**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| AMAZON.COM SERVICES, LLC,<br><br>Appellant,<br><br>vs.<br><br>DWIGHT MALLOY,<br><br>Respondent. | Case No. 89314 |

# JOINT APPENDIX VOL. 1

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEVADA**

DWIGHT MALLOY, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

AMAZON.COM SERVICES, LLC,

Defendant.

**Case No. _____**

**PLAINTIFF'S ORIGINAL CLASS ACTION COMPLAINT AND JURY DEMAND**

1) Failure to Compensate for All Hours Worked in Violation of NRS 608.140 and 608.016;

2) Failure to Pay Minimum Wages in Violation of the Nevada Constitution;

3) Failure to Pay Overtime in Violation of NRS 608.140 and 608.018; and

4) Failure to Timely Pay All Wages Due and Owing in Violation of NRS 608.140 and 608.020-050.

**PLAINTIFF'S ORIGINAL CLASS ACTION COMPLAINT AND JURY DEMAND**

## I. INTRODUCTION

1. This is a class action lawsuit brought by Plaintiff Dwight Malloy ("Plaintiff"), individually and on behalf the Class Members to recover unpaid wages, penalties, and attorneys' fees and costs. Defendant Amazon.Com Services, LLC ("Amazon") implemented an illegal policy requiring its non-exempt workers to undergo a COVID-19 screening each shift without pay. This physical and medical examination constitutes compensable time that was worked by the Plaintiff and the Class Members. By failing to pay for this time worked, Amazon has violated Nevada law. In addition to the Plaintiff, Amazon has failed to pay for the time spent undergoing COVID-19 screenings by thousands of other workers across the State of Nevada.

2. Amazon's conduct violates the state laws of Nevada because Amazon failed to pay for all hours worked by its employees, failed to pay overtime wages, and failed to provide itemized wage statements as required by Nevada law.

## II. JURISDICTION AND VENUE

3. This Court has jurisdiction over subject matter of this action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2) ("CAFA"). Under CAFA, this court has original jurisdiction over Plaintiff's Rule 23 class action claims because the matter in controversy is believed to exceed $5,000,000, and because Plaintiff and Defendant are citizens of different states. Moreover, the number of proposed class members in Nevada is believed to exceed 100 individuals.

4. Venue is proper in this District because a substantial portion of the events forming the basis of this suit occurred in or near Las Vegas, Nevada. Plaintiff worked in this District and was denied wages in this District.

5. Amazon is subject to personal jurisdiction before this Court because it has purposefully availed itself of the privileges of conducting activities in the State of Nevada and established minimum contacts sufficient to confer jurisdiction. Amazon does business in Nevada, advertises in Nevada, markets to Nevada consumers, and the violations of the law forming basis of this lawsuit occurred in Nevada. Further, Amazon maintains offices in Nevada and employs Nevada residents.

Therefore, the assumption of jurisdiction over Amazon will not offend traditional notions of fair play and substantial justice and is consistent with the constitutional requirements of due process.

6. This Court is empowered to issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201 and 2202.

## III. PARTIES AND PERSONAL JURISDICTION

7. Plaintiff Dwight Malloy is an individual residing in North Las Vegas, Nevada. At all relevant times, Plaintiff has been domiciled in and is a citizen of the State of Nevada.

8. The "Class Members" are all current and former hourly paid employees of Amazon who underwent a COVID-19 screening during at least one week in Nevada in the three-year period before the filing of the Original Complaint until final resolution of this Action.

9. Defendant Amazon.com Services, LLC is a Delaware limited liability company with its principal place of business located in Seattle, Washington. As such, Defendant is a citizen of both Delaware and Washington for purposes of assessing diversity. Amazon may be served with process through its registered agent in Nevada, Corporation Service Company, 112 North Curry Street, Carson City, Nevada 89703

10. At all material times, Amazon was and is legally responsible for the unlawful conduct, policies, practices, acts, and omissions as described and set forth in this Complaint, as the employer of Plaintiff and Class Members.

11. At all material times, Plaintiff and Class Members were employees of Amazon within the meaning of NRS 608.010.

## IV. FACTS

12. The novel Coronavirus has infected over 76 million Americans and caused the death of over 900,000 Americans. (*See* https://coronavirus.jhu.edu/us-map, last visited Feb. 7, 2022).[1] Following the outbreak of the Coronavirus, Amazon implemented a company-wide policy requiring each of its hourly, non-exempt employees to undergo a physical and medical examination to check

[1] In Nevada, the Coronavirus has infected more than 660,000 Nevada residents, and has resulted in at least 9,000 confirmed deaths. *See* https://nvhealthresponse.nv.gov/, last visited Feb. 7, 2022.

for symptoms of the Coronavirus each shift. This examination was imposed by Amazon as a requirement to work each shift. The examination was conducted on the premises of Amazon, was required by Amazon, and was necessary for each employee to perform his/her work for Amazon. Unfortunately, Amazon refused to pay for this time. Amazon's conduct violates Nevada wage-and-hour law. This illegal conduct continues to this day.

13. Amazon operates fulfillment centers and distribution centers in Nevada and across the country. These Amazon facilities are large warehouses that normally operate 24 hours per day. These Amazon facilities are the warehouses where Amazon stores the packages that are delivered to customers. Upon information and belief, Amazon employs more than 10,000 Nevadans at distribution centers and fulfillment centers throughout the state.

14. Plaintiff worked for Amazon as an hourly, non-exempt employee for Amazon in North Las Vegas. He worked as a fulfillment center associate. His hourly rate was approximately $15.80 to $16.10 per hour. His job duties included moving boxes, stacking packages, and loading boxes. He started with Amazon in approximately August 2020 and stopped working for Amazon in approximately April 2021. He normally worked five days per week and his normal shift was ten hours per day on average. Specifically, he was normally required to work Thursday through Monday, with Tuesdays and Wednesdays off, from 7:00 p.m. to 5:30 a.m. He worked with hundreds of other Amazon workers at the Las Vegas fulfillment center location.

**COVID-19 SCREENING**

15. As an hourly, non-exempt employee, Plaintiff was required to clock-in and clock-out each day. Unfortunately, Amazon did not pay for all hours that he worked. Prior to clocking in each day, Plaintiff was required to undergo a physical and medical examination to screen for COVID-19.

16. Amazon requires its employees to arrive at its fulfillment centers and distribution centers prior to the start of their scheduled shifts. However, when employees of Amazon arrive, they are not allowed to clock-in for the day until they pass a physical and medical examination to screen for symptoms of COVID-19.

17. At the Las Vegas fulfilment center location, for example, Amazon employees were

required to form a line in the entrance to the facility. Amazon employees were then called one-by-one to a checkpoint where the COVID-19 screening took place. Once inside the facility, each employee whose shift is about to start is required to undergo a temperature screening. If the employee passed the examination, he/she was then given a mask to wear. After putting on the mask, the employee walked to the next station where the employee is allowed to clock-in for the day.

18. If the employee does not initially pass the physical and medical examination, the employee is moved to another section where a second examination occurs. The employee is then asked a series of follow-up questions related to their health condition, such as whether they had trouble breathing, were coughing, had a runny nose, chest pain, and other questions regarding their health. They were also asked questions such as whether the employee has travelled recently, whether the employee was exposed to someone with COVID-19, and other similar questions to identify whether the worker currently has symptoms of COVID-19 and poses a potential health hazard. If the employee passed the second examination, the employee is then given a face mask and is allowed to clock-in for the day. If not, the employee is not permitted to work that day.

19. The amount of time it takes to wait in line and undergo the COVID-19 examination is approximately 5 minutes to 15 minutes on average. This amount of time could be longer depending upon the number of other Amazon employees in line for the COVID-19 screening.

20. Plaintiff knows and is aware that other Amazon facilities in Nevada have COVID-19 screening procedures because there were multiple notices posted around the facility indicating that COVID-19 screening and prevention practices were being instituted across Amazon at a corporate-wide level, not just at the North Las Vegas facility.

21. This COVID-19 screening should have been paid by Amazon because it constitutes compensable time worked. During this time, Plaintiff and Class Members were subject to Amazon's control.

22. Plaintiff and Class Members were required to follow Amazon's instructions while awaiting and during the COVID-19 screening. Amazon required every employee to complete the COVID-19 screening and it was not optional. Indeed, the COVID-19 screening was required by

Amazon and its employees were required to comply under threat of discipline, including possible termination.

23. Additionally, Plaintiff and Class Members were confined to the premises of Amazon when they waited for the examinations and during the examinations.

24. Moreover, Amazon compelled its employees to perform specific tasks during the examinations. They were required to answer questions, submit to have their temperature taken, and wear masks.

25. In other words, Amazon directed, commanded, and restrained its employees during the COVID-19 examinations; prevented them from using that time effectively for their own purposes; and they remained subject to Amazon's control during the examinations.

26. The COVID-19 screenings were also necessary to the principal work performed by the Plaintiff and Class Members and were necessary to ensure a safe workplace. The COVID-19 examinations were also undertaken on Amazon's premises, were controlled and required by Amazon, and undertaken primarily for the benefit of Amazon.

27. Indeed, Amazon required Plaintiff and Class Members to undergo this screening for the purposes of overall safety in the Amazon facilities and to prevent the Plaintiff and Class Members from inadvertently and unintentionally infecting the Amazon facilities or Amazon products, and in turn, Amazon's customers. Likewise, the job duty of the Plaintiff and Class Members was to serve the customers of Amazon and the screening was necessary to ensure that Plaintiff and Class Members safely provide that service.

