenings could be excluded from working time as a preliminary activity, especially since temperature screenings may not be considered an employee's *principal* activity. The US Supreme Court has held that certain pre- and post-shift security screenings could be excluded under this principle.
- Remember! Take [measures to ensure such screenings do not violate the Americans with Disabilities Act](#),



# Wellness and temperature checks

## Limit your exposure

- Limit wait times
- Provide flexibility
  - At-home screenings
  - Questionnaire
  - Flexible timing
- Err on the side of caution by paying for time spent
- For checks at home, consider having employees sign acknowledgments that reported time is correct.



# Compensation for time spent on cleaning and disinfection

## Working time

- Nonexempt employees must be paid for all the time controlled or required by an employer and pursued for the employer's benefit.
- 📌 Remember: For nonexempt employees, you can establish different rates of pay for different types of work
- Consider other [health and safety issues](#)



# Compensation for time spent on cleaning and disinfection

## Tip credit

- [80/20 rule](#)
  - In 2018, the DOL said it will no longer limit the amount of duties related to a tip-producing occupation that may be performed as long as they are performed *contemporaneously with direct customer-service duties* and all other requirements of the FLSA are met.
  - The US Department of Labor (DOL) has [proposed regulations](#) that would, if finalized, codify this position.
  - But several federal courts have declined to defer to the DOL's interpretation, including courts in Arkansas, Missouri, Ohio, Pennsylvania and Virginia.
  - Tread carefully here!



# Business expense reimbursement

## The basics

- Some states explicitly require employers to reimburse business expenses.
- Federal rules will apply in states where there is not a more employee-friendly standard.
- Under the FLSA, *tools of the trade* that are "incidental to carrying on the employer's business" are considered to be primarily for the employer's benefit or convenience. As a result, employers generally are [prohibited](#) from counting tools of the trade as part of an employee's wages.
-  Remember: Most reimbursements for business expenses [do not need to be included in the regular rate of pay when calculating overtime](#). However, only the actual or reasonably approximate amount of the expense may be excluded.



# Business expense reimbursement

## Masks

- If required by employer and/or by law, then masks will likely qualify as a reimbursable business expense in several states
- Always must be reimbursed if it brings wages below minimum wage
- Laundering: The CDC says reusable masks can be laundered along with regular clothes. But in certain jurisdictions you may need to pay employees if you ask them to launder their own masks.
- Best way to ensure employees are not reusing a contaminated face covering is to provide and launder.



# Other considerations

## Don't forget about these additional issues

- [Employee classification](#): Reductions in salary and/or changes in job duties can affect employees' exempt status
- [Show-up time / reporting time](#): Some states require that employees be paid a certain amount if they report for duty but are not provided a full shift's worth of work
- [Scheduling laws](#): Some states and localities require employers to provide employees advance notice about changes in schedules, predictability pay and more



# How XpertHR can help

## Resources

- [Coronavirus \(COVID-19\): Wage and Hour](#)
- [Coronavirus \(COVID-19\): Temporary Wage Increase Notification Letter](#)
- [Coronavirus \(COVID-19\): End of Temporary Wage-Increase Notification Letter](#)
- [Pay Statement and Pay Rate Notification Requirements by State](#)
- [Scheduling Laws by State and Municipality](#)
- [Coronavirus \(COVID-19\): Self-Certification to Return to Work After COVID-19 Symptoms/Exposure Form](#)
- [Coronavirus \(COVID-19\): Remote Work - Business Expense Reimbursements](#)

The logo for XpertHR, with 'Xpert' in a white sans-serif font and 'HR' in a white sans-serif font inside a white square. The background of the top half of the slide is a blurred image of a woman's profile with long brown hair, looking out over a city at night with bokeh lights.

# XpertHR

# Thank You!

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