28. The COVID-19 examinations were necessary to ensure that the virus did not infect the Amazon facilities or customers. The examinations were also necessary to ensure that the virus did not disrupt the work performed by Plaintiff and Class Members or affect the business operations of Amazon. If Amazon did not have the COVID-19 screening, workers could inadvertently or unintentionally bring the virus into the Amazon facilities causing a mass breakout of the virus infecting hundreds to thousands of other workers of Amazon.

29. The COVID-19 screenings were integral and indispensable to the principal activity and

primary job duty performed by Plaintiff and Class Members, which was to serve and assist Amazon customers. The COVID-19 screenings were necessary for Plaintiff and Class Members to perform their primary job duty for Amazon. If Amazon cancelled the COVID-19 screening, the Amazon facilities could get contaminated with the virus, the items that Amazon sold could get contaminated with the virus, the customers could get infected, and other employees of Amazon could get infected. In that event, Amazon's business would be disrupted, and Plaintiff and Class Members would not be able to do their work. Therefore, the COVID-19 screenings were necessary to ensure that Plaintiff and Class Members could do their jobs for Amazon.

30. Under these facts, the COVID-19 screenings were for the benefit of Amazon and its customers. The COVID-19 screenings allowed Amazon's operations to continue and therefore, allowed Amazon to earn a profit. Similarly, the COVID-19 screenings benefited Amazon's customers by allowing them to receive products in a timely basis and to receive products that were not contaminated. Indeed, the COVID-19 screenings were conducted by Amazon with the intent for Amazon to benefit, to earn more profits, and to continue its business. In fact, Amazon's business substantially grew during the pandemic and it appears that the pandemic provided a windfall for Amazon's operations.

31. Under the Nevada Administrative Code, "hours worked" includes "all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee." Nev. Admin. Code 608.115(a); *see also In re: Amazon.Com Fulfillment Center FLSA and Wage and Hour Litig.*, 905 F.3d 387, 401 (6th Cir. 2018). The COVID-19 screenings constitute hours worked under Nevada law and should have been paid by Amazon. *In re: Amazon.Com Fulfillment Center FLSA and Wage and Hour Litig.*, 905 F.3d 387, 401 (6th Cir. 2018) (holding that "time spent waiting in line and then undergoing mandatory security screenings" is compensable under Nevada law and that the Portal-to-Portal Act was not incorporated into Nevada law).

32. In light of Amazon's conduct, Plaintiff and Class Members are owed significant unpaid wages and penalties.

33. Plaintiff and Class Members are and were non-exempt employees.

34. Plaintiff and Class Members are paid on an hourly rate basis.

35. When they work more than eight (8) hours in a day or forty (40) hours in a workweek, they are entitled to overtime pay.

36. The COVID-19 screenings identified above were not incidental activities for the Plaintiff and Class Members, but instead, this time was integral and indispensable to their principal activity, was controlled by Amazon, was required by Amazon, was conducted on Amazon's premises, and was performed primarily for the benefit of Amazon and its customers. Therefore, the time spent by the Plaintiff and Class Members completing the COVID-19 screenings is compensable.

37. Although Amazon employs electronic "clocking-in" technology, this technology was not made accessible to Plaintiff and Class Members before the COVID-19 screenings.

38. As a result of Amazon's company-wide policies, Plaintiff and Class Members were not paid for all time worked each day and are owed significant unpaid wages.

39. Amazon's method of paying Plaintiff and Class Members in violation of Nevada law was willful and was not based on a good faith and reasonable belief that their conduct complied with the law. Amazon knew the requirement to pay for all time worked, but intentionally and/or recklessly chose not to do so.

## V. RULE 23 CLASS ACTION ALLEGATIONS

40. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of the California Class, which is comprised of:

> **All current and former hourly paid employees of Amazon who underwent a COVID-19 screening during at least one week in Nevada in the three-year period before the filing of the Original Complaint to final resolution of this Action.**

41. Numerosity: The number of members in the Class is believed to exceed forty (40) and in fact, is likely to be in the thousands. This volume makes bringing the claims of each individual member of the class before this Court impracticable. Likewise, joining each individual member of the Class as a plaintiff in this action is impracticable. Furthermore, the identity of the members of

the Class will be determined from Amazon's records, as will the compensation paid to each of them. As such, a class action is a reasonable and practical means of resolving these claims. To require individual actions would prejudice the Class and Amazon.

42. Typicality: Plaintiff's claims are typical of the Class because like the members of the Class, Plaintiff was subject to Amazon's uniform policies and practices and were compensated in the same manner as others in the Class. Amazon failed to pay the Class Members for all hours they worked. Additionally, members of the Class worked substantially more than eight (8) hours in a day and forty (40) hours in a week as non-exempt employees. Accordingly, Plaintiff and the Class Members have been uncompensated and/or under-compensated as a result of Amazon's common policies and practices which failed to comply with Nevada law. As such, Plaintiffs' claims are typical of the claims of the Class. Plaintiff and all members of the Class sustained damages arising out of and caused by Amazon's common course of conduct in violation of law as alleged herein.

43. Adequacy: Plaintiff is a representative party who will fairly and adequately protect the interests of the Class because it is in his interest to effectively prosecute the claims herein alleged in order to obtain the unpaid wages and penalties required under Nevada law. Plaintiff has retained attorneys who are competent in both class actions and wage-and-hour litigation. Plaintiff does not have any interest which may be contrary to or in conflict with the claims of the Class he seeks to represent.

44. Commonality: Common issues of fact and law predominate over any individual questions in this matter. The common issues of fact and law include, but are not limited to:

a. Whether Plaintiff and the Class are entitled to compensation for the time spent in the COVID-19 screenings;

b. The amount of time spent in the COVID-19 screenings;

c. Whether Plaintiff and the Class worked more than eight (8) hours in a day and/or worked more than forty (40) hours in a workweek;

d. Whether Amazon failed to pay Plaintiff and the Class wages for all hours worked;

e. Whether Amazon failed to keep accurate records of employees' hours of work,

hourly wages, and hourly rates, and failed to timely furnish each Class Member with a statement accurately showing the total number of hours worked, hourly rates, and wages earned each pay period;

f. Whether Amazon failed to timely pay employees unpaid wages and overtime due upon their separation of employment with Amazon;

g. Whether Plaintiff and the Class are entitled to compensatory damages;

h. The proper measure of damages sustained by Plaintiff and the Class; and

i. Whether Amazon's actions were "willful."

45. Superiority: A class action is superior to other available means for the fair and efficient adjudication of this lawsuit. Even in the event any member of the Class could afford to pursue individual litigation against a company the size of Amazon, doing so would unduly burden the court system. Individual litigation would magnify the delay and expense to all parties and flood the court system with duplicative lawsuits. Prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying judicial results and establish incompatible standards of conduct for Amazon.

46. A class action, by contrast, presents far fewer management difficulties and affords the benefits of uniform adjudication of the claims, financial economy for the parties, and comprehensive supervision by a single court. By concentrating this litigation in one forum, judicial economy and parity among the claims of individual Class Members are promoted. Additionally, class treatment in this matter will provide for judicial consistency. Notice of the pendency and any resolution of this action can be provided to the Class by mail, electronic mail, text message, print, broadcast, internet and/or multimedia publication. The identity of the members of the California Class is readily identifiable from Amazon's records.

47. This type of case is well-suited for class action treatment because: (1) Amazon's practices, policies, and/or procedures were uniform; (2) the burden is on Amazon to prove it properly compensated its employees including any potential exemptions that might apply; and (3) the burden is on Amazon to accurately record hours worked by employees. Ultimately, a class action is a

superior form to resolve the Nevada claims detailed herein because of the common nucleus of operative facts centered on the continued failure of Amazon to pay Plaintiff and the Class per applicable Nevada laws.

## VII. CAUSES OF ACTION

### FIRST CLAIM FOR RELIEF
**Failure to Pay for All Hours Worked**
**Violation of NRS 608.140 and 608.016**
**On Behalf of Plaintiff and the Class**

48. Plaintiff incorporates all preceding paragraphs as though fully set forth herein.

49. Employees such as Plaintiff and Class Members have a private cause of action for unpaid wages pursuant to NRS 608.140. *See Neville v. Eighth Judicial District Court in and for County of Clark*, 406 P.3d 777, 783 (Nev. 2017).

50. NRS 608.016 provides that "an employer shall pay to the employee wages for each hour the employee worked."

51. Specifically, pursuant to the Nevada Administrative Code, hours worked includes "all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee." Nev. Admin. Code 608.115(1). Further, Nevada law incorporates the federal definition of "work," *see In re: Amazon.Com, Inc. Fulfillment Center FLSA and Wage and Hour Litig*., 905 F.3d 387, 401 (6th Cir. 2018), which includes such physical examinations such as the COVID-19 screenings here. *See* DOL Wage and Hour Opinion Letter, Jan. 27, 1998.

52. Amazon failed to compensate Plaintiff and Class Members for all hours that they worked. As noted above, Plaintiff and Class Members were not paid for the time they spent in the COVID-19 screenings during which they were subjected to physical examinations that were under Amazon's discretion and control, and which was an essential requirement of the job and for Amazon's benefit. As a result, Plaintiff and Class Members are entitled to compensation for all hours worked, but not paid, during the statutory period covered by this lawsuit. Plaintiff and Class Members

are also entitled to reasonable attorneys' fees, interest, and costs of suit, and the relief requested below in the Prayer for Relief.

53. The Class Members, including Plaintiff, have been deprived of their rightfully earned wages as a direct and proximate result of Amazon's company-wide policies and practices in Nevada.

54. Amazon has knowingly and willfully refused to perform its obligations to compensate Plaintiff and the Class for all wages earned and all hours worked, in violation of Nevada law. As a direct result, Plaintiff and the Class have suffered, and continue to suffer, substantial losses related to the use and enjoyment of such wages.

55. Amazon regularly, willfully, and repeatedly failed and continues to fail to make, keep, and preserve accurate time records required by NRS 608.115, with respect to Plaintiff and Class Members. Through this unlawful course of conduct, Amazon has deprived and continues to deprive Plaintiff and Class Members of records necessary to calculate with precision the compensation due to them.

56. Plaintiff demands, on behalf of himself and the Class Members, payment by Defendant at their regular hourly rate of pay or the minimum wage rate, whichever is higher, for all hours worked during the relevant time period together with attorneys' fees, costs, interest as provided by law, and the relief requested below in the Prayer for Relief.

57. Wherefore, Plaintiff and the Class request relief as hereinafter provided.

**SECOND CLAIM FOR RELIEF**
**Failure to Pay Minimum Wages**
**Violation of the Nevada Constitution**
**On Behalf of Plaintiff and the Class**

58. Plaintiffs incorporate all preceding paragraphs as though fully set forth herein.

59. Article 15, Section 16 of the Nevada Constitution sets forth the minimum wage requirements in the State of Nevada. Section 16 provides that:

> The provisions of the section may not be waived by agreement between an individual employee and an employer. . . . An employee claiming violation of the section may bring an action against his or her employer in the courts of the State to enforce the provisions of the section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of the section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action

> to enforce the section shall be awarded his or her reasonable attorney's fees and costs.

60. By failing to compensate Plaintiff and Class Members for the time spent engaging in the pre-shift COVID-19 screening activities, Defendant failed and continues to fail to pay Plaintiff and Class Members for all hours worked in violation of the Nevada Constitution.

61. Plaintiff demands, on behalf of himself and the Class Members, payment by Defendant at their regular hourly rate of pay or the minimum wage rate, whichever is higher, for all hours worked during the relevant time period together with attorneys' fees, costs, interest as provided by law, and the relief requested below in the Prayer for Relief.

62. Wherefore, Plaintiff and the Class request relief as hereinafter provided.

**THIRD CLAIM FOR RELIEF**
**Failure to Pay Overtime Wages**
**Violation of NRS 608.140 and 608.018**
**On Behalf of Plaintiff and the Class**

63. Plaintiff incorporates all preceding paragraphs as though fully set forth herein.

64. NRS 608.018(1) provides as follows:

> An employer shall pay 1 1/2 an employee's regular wage rate whenever an employee who receives compensation for employment at a rate of 1 1/2 times the minimum rate set forth in NRS 608.250 worked: (a) More than 40 hours in any scheduled week of work; or (b) More than 8 hours in any workday unless by mutual agreement the employee worked a schedule 10 hours per day for 4 calendar days within any scheduled week of work.

65. NRS 608.018(2) provides as follows:

> An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate not less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works more than 40 hours in any scheduled week of work.

66. At all relevant times, Amazon was required to compensate its non-exempt employees for all hours worked. Amazon was also required to compensate all of its employees for all overtime worked, at one-and-a-half times their regular rates of pay for hours worked more than eight (8) hours per day or forty (40) hours per workweek.

67. At all relevant times, Amazon operated under and continues to operate under a common policy and plan of willfully, regularly, and repeatedly failing and refusing to pay Plaintiffs and Class Members for overtime at the rates required by NRS 608.018.

68. Amazon knew or clearly should have known that Plaintiffs and the Class Members were entitled to compensation for the time they spent in the COVID-19 screenings.

69. Amazon routinely requires Plaintiffs and Class Members to work more than eight (8) hours per day or forty (40) hours per workweek. Despite the provisions of Nevada's overtime law, Amazon has willfully failed and refused to pay the Class, including Plaintiff, overtime wages during the statutory period covered by this lawsuit.

70. Although the statute of limitations for minimum wage violations is two years, there is no express statute of limitations for overtime violations pursuant to NRS 608.140 and 608.018. Therefore, the three-year limitations period contained in NRS 11.190(3) for statutory violations applies.

71. The Class Members, including Plaintiffs, have been deprived of their rightfully earned overtime wages as a direct and proximate result of Amazon's company-wide policies and procedures.

72. Amazon regularly, willfully, and repeatedly failed and continues to fail to make, keep, and preserve accurate time records required by NRS 608.115, with respect to Plaintiff and Class Members. Through this unlawful course of conduct, Amazon has deprived and continues to deprive Plaintiff and the Class Members of records necessary to calculate with precision the overtime compensation due to them.

73. Plaintiff and Class Members are entitled to recover, and seek to recover, damages for the nonpayment of overtime wages for all overtime hours worked in excess of eight (8) hours per day, in excess of forty (40) hours per workweek, plus reasonable attorneys' fees, interest, and costs of suit, interest as provided by law, and the relief requested below in the Prayer for Relief.

74. Wherefore, Plaintiffs and California Class request relief as hereinafter provided.

**FOURTH CLAIM FOR RELIEF**
**Failure to Pay All Wages Due and Owing Upon Termination**
**Violation of NRS 608.140 and 608.020-.050**
**On Behalf of Plaintiff and the Class**

75. Plaintiffs incorporate all preceding paragraphs as though fully set forth herein.

76. NRS 608.020 provides that "[w]henever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately."

77. NRS 608.040(1)(a-b) imposes a penalty on employers who fail to pay a discharged or quitting employee: "Within 3 days after the wages or compensation of a discharged employee becomes due; or on the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quite, or was discharged until paid for 30-days, whichever is less."

78. NRS 608.050 grants an "employee lien" to each discharged or laid-off employee for the purposes of collecting the wages or compensation owed to them "in the sum agreed upon in the contract of employment for each day the employer is in default, until the employee is paid in full, without rendering any service therefor; but the employee shall cease to draw such wages or salary 30 days after such default."

79. By failing to pay Plaintiff and Class Members for all hours worked (including minimum wages, regular wages, and/or overtime wages owed) in violation of Nevada law, at the correct legal rate, Amazon has failed to timely remit all wages due and owing to Plaintiff and Class Members who have separated their employment with Amazon during the relevant time period.

80. Despite demand, Amazon willfully refuses and continues to refuse to pay Plaintiff and Class Members all wages due and owing.

81. Plaintiffs, on behalf of themselves and on behalf of the members of the Class who are no longer employed by Amazon, respectfully request that the Court award all penalties due in accordance with NRS 608.140 and 608.040, and an additional thirty (30) days' wages under NRS 608.050, together with attorneys' fees, costs, interest as provided by law, and the relief requested below in the Prayer for Relief.

82. Wherefore, Plaintiff and the Class request relief as hereinafter provided.

## VIII. JURY DEMAND

83. Plaintiff hereby demands trial by jury on all issues.

## IX. PRAYER FOR RELIEF

Plaintiff, individually and on behalf of all Class Members, prays that the Court:

1. Certify that this action may proceed as a class action under Fed. R. Civ. P. 23;
2. Appoint Plaintiff as Representative of the Class, and appoint his counsel as Class Counsel;
3. Find and declare that Amazon's policies and/or practices described above violate Nevada law;
4. Award all damages, penalties, and/or restitution to be paid by Amazon for the causes of action alleged herein;
5. Award interest at the maximum legal rate, costs, and expenses, including reasonable attorneys' fees and expert fees;
6. Award pre-judgment and post-judgment interest, as provided by law; and
7. Order such other and further legal and equitable relief the Court deems just, necessary and proper.

Date: February 15, 2022

Respectfully submitted,

/s/ Esther C. Rodriguez

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AO 440 (Rev. 06/12) Summons in a Civil Action

# UNITED STATES DISTRICT COURT

for the

District of Nevada

DWIGHT MALLOY, Individually and On Behalf of All Others Similarly Situated,

*Plaintiff(s)*

v.

Amazon.Com Services, LLC

*Defendant(s)*

Civil Action No. 2:22-cv-00286-GMN-VCF

## SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

Amazon.Com Services, LLC
c/o Corporation Service Company
112 North Curry Street
Carson City, Nevada 89703

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Esther C. Rodriguez
Rodriguez Law Offices, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
Tel: (702) 320-8400

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: 2/16/2022

*CLERK OF COURT*

*Signature of Clerk or Deputy Clerk*

Civil Action No.

**PROOF OF SERVICE**

***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))***

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
*Server's signature*

_____
*Printed name and title*

_____
*Server's address*

Additional information regarding attempted service, etc:

Print Save As... Reset

Civil Action No. 2:22-cv-00286-GMN-VCF

**PROOF OF SERVICE**

***(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))***

This summons for *(name of individual and title, if any)* Amazon.Com Services, LLC c/o Corporation Service Company was received by me on *(date)* 02/17/2022 .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

☑ I served the summons on *(name of individual)* Kris Osborn, Client Rep , who is designated by law to accept service of process on behalf of *(name of organization)* Amazon.Com Services, LLC c/o Corporation Service Company on *(date)* 02/17/2022 ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: February 22, 2022

*Server's signature*

Dawn Calhoun, Process Server

*Printed name and title*

301 Anderson Street
Carson City, NV 89701
(775) 219-2871

*Server's address*

Additional information regarding attempted service, etc:

o Plaintiffs Original Class Action Complaint and Jury Demand; Civil Cover Sheet; Plaintiffs Certificate of Interested Parties; Motion Pro Hac Vice for Mr. Foty; Email from court – Notice to Counsel; Email from court – Case random assignment; Email from court – Standing Order from court; and Motion Pro Hac Vice for Mr. Hogg.

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* To apply for admission *pro hac vice*.

*Attorneys for Plaintiff and Class Members*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEVADA**

DWIGHT MALLOY, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

AMAZON.COM SERVICES, LLC,

Defendant.

**Case No. 2:22-CV—286-ART-VCF**

**PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT AND JURY DEMAND**

1) Failure to Compensate for All Hours Worked in Violation of NRS 608.140 and 608.016;

2) Failure to Pay Minimum Wages in Violation of the Nevada Constitution;

3) Failure to Pay Overtime in Violation of NRS 608.140 and 608.018; and

4) Failure to Timely Pay All Wages Due and Owing in Violation of NRS 608.140 and 608.020-050.

**PLAINTIFF'S CLASS ACTION COMPLAINT AND JURY DEMAND**

## I. INTRODUCTION

1. This is a class action lawsuit brought by Plaintiff Dwight Malloy ("Plaintiff"), individually and on behalf the Class Members to recover unpaid wages, penalties, and attorneys' fees and costs. Defendant Amazon.Com Services, LLC ("Amazon") implemented an illegal policy requiring its non-exempt workers to undergo a COVID-19 screening each shift without pay. This physical and medical examination constitutes compensable time that was worked by the Plaintiff and the Class Members. By failing to pay for this time worked, Amazon has violated Nevada law. In addition to the Plaintiff, Amazon has failed to pay for the time spent undergoing COVID-19 screenings by thousands of other workers across the State of Nevada.

2. Amazon's conduct violates the state laws of Nevada because Amazon failed to pay for all hours worked by its employees, failed to pay overtime wages, and failed to provide itemized wage statements as required by Nevada law.

## II. JURISDICTION AND VENUE

3. This Court has jurisdiction over subject matter of this action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2) ("CAFA"). Under CAFA, this court has original jurisdiction over Plaintiff's Rule 23 class action claims because the matter in controversy is believed to exceed $5,000,000, and because Plaintiff and Defendant are citizens of different states. Moreover, the number of proposed class members in Nevada is believed to exceed 100 individuals.

4. Venue is proper in this District because a substantial portion of the events forming the basis of this suit occurred in or near Las Vegas, Nevada. Plaintiff worked in this District and was denied wages in this District.

5. Amazon is subject to personal jurisdiction before this Court because it has purposefully availed itself of the privileges of conducting activities in the State of Nevada and established minimum contacts sufficient to confer jurisdiction. Amazon does business in Nevada, advertises in Nevada, markets to Nevada consumers, and the violations of the law forming basis of this lawsuit occurred in Nevada. Further, Amazon maintains offices in Nevada and employs Nevada residents.

Therefore, the assumption of jurisdiction over Amazon will not offend traditional notions of fair play and substantial justice and is consistent with the constitutional requirements of due process.

6. This Court is empowered to issue a declaratory judgment and further relief pursuant to 28 U.S.C. §§ 2201 and 2202.

## III. PARTIES AND PERSONAL JURISDICTION

7. Plaintiff Dwight Malloy is an individual residing in North Las Vegas, Nevada. At all relevant times, Plaintiff has been domiciled in and is a citizen of the State of Nevada.

8. The "Class Members" are all current and former hourly paid employees of Amazon who underwent a COVID-19 screening during at least one week in Nevada in the three-year period before the filing of the Original Complaint until final resolution of this Action.

9. Defendant Amazon.com Services, LLC is a Delaware limited liability company with its principal place of business located in Seattle, Washington. Defendant has been properly served and has made an appearance in this case.

10. At all material times, Amazon was and is legally responsible for the unlawful conduct, policies, practices, acts, and omissions as described and set forth in this Complaint, as the employer of Plaintiff and Class Members.

11. At all material times, Plaintiff and Class Members were employees of Amazon within the meaning of NRS 608.010.

## IV. FACTS

12. The novel Coronavirus has infected over 81 million Americans and caused the death of over 900,000 Americans. (*See* https://coronavirus.jhu.edu/us-map, last visited April 25, 2022).[1] Following the outbreak of the Coronavirus, Amazon implemented a company-wide policy requiring each of its hourly, non-exempt employees to undergo a physical and medical examination to check for symptoms of the Coronavirus each shift. This examination was imposed by Amazon as a requirement to work each shift. The examination was conducted on the premises of Amazon, was

[1] In Nevada, the Coronavirus has infected more than 660,000 Nevada residents, and has resulted in at least 9,000 confirmed deaths. (*See* https://nvhealthresponse.nv.gov/, last visited April 25, 2022).

required by Amazon, and was necessary for each employee to perform his/her work for Amazon. Unfortunately, Amazon refused to pay for this time. Amazon's conduct violates Nevada law. This illegal conduct continues to this day.

13. Amazon operates fulfillment centers and distribution centers in Nevada and across the country. These Amazon facilities are large warehouses that normally operate 24 hours per day. These Amazon facilities are the warehouses where Amazon stores the packages that are delivered to customers. Upon information and belief, Amazon employs more than 10,000 Nevadans at distribution centers and fulfillment centers throughout the state.

14. Plaintiff worked for Amazon as an hourly, non-exempt employee for Amazon in North Las Vegas. He worked as a fulfillment center associate. His hourly rate was approximately $15.80 to $16.10 per hour. His job duties included moving boxes, stacking packages, and loading boxes. He started with Amazon in approximately August 2020 and stopped working for Amazon in approximately April 2021. He normally worked five days per week and his normal shift was ten hours per day on average. Thus, he normally worked approximately 50 hours per week.

15. Plaintiff's schedule of work was Thursday through Monday, with Tuesdays and Wednesdays off. He was normally scheduled from 7:00 p.m. to 5:30 a.m. Plaintiff worked more than 40 hours nearly every week that he worked for Amazon. He worked with hundreds of other Amazon workers at the Las Vegas fulfillment center location.

**COVID-19 SCREENING**

16. As an hourly, non-exempt employee, Plaintiff was required to clock-in and clock-out each day. Unfortunately, Amazon did not pay for all hours that he worked. Prior to clocking in each day, Plaintiff was required to undergo a physical and medical examination to screen for symptoms of COVID-19. This COVID-19 screening was required by Amazon but, unfortunately, Amazon did not pay any of its employees, including Plaintiff, for the time spent undergoing the COVID-19 screening.

17. In Nevada, Amazon required its employees to arrive at its fulfillment centers and distribution centers prior to the start of their scheduled shifts. However, when employees of Amazon

arrived, they were not allowed to clock-in for the day until they passed a physical and medical examination to screen for symptoms of COVID-19. Because they clocked in after the completing the COVID-19 screenings no Amazon employee in Nevada was paid for the time spent in the COVID-19 screening.

18. Prior to the start of their shifts, Amazon employees were required to form a line at the entrance to the facility and to stand six feet apart. Amazon employees were then called one-by-one to a checkpoint where the COVID-19 screening took place. Each employee whose shift was set to begin was required to undergo a temperature check and to answer questions about his/her health. If the employee passed the examination, he/she was then given a mask to wear. After putting on the mask, the employee then walked to the next station where the employee was allowed to clock-in for the day.

19. If the employee did not initially pass the COVID-19 screening, the employee was moved to another section where a second examination occurred. The employee was then asked a series of follow-up questions related to his/her health condition, such as whether he/she had trouble breathing, were coughing, had a runny nose, chest pain, and other health questions. Amazon employees were also asked questions such as whether they had travelled recently, whether they were exposed to someone with COVID-19, and other similar questions to identify whether there were any symptoms of COVID-19 and whether the workers pose a potential health hazard. If an employee passed the second examination, the employee was given a face mask and was allowed to clock-in for the day. If not, the employee was not permitted to work that day.

20. The amount of time it takes to wait in line and undergo the COVID-19 examination was approximately 10 minutes to 15 minutes on average. This amount of time could be longer depending upon the number of other Amazon employees in line for the COVID-19 screening.

21. Plaintiff knows and is aware that other Amazon facilities in Nevada have COVID-19 screening procedures because there were multiple notices posted around the facility indicating that COVID-19 screening and prevention practices were being instituted across Amazon at a corporate-wide level, not just at the North Las Vegas facility.

22. This COVID-19 screening should have been paid by Amazon because it constitutes compensable time worked. During this time, Plaintiff and Class Members were subject to Amazon's control.

23. Plaintiff and Class Members were required to follow Amazon's instructions while awaiting and during the COVID-19 screening. Amazon required every employee to complete the COVID-19 screening and it was not optional. Indeed, the COVID-19 screening was required by Amazon and its employees were required to comply under threat of discipline, including possible termination.

24. Additionally, Plaintiff and Class Members were confined to the premises of Amazon when they waited for the examinations and during the examinations.

25. Moreover, Amazon compelled its employees to perform specific tasks during the examinations. They were required to answer questions, submit to have their temperature taken, and wear masks.

26. In other words, Amazon directed, commanded, and restrained its employees during the COVID-19 examinations; prevented them from using that time effectively for their own purposes; and they remained subject to Amazon's control during the examinations.

27. The COVID-19 screenings were also necessary to the principal work performed by the Plaintiff and Class Members and were necessary to ensure a safe workplace. The COVID-19 examinations were also undertaken on Amazon's premises, were controlled and required by Amazon, and undertaken primarily for the benefit of Amazon.

28. Indeed, Amazon required Plaintiff and Class Members to undergo this screening for the purposes of overall safety in the Amazon facilities and to prevent the Plaintiff and Class Members from inadvertently and unintentionally infecting the Amazon facilities or Amazon products, and in turn, Amazon's customers. Likewise, the job duty of the Plaintiff and Class Members was to serve the customers of Amazon and the screening was necessary to ensure that Plaintiff and Class Members safely provide that service.

29. The COVID-19 examinations were necessary to ensure that the virus did not infect the

Amazon facilities or customers. The examinations were also necessary to ensure that the virus did not disrupt the work performed by Plaintiff and Class Members or affect the business operations of Amazon. If Amazon did not have the COVID-19 screening, workers could inadvertently or unintentionally bring the virus into the Amazon facilities causing a mass breakout of the virus infecting hundreds to thousands of other workers of Amazon.

30. The COVID-19 screenings were integral and indispensable to the principal activity and primary job duty performed by Plaintiff and Class Members, which was to serve and assist Amazon customers. The COVID-19 screenings were necessary for Plaintiff and Class Members to perform their primary job duty for Amazon. If Amazon cancelled the COVID-19 screening, the Amazon facilities could get contaminated with the virus, the items that Amazon sold could get contaminated with the virus, the customers could get infected, and other employees of Amazon could get infected. In that event, Amazon's business would be disrupted, and Plaintiff and Class Members would not be able to do their work. Therefore, the COVID-19 screenings were necessary to ensure that Plaintiff and Class Members could do their jobs for Amazon.

31. The COVID-19 screenings were also integral and indispensable to the principal activity and primary job duty performed by Plaintiff and the Class Members because the COVID-19 screenings were necessary to ensure that Amazon workers could perform their work safely, to prevent contamination from the virus, and to keep the customers of Amazon safe. If employees became infected with the virus, they would not be able to provide their services to Amazon. Moreover, if Amazon customers received packages that were infected with the virus, the customers would likely no longer use Amazon's services.

32. Thus, the COVID-19 screenings were necessary for the Plaintiff and Class Members to do their work for Amazon and without the screenings, their ability to do their jobs would have been compromised. Plaintiff and the Class Members could not skip the screenings altogether without the safety or effectiveness of their principal activities being substantially impaired. The screenings prevented the COVID-19 virus from spreading through Amazon's facilities and infecting employees and products, thereby allowing Amazon employees to continue to work.

33. Under these facts, the COVID-19 screenings were also for the benefit of Amazon and its customers. The COVID-19 screenings allowed Amazon's operations to continue and therefore, allowed Amazon to earn a profit. Similarly, the COVID-19 screenings benefited Amazon's customers by allowing them to receive products in a timely basis and to receive products that were not contaminated. Indeed, the COVID-19 screenings were conducted by Amazon with the intent for Amazon to benefit, to earn more profits, and to continue its business. In fact, Amazon's business substantially grew during the pandemic and it appears that the pandemic provided a windfall for Amazon's operations.

34. The COVID-19 screenings were also primarily for the benefit of Amazon because Amazon's COVID-19 screening policy was intended to keep its fulfillment centers and distribution centers as safe of a workplace as possible given the circumstances of the global pandemic. Amazon's COVID-19 screening policy was also intended to ensure the safety of Amazon's workers and to ensure that Amazon complied with the law. By making the workplace safe, Amazon increased the efficiency of Amazon's operations and allowed it to make billions in profits during the pandemic. Indeed, having business operations continue without interruption undoubtedly increased the profits of Amazon. Similarly, complying with all laws ensured Amazon could continue to operate and earn profits. Moreover, having employees who are healthy and able to perform their work ensures that Amazon can continue to operate and earn profits.

35. The COVID-19 screenings were to ensure that the virus did not disrupt the work performed by the Plaintiff/Class Members or affect the business operations of Amazon. If Amazon facilities suffered an infection outbreak, Amazon would potentially have to find new employees or shut down its warehouses until it was safe to open again. Such an outbreak would harm Amazon directly and cause it to lose significant profits. Given this substantial risk to Amazon's business operations, Amazon primarily benefitted from the COVID-19 screenings.

36. Under the Nevada Administrative Code, "hours worked" includes "all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee." Nev. Admin. Code 608.115(a); *see also In re:*

*Amazon.Com Fulfillment Center FLSA and Wage and Hour Litig.*, 905 F.3d 387, 401 (6th Cir. 2018). The COVID-19 screenings constitute hours worked under Nevada law and should have been paid by Amazon. *In re: Amazon.Com Fulfillment Center FLSA and Wage and Hour Litig.*, 905 F.3d 387, 401 (6th Cir. 2018) (holding that "time spent waiting in line and then undergoing mandatory security screenings" is compensable under Nevada law and that the Portal-to-Portal Act was not incorporated into Nevada law).

37. In light of Amazon's conduct, Plaintiff and Class Members are owed significant unpaid wages and penalties.

38. Plaintiff and Class Members are and were non-exempt employees.

39. Plaintiff and Class Members are paid on an hourly rate basis.

40. When they work more than eight (8) hours in a day or forty (40) hours in a workweek, they are entitled to overtime pay.

41. The COVID-19 screenings identified above were not incidental activities for the Plaintiff and Class Members, but instead, this time was integral and indispensable to their principal activity, was controlled by Amazon, was required by Amazon, was conducted on Amazon's premises, and was performed primarily for the benefit of Amazon and its customers. Therefore, the time spent by the Plaintiff and Class Members completing the COVID-19 screenings is compensable.

42. Although Amazon employs electronic "clocking-in" technology, this technology was not made accessible to Plaintiff and Class Members before the COVID-19 screenings.

43. As a result of Amazon's company-wide policies, Plaintiff and Class Members were not paid for all time worked each day and are owed significant unpaid wages.

44. Amazon's method of paying Plaintiff and Class Members in violation of Nevada law was willful and was not based on a good faith and reasonable belief that their conduct complied with the law. Amazon knew the requirement to pay for all time worked, but intentionally and/or recklessly chose not to do so.

## V. RULE 23 CLASS ACTION ALLEGATIONS

45. Plaintiff brings this action as a class action pursuant to Rule 23 of the Federal Rules of

Civil Procedure on behalf of the Nevada Class, which is comprised of:

> **All current and former hourly paid employees of Amazon who underwent a COVID-19 screening during at least one week in Nevada in the three-year period before the filing of the Original Complaint to final resolution of this Action.**

46. Numerosity: The number of members in the Class is believed to exceed forty (40) and in fact, is likely to be in the thousands. This volume makes bringing the claims of each individual member of the class before this Court impracticable. Likewise, joining each individual member of the Class as a plaintiff in this action is impracticable. Furthermore, the identity of the members of the Class will be determined from Amazon's records, as will the compensation paid to each of them. As such, a class action is a reasonable and practical means of resolving these claims. To require individual actions would prejudice the Class and Amazon.

47. Typicality: Plaintiff's claims are typical of the Class because like the members of the Class, Plaintiff was subject to Amazon's uniform policies and practices and were compensated in the same manner as others in the Class. Amazon failed to pay the Class Members for all hours they worked. Additionally, members of the Class worked substantially more than eight (8) hours in a day and forty (40) hours in a week as non-exempt employees. Accordingly, Plaintiff and the Class Members have been uncompensated and/or under-compensated as a result of Amazon's common policies and practices which failed to comply with Nevada law. As such, Plaintiffs' claims are typical of the claims of the Class. Plaintiff and all members of the Class sustained damages arising out of and caused by Amazon's common course of conduct in violation of law as alleged herein.

48. Adequacy: Plaintiff is a representative party who will fairly and adequately protect the interests of the Class because it is in his interest to effectively prosecute the claims herein alleged in order to obtain the unpaid wages and penalties required under Nevada law. Plaintiff has retained attorneys who are competent in both class actions and wage-and-hour litigation. Plaintiff does not have any interest which may be contrary to or in conflict with the claims of the Class he seeks to represent.

49. Commonality: Common issues of fact and law predominate over any individual questions in this matter. The common issues of fact and law include, but are not limited to:

a. Whether Plaintiff and the Class are entitled to compensation for the time spent in the COVID-19 screenings;

b. The amount of time spent in the COVID-19 screenings;

c. Whether Plaintiff and the Class worked more than eight (8) hours in a day and/or worked more than forty (40) hours in a workweek;

d. Whether Amazon failed to pay Plaintiff and the Class wages for all hours worked;

e. Whether Amazon failed to keep accurate records of employees' hours of work, hourly wages, and hourly rates, and failed to timely furnish each Class Member with a statement accurately showing the total number of hours worked, hourly rates, and wages earned each pay period;

f. Whether Amazon failed to timely pay employees unpaid wages and overtime due upon their separation of employment with Amazon;

g. Whether Plaintiff and the Class are entitled to compensatory damages;

h. The proper measure of damages sustained by Plaintiff and the Class; and

i. Whether Amazon's actions were "willful."

50. Superiority: A class action is superior to other available means for the fair and efficient adjudication of this lawsuit. Even in the event any member of the Class could afford to pursue individual litigation against a company the size of Amazon, doing so would unduly burden the court system. Individual litigation would magnify the delay and expense to all parties and flood the court system with duplicative lawsuits. Prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying judicial results and establish incompatible standards of conduct for Amazon.

51. A class action, by contrast, presents far fewer management difficulties and affords the benefits of uniform adjudication of the claims, financial economy for the parties, and comprehensive supervision by a single court. By concentrating this litigation in one forum, judicial economy and

parity among the claims of individual Class Members are promoted. Additionally, class treatment in this matter will provide for judicial consistency. Notice of the pendency and any resolution of this action can be provided to the Class by mail, electronic mail, text message, print, broadcast, internet and/or multimedia publication. The identity of the members of the Nevada Class is readily identifiable from Amazon's records.

52. This type of case is well-suited for class action treatment because: (1) Amazon's practices, policies, and/or procedures were uniform; (2) the burden is on Amazon to prove it properly compensated its employees including any potential exemptions that might apply; and (3) the burden is on Amazon to accurately record hours worked by employees. Ultimately, a class action is a superior form to resolve the Nevada claims detailed herein because of the common nucleus of operative facts centered on the continued failure of Amazon to pay Plaintiff and the Class per applicable Nevada laws.

## VII. CAUSES OF ACTION

### FIRST CLAIM FOR RELIEF
**Failure to Pay for All Hours Worked**
**Violation of NRS 608.140 and 608.016**
**On Behalf of Plaintiff and the Class**

53. Plaintiff incorporates all preceding paragraphs as though fully set forth herein.

54. Employees such as Plaintiff and Class Members have a private cause of action for unpaid wages pursuant to NRS 608.140. *See Neville v. Eighth Judicial District Court in and for County of Clark*, 406 P.3d 777, 783 (Nev. 2017).

55. NRS 608.016 provides that "an employer shall pay to the employee wages for each hour the employee worked."

56. Specifically, pursuant to the Nevada Administrative Code, hours worked includes "all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee." Nev. Admin. Code 608.115(1). Further, Nevada law incorporates the federal definition of "work," *see In re: Amazon.Com, Inc. Fulfillment Center FLSA and Wage and Hour Litig.*, 905 F.3d 387, 401 (6th Cir.

2018), which includes such physical examinations such as the COVID-19 screenings here. *See* DOL Wage and Hour Opinion Letter, Jan. 27, 1998.

57. Amazon failed to compensate Plaintiff and Class Members for all hours that they worked. As noted above, Plaintiff and Class Members were not paid for the time they spent in the COVID-19 screenings during which they were subjected to physical examinations that were under Amazon's discretion and control, and which was an essential requirement of the job and for Amazon's benefit. As a result, Plaintiff and Class Members are entitled to compensation for all hours worked, but not paid, during the statutory period covered by this lawsuit. Plaintiff and Class Members are also entitled to reasonable attorneys' fees, interest, and costs of suit, and the relief requested below in the Prayer for Relief.

58. The Class Members, including Plaintiff, have been deprived of their rightfully earned wages as a direct and proximate result of Amazon's company-wide policies and practices in Nevada.

59. Amazon has knowingly and willfully refused to perform its obligations to compensate Plaintiff and the Class for all wages earned and all hours worked, in violation of Nevada law. As a direct result, Plaintiff and the Class have suffered, and continue to suffer, substantial losses related to the use and enjoyment of such wages.

60. Amazon regularly, willfully, and repeatedly failed and continues to fail to make, keep, and preserve accurate time records required by NRS 608.115, with respect to Plaintiff and Class Members. Through this unlawful course of conduct, Amazon has deprived and continues to deprive Plaintiff and Class Members of records necessary to calculate with precision the compensation due to them.

61. Plaintiff demands, on behalf of himself and the Class Members, payment by Defendant at their regular hourly rate of pay or the minimum wage rate, whichever is higher, for all hours worked during the relevant time period together with attorneys' fees, costs, interest as provided by law, and the relief requested below in the Prayer for Relief.

62. Wherefore, Plaintiff and the Class request relief as hereinafter provided.

**SECOND CLAIM FOR RELIEF**
**Failure to Pay Minimum Wages**
**Violation of the Nevada Constitution**
**On Behalf of Plaintiff and the Class**

63. Plaintiffs incorporate all preceding paragraphs as though fully set forth herein.

64. Article 15, Section 16 of the Nevada Constitution sets forth the minimum wage requirements in the State of Nevada. Section 16 provides that:

> The provisions of the section may not be waived by agreement between an individual employee and an employer. . . . An employee claiming violation of the section may bring an action against his or her employer in the courts of the State to enforce the provisions of the section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of the section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce the section shall be awarded his or her reasonable attorney's fees and costs.

65. By failing to compensate Plaintiff and Class Members for the time spent engaging in the pre-shift COVID-19 screening activities, Defendant failed and continues to fail to pay Plaintiff and Class Members for all hours worked in violation of the Nevada Constitution.

66. Plaintiff demands, on behalf of himself and the Class Members, payment by Defendant at their regular hourly rate of pay or the minimum wage rate, whichever is higher, for all hours worked during the relevant time period together with attorneys' fees, costs, interest as provided by law, and the relief requested below in the Prayer for Relief.

67. Wherefore, Plaintiff and the Class request relief as hereinafter provided.

**THIRD CLAIM FOR RELIEF**
**Failure to Pay Overtime Wages**
**Violation of NRS 608.140 and 608.018**
**On Behalf of Plaintiff and the Class**

68. Plaintiff incorporates all preceding paragraphs as though fully set forth herein.

69. NRS 608.018(2) provides as follows:

> An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate not less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works more than 40 hours in any scheduled week of work.

70. At all relevant times, Amazon was required to compensate its non-exempt employees for all hours worked. Amazon was also required to compensate all of its employees for all overtime

worked, at one-and-a-half times their regular rates of pay for hours worked more than orty (40) hours per workweek.

71. At all relevant times, Amazon operated under and continues to operate under a common policy and plan of willfully, regularly, and repeatedly failing and refusing to pay Plaintiffs and Class Members for overtime at the rates required by NRS 608.018.

72. Amazon knew or clearly should have known that Plaintiffs and the Class Members were entitled to compensation for the time they spent in the COVID-19 screenings.

73. Amazon routinely requires Plaintiffs and Class Members to work more than forty (40) hours per workweek. Despite the provisions of Nevada's overtime law, Amazon has willfully failed and refused to pay the Class, including Plaintiff, overtime wages during the statutory period covered by this lawsuit.

74. Although the statute of limitations for minimum wage violations is two years, there is no express statute of limitations for overtime violations pursuant to NRS 608.140 and 608.018. Therefore, the three-year limitations period contained in NRS 11.190(3) for statutory violations applies.

75. The Class Members, including Plaintiffs, have been deprived of their rightfully earned overtime wages as a direct and proximate result of Amazon's company-wide policies and procedures.

76. Amazon regularly, willfully, and repeatedly failed and continues to fail to make, keep, and preserve accurate time records required by NRS 608.115, with respect to Plaintiff and Class Members. Through this unlawful course of conduct, Amazon has deprived and continues to deprive Plaintiff and the Class Members of records necessary to calculate with precision the overtime compensation due to them.

77. Plaintiff and Class Members are entitled to recover, and seek to recover, damages for the nonpayment of overtime wages for all overtime hours worked in excess of forty (40) hours per workweek, plus reasonable attorneys' fees, interest, and costs of suit, interest as provided by law, and the relief requested below in the Prayer for Relief.

78. Wherefore, Plaintiff and Nevada Class request relief as hereinafter provided.

**FOURTH CLAIM FOR RELIEF**
**Failure to Pay All Wages Due and Owing Upon Termination**
**Violation of NRS 608.140 and 608.020-.050**
**On Behalf of Plaintiff and the Class**

79. Plaintiff incorporates all preceding paragraphs as though fully set forth herein.

80. NRS 608.020 provides that "[w]henever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately."

81. The amount due to Plaintiff is readily ascertainable because Amazon was fully aware that Plaintiff underwent a COVID-19 screening prior to clocking-in each shift. Amazon also had electronic time clock technology and could have placed the time clocks at the beginning of the line for the COVID-19 screenings. Amazon intentionally chose not to.

82. Further, the amount of time Plaintiff underwent the COVID-19 screenings each shift is readily ascertainable from the surveillance footage that Amazon maintains.

83. NRS 608.040(1)(a-b) imposes a penalty on employers who fail to pay a discharged or quitting employee: "Within 3 days after the wages or compensation of a discharged employee becomes due; or on the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quite, or was discharged until paid for 30-days, whichever is less."

84. NRS 608.050 grants an "employee lien" to each discharged or laid-off employee for the purposes of collecting the wages or compensation owed to them "in the sum agreed upon in the contract of employment for each day the employer is in default, until the employee is paid in full, without rendering any service therefor; but the employee shall cease to draw such wages or salary 30 days after such default."

85. By failing to pay Plaintiff and Class Members for all hours worked (including minimum wages, regular wages, and/or overtime wages owed) in violation of Nevada law, at the correct legal rate, Amazon has failed to timely remit all wages due and owing to Plaintiff and Class Members who have separated their employment with Amazon during the relevant time period.

86. Despite demand, Amazon willfully refuses and continues to refuse to pay Plaintiff and Class Members all wages due and owing.

87. Plaintiffs, on behalf of themselves and on behalf of the members of the Class who are no longer employed by Amazon, respectfully request that the Court award all penalties due in accordance with NRS 608.140 and 608.040, and an additional thirty (30) days' wages under NRS 608.050, together with attorneys' fees, costs, interest as provided by law, and the relief requested below in the Prayer for Relief.

88. Wherefore, Plaintiff and the Class request relief as hereinafter provided.

## VIII. JURY DEMAND

89. Plaintiff hereby demands trial by jury on all issues.

## IX. PRAYER FOR RELIEF

Plaintiff, individually and on behalf of all Class Members, prays that the Court:

1. Certify that this action may proceed as a class action under Fed. R. Civ. P. 23;
2. Appoint Plaintiff as Representative of the Class, and appoint his counsel as Class Counsel;
3. Find and declare that Amazon's policies and/or practices described above violate Nevada law;
4. Award all damages, penalties, and/or restitution to be paid by Amazon for the causes of action alleged herein;
5. Award interest at the maximum legal rate, costs, and expenses, including reasonable attorneys' fees and expert fees;
6. Award pre-judgment and post-judgment interest, as provided by law; and
7. Order such other and further legal and equitable relief the Court deems just, necessary and proper.

Date: April 25, 2022

Respectfully submitted,

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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

DWIGHT MALLOY, on behalf of himself and all others similarly situated;

Plaintiffs,

vs.

AMAZON.COM SERVICES, LLC,

Defendant.

Case No. 2:22-cv-00286-ART-VCF

**DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT**

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

This purported class action arises from the safety measures Amazon, an essential business allowed to operate throughout the pandemic, took to keep its employees, their families, friends, and the general public safe during the Covid-19 pandemic in accordance with government mandates. Plaintiff alleges that Nevada law entitles him to be paid for time he allegedly spent undergoing pre-shift protective screenings for Covid-19, and based on this allegation asserts claims for: (1) failure to compensate for all hours worked in violation of 608.016[1]; (2) failure to pay minimum wage in violation of the Nevada Constitution; (3) failure to pay overtime in violation of 608.018; and (4) failure to timely pay all wages due and owing in violation of 608.020-.050.

[1] While Plaintiff also pled NRS 608.140 with his first, third, and fourth causes of action, NRS 608.140 is not an independent cause of action in and of itself. *See Neville v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 133 Nev. 777, 778 ("NRS 608.140 allows for assessment of attorney fees in a private cause of action for recovery of unpaid wages.").

This Court should dismiss Plaintiff's First Amended Class Action Complaint ("FAC") because the time that Plaintiff claims he and others spent undergoing these Covid-19 screenings is not compensable. For this time spent to be compensable under Nevada law, it must be "hours worked" and, to be "hours worked", it must have been spent primarily for Amazon's benefit. This was not; rather, these screenings were unquestionably for the benefit of the employees themselves as the screenings aided in protecting them from illness, hospitalization, even death, and Plaintiff concedes they benefitted the public generally. Even if this time could be considered hours worked, the screening is not indispensable and integral to the employees' primary duties and, thus, is not compensable time in light of United States Supreme Court precedent. Because all of Plaintiff's claims are predicated on this time being compensable, each claim fails and the FAC must be dismissed with prejudice.

Assuming, *arguendo*, that this screening time could be compensable time, Plaintiff has still failed to plausibly allege that Amazon violated Nevada law. Plaintiff's claim that Amazon violated NRS 608.016 because it (allegedly) did not pay for all hours worked fails because that statute applies only to trial periods / break-in periods for new employees. Plaintiff's minimum wage claim fails because, on the face of the FAC, Plaintiff was paid more than Nevada's minimum wage. Further, Plaintiff has failed to sufficiently plead his weekly overtime claims as he has not identified a given week in which he was denied overtime pay due to him. Plaintiff's claim for waiting time penalties fails because it is dependent on the foregoing claims, all of which fail. Moreover, those penalties are not triggered until the amount of wages that are due has been ascertained which, here, it has not been and will not be unless Plaintiff prevails on one or more of the foregoing claims. Finally, Plaintiff failed to sufficiently plead his waiting time penalties claim.

Plaintiff has not alleged a legally actionable claim that Amazon failed to compensate him in compliance with the law and each of his claims must be dismissed with prejudice.

## II. BACKGROUND

### A. Plaintiff's Factual Allegations

Plaintiff worked for Amazon as an hourly, non-exempt employee from approximately August 2020 to April 2021. FAC ¶ 14. Plaintiff "normally" worked five days a week, his "normal" shift was ten hours a day on average, and he "normally" worked "approximately" 50 hours a week. *Id.* He was

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paid an hourly rate between $15.80 - $16.10 per hour. *Id.* Plaintiff worked as a "fulfillment center associate" and "[h]is job duties included moving boxes, stacking packages, and loading boxes." *Id.*

As described in the FAC, "the novel Coronavirus has infected over 81 million Americans and caused the death of over 900,000 Americans." *Id.*, ¶ 12. In response to this pandemic, "Amazon implemented a company-wide policy requiring each of its hourly, non-exempt employees to undergo a physical and medical examination to check for symptoms of the Coronavirus each shift." *Id.* The examination, which was undertaken on Amazon's premises prior to the start of the employees' shifts and prior to clocking-in, was a requirement to work each shift. *Id.*, ¶¶ 12, 16. The examination, inclusive of time waiting in line, took "approximately 10 minutes to 15 minutes on average." *Id.*, ¶ 20. Amazon did not pay the employees for this time. *Id.*, ¶ 12.

As alleged, "Amazon required Plaintiff and Class Members to undergo this screening for the purposes of overall safety in the Amazon facilities and to prevent the Plaintiff and Class Members from inadvertently and unintentionally infecting the Amazon facilities or Amazon products, and in turn, Amazon's customers." *Id.*, ¶ 28. "The COVID-19 examinations were necessary to ensure that the virus did not infect the Amazon facilities or customers. The examinations were also necessary to ensure that the virus did not disrupt the work performed by Plaintiff and Class Members or affect the business operations of Amazon. If Amazon did not have the COVID-19 screening, workers could inadvertently or unintentionally bring the virus into the Amazon facilities causing a mass breakout of the virus infecting hundreds to thousands of other workers of Amazon." *Id.*, ¶29.

**B. The State of Nevada Enlisted Employers to Assist in Inhibiting the Spread of COVID-19.**

Amazon is an "essential business" allowed to remain open throughout the pandemic. *See* Exhibit A, Emergency Regulations Issued by Nevada Department of Public Safety, p.5-6.[2] As early as

[2] Pursuant to Federal Rule of Evidence 201(b), a court may take judicial notice of "a fact that is not subject to reasonable dispute because it (1) is generally known within the court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." When ruling on a motion to dismiss, a court may take judicial notice of "matters of public record" without converting the motion to dismiss into a motion for summary judgment. *Intri–Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007); *see also United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003); *Parks Sch. of Bus. v. Symington*,



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April 14, 2020, Nevada's Occupational Safety & Health Administration ("Nevada OSHA") was recommending that essential businesses, such as Amazon, "[c]onduct daily surveys of changes to staff/labor health conditions." *See* Exhibit B, April 14, 2020 Letter Issued by Nevada OSHA, p.2. Nevada OSHA further asserted that it "**is emphasizing the need for business leadership to be working with and [be] aware of the health and well-being of its staff**." *Id.* (emphasis in original). The foregoing letter specifically "[**r]equired**" businesses to consult the Federal OSHA publication "Guidance on Preparing Workplaces for COVID-19". *Id.* (emphasis in original). This Guidance instructed employers to "Develop Policies and Procedures for Prompt Identification and Isolation of Sick People, if Appropriate." Exhibit C, Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 2020, p.9. On May 7, 2020, the Governor of Nevada issued Declaration of Emergency Directive #018 which stated:

> Section 10: *All businesses must adopt measures that meet or exceed the standards promulgated by NV OSHA to minimize the risk of spread of COVID-19.* All businesses are encouraged to permit their employees to work from home to the maximum extent practicable. The Nevada State Occupational Safety and Health Administration shall continue to ensure that businesses reopened pursuant to this Directive or otherwise operating during the state of emergency provide adequate protections to their workers and adopt sanitation protocols that minimize the risk of spread of COVID-19 among their workforce. NV OSHA shall enforce all violations of its guidance, protocols, and regulations.

Exhibit D, Declaration of Emergency Directive #018 (emphasis added).

The following day, May 8, 2020, Nevada OSHA reiterated its guidance with respect to conducting daily surveys and business leaders' need to work with public health officials and to be aware of the health and well-being of the employees. Exhibit E, May 8, 2020 Letter Issued by Nevada OSHA, p.2. Indeed, Nevada OSHA took it a step further, stating "**NV OSHA emphasizes that *slowing/addressing the spread of COVID-19 is a required aspect of all activities/task/services associated with open businesses* and will continue to enforce or promote the use of identified measures to address this public health crisis.**" *Id.* at p.4 (bold emphasis in original, italicized emphasis added). In association with the Governor's Declaration of Emergency Directive #033 issued

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51 F.3d 1480, 1484 (9th Cir. 1995). Thus, the Court may take judicial notice of **Exhibit A**, as well as **Exhibits C-G**, without converting this motion into a motion for summary judgment because each of these documents are public records, in the form of Declarations of Emergency Directives from the Governor of Nevada and guidance issued by OSHA.



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on October 1, 2020, Nevada OSHA provided employers sample Covid-19 screening questions for employees. Exhibit F. Nevada OSHA instructed that employers were to "implement COVID-19 Prevention Programs", noting that the "most effective" would include "*adopting measures* to ensure that workers who are infected or potentially infected *are separated and sent home* from the workplace." Exhibit G, May 14, 2021 Letter Issued by Nevada OSHA, p.3.

## III. LEGAL STANDARD

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). To survive dismissal, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed.R.Civ. P. 8(a)(2). While a pleading generally need not contain detailed allegations, it must allege sufficient facts to raise a right to relief above the speculative level. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). This obligation "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.* Rather, to survive a motion to dismiss, a complaint must plead "enough facts to state a claim for relief that is plausible on its face." *Id.* at 570; *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

## IV. ARGUMENT

### A. The Time Spent Undergoing Covid-19 Screenings is Not Compensable

#### 1. The Time Spent in Covid-19 Screenings Did Not "Primarily" Benefit Amazon and, Therefore, Does Not Constitute Hours Worked.

Whether the time Plaintiff claims to have spent being screened for Covid-19 is compensable depends first on whether that time constitutes "hours worked" under Nevada law. While Nevada statutes do not define "work" time, there can be no dispute that Nevada follows federal guidance in understanding the concept. *See Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879 (2014) (in deciding wage-and-hour issues, Nevada courts look to the federal Fair Labor Standards Act ("FLSA") unless Nevada's statutory language is materially different from or inconsistent with it); *Sargent v. HG Staffing, LLC*, No. 3:13-cv-00453-LRH-GWF, 2019 WL 1117905, at *9 (D. Nev. Mar. 8, 2019).

Under the FLSA, work is defined as any activity "controlled or required by the employer and pursued *necessarily and primarily for the benefit of the employer* and his business." *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 31 (2014) (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No., 123*, 321 U.S. 590, 598 (1944)) (emphasis added). An activity is not primarily for the benefit



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of the employer under the FLSA where any benefit the employer receives is only incidental, or where the employer and its employees benefit more or less equally from the activity, including when the activity is related to employee health and safety. *See, e.g., Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1163 (D.C. Cir. 1975) (employees accompaniment of OSHA inspectors around employer's facility was not primarily for the employer's benefit despite "furthering industrial safety benefits"); *Wheat v. J.B. Hunt Transp., Inc.*, 2016 WL 1397673, at *4 (C.D. Cal. Apr. 5, 2016) (truck drivers' sleep apnea testing pursuant to federal requirements and employer's internal policies was not primarily for the benefit of the employer; rather, that "benefit [was] incidental"); *Gibbs v. City of N.Y.*, 87 F. Supp. 3d 482, 493-95 (S.D.N.Y. 2015) (counseling sessions that police officers with alcohol problems were required to complete were not compensable); *Makinen v. City of N.Y.*, 53 F. Supp. 3d 676, 698-99 (S.D.N.Y. 2014) (employer-mandated alcohol rehabilitation treatments were not primarily for the police department's benefit). As the *Leone* court noted, "[m]any activities which may increase employee effectiveness and thus benefit the employer are not worktime activities under [the] FLSA" and, by extension, do not meet the *Tennessee Coal* definition of "work." 523 F.2d at 1163.

The fact that Amazon's Covid-19 screenings were conducted in alignment with the Governor's Emergency Directives and the guidance of Nevada OSHA makes clear that these screenings benefited Amazon associates and the public at large and were not undertaken primarily for Amazon's benefit. As laid out above, as early as April 14, 2020, Nevada OSHA was recommending that those few businesses that were deemed essential and, thus, allowed to continue operating, such as Amazon, "[c]onduct daily surveys of changes to staff/labor health conditions" and was "emphasizing the need for business leadership to be working with and [be] aware of the health and well-being of its staff." In early May of 2020, the Governor issued a directive requiring business to "adopt measures that meet or exceed the standards promulgated by NV OSHA to minimize the risk of spread of COVID-19" and both the Governor and Nevada OSHA have since repeatedly pressed employers to take steps to inhibit the transmission of Covid-19, including that employers separate infected workers and send them home which, per Paragraph 19 of the FAC, Amazon did.

Courts have held, in analogous circumstances, that government mandated workplace screenings are not conducted primarily for the employer's benefit. In *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007), for example, the court determined that mandatory

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security screenings of construction workers at the Miami International Airport were not compensable time. The screenings at issue were required by the Federal Aviation Administration; the employer could not choose whether its employees were screened. For that reason, the court concluded that the employer "did not primarily--or even particularly--benefit from the security regime." *Id*. at 1344. In other words, though the screenings were "necessary" for workers to access their jobsite, they were required by the government to achieve purposes that did not primarily benefit the employer. *Id*.[3]

Moreover, it strains all credibility to say that actions being taken to protect employees from a pandemic that has resulted in more than 900,000 deaths in America alone, has resulted in the hospitalizations of millions more, and has left an untold number of people with possibly life-long afflictions were undertaken primarily for *Amazon's* benefit. The assertion that doing so also protected Amazon's customers and, therefore, was primarily for Amazon's benefit is illogical – if the screenings protected customers, they also protected the public at large which is a far larger group than just Amazon's customers.

Plaintiff's desperate re-working of the complaint after seeing Amazon's Motion to Dismiss cannot and does not change the fundamental fact that these screenings primarily benefitted Amazon's employees, their families and friends, and the general public, no matter how many different ways

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[3] Counsel is not aware of any case in which a Court has found that Covid-19 screenings are, in fact, "hours worked"; i.e. has found they actually are primarily for the benefit the employer. The two cases of which counsel is aware that have looked at this "hours worked" question are readily distinguishable. In the first, *Vaccaro v. Amazon.com.dedc, LLC*, Civil Action No. 18-11852 (FLW), 2021 WL 1022699 * 4-5 (D.N.J. March 17, 2021), the Court did not analyze the plausibility of Plaintiff's assertion that the screenings were primarily for Amazon's benefit; instead, it simply declared it to be a fact question. In the second, *Boone v. Amazon.com Services, LLC*, No. 1:21-cv-00241-DAD-BAM, 2022 WL 780215 (E.D. Cal. March 11, 2022), the Court effectively accepted at face value the allegation that the screenings primarily benefit the employer and did not meaningfully examine whether that assertion is plausible. With respect, both *Boone* and *Vaccaro* are wrongly decided as they are overly deferential to counsel's wordsmithing, failing even to appreciate (indeed, seemingly giving no weight at all to) the real-life toll of the pandemic on the general public, the governmental mandates related to it, or the role companies were compelled to play in combatting it. Notably, in *Perez v. Walmart, Inc.*, 2021 WL 5741484, at *2 (W.D. Mo. Oct. 25, 2021), the Court dug deeper and dismissed that plaintiff's unjust enrichment claim, holding that "there is little doubt that plaintiff, defendants, and their consumers, contractors, and all persons entering the stores were the beneficiaries of the early detection health and safety protocols" and, thus, the employer's Covid-19 screenings provided a "mutual benefit to the parties." *Id.* at *3. Even there, the Court's litany of beneficiaries is incomplete because it does not include the employees' family members and the general public.



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counsel wordsmiths it. Tellingly, the FAC asserts that "[i]f Amazon facilities suffered an infection outbreak, Amazon would potentially have to ... shut down its warehouses until it was safe to open again." FAC ¶ 35. It is implausible that it is *Amazon* who that would primarily harm; rather, the harm would fall primarily on each Class Member who was ill as they might be hospitalized, suffer long-term consequences, or die, each Class Member might infect their family members or friends who might, in turn, be hospitalized, suffer long-term consequences, or die, and so on. Further, each of the *thousands* of Class Members who would be affected is an hourly employee who would not be being paid during such a shut down.[4] The primary harm, and therefore the primary benefit for avoiding a shut down, is to the employees, their family members and friends, and the general public (especially given that Amazon was an essential business). Plaintiff's assertion to the contrary is implausible.

**2. Nevada Law Incorporates the Portal-to-Portal Act.**

The Portal-to-Portal Act was passed by Congress in 1947 to address the "flood of litigation" that the Supreme Court's definition of work in *Tennesssee Coal* and its progeny had spawned; litigation which Congress deemed could "bring about the financial ruin of many employers." *Busk*, 574 U.S. at 32 (quoting 29 U.S.C. § 251(a)–(b)). Thus, the Portal-to-Portal Act "exempted employers from liability [under the FLSA] for . . . 'activities which are preliminary to or postliminary to [the employee's] principal activity or activities.'" *Id.* at 32-33 (quoting 29 U.S.C. § 254(a)). As the Supreme Court held in *Busk*, security screenings are among the activities that are not compensable pursuant to the Portal-to-Portal Act. *Id.* at 35. While the Sixth Circuit determined in *In Re: Amazon.Com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation*, 905 F.3d 387, 404 (6th Cir. 2018) that Nevada law does not incorporate the Portal-to-Portal Act, for several reasons, including that the matter was wrongly decided, this Court should reject its holding.

[4] Plaintiff's allegation that infected employees "would not be able to provide their services to Amazon", FAC ¶ 31, further shows that Amazon is not the primary beneficiary of these screenings. The multiple harms and risks noted above exist from a single infection and fall far more heavily on the infected employee than on Amazon and, thus, the benefit from avoiding infection flows primarily to the employee. Plaintiff's assertion otherwise is implausible.



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**a. *In Re: Amazon's* Holding With Respect to Security Screenings Is Inapposite.**

In the FAC, Plaintiff cites *In Re: Amazon*, implying that its holding with respect to security screenings controls the outcome of this suit. FAC, ¶¶ 36, 56. It does not. First, the Court in that matter did not discuss at all whether the security screenings at issue were an activity that was primarily for the benefit of Amazon. Second, security screenings are apples and oranges to the Covid-19 screenings at issue in this suit. Unquestionably, the employees and the public at large derive significant benefits from the Covid-19 screenings. Further, as discussed below, the *In Re: Amazon* decision is not binding on this Court and, in any event, is erroneous and should be not be followed by this Court.

**b. *In Re: Amazon* is Not Binding on This Court.**

While the Sixth Circuit rendered a decision with respect to Nevada law in the *In Re Amazon* matter, that decision is not binding on this Court. *See Hart v. Massanari*, 266 F.3d 1155, 1169–75 (9th Cir. 2001) (stating "an opinion of our court is binding within our circuit, not elsewhere in the country. The courts of appeals, and even the lower courts of other circuits, may decline to follow the rule we announce—and often do."); *see also Heidig v. PNC Mortg., a Div. of PNC Bank, N.A.*, 2017 WL 6447869, at *3 n. 7 (D. Nev. Dec. 18, 2017) ("Plaintiffs' Motion for Reconsideration . . . cite[s] to case law in other states as well as case law in federal courts of appeal other than the Ninth Circuit. This Court is not bound by those decisions; it is bound only by interpretations of Nevada law and precedential case law from the Ninth Circuit and the United States Supreme Court."). Consequently, this Court should reach its own determination with respect to whether Nevada Law incorporates the provisions of the Portal-to-Portal Act.

**c. This Court Should Reject *In Re: Amazon*'s Erroneous Holding that Nevada Law Does Not Incorporate the Portal-to-Portal Act.**

As noted above, the question of whether the Portal-to-Portal Act had been incorporated into Nevada law arose in *In Re: Amazon* with the majority holding that it had not. 905 F.3d at 404. That holding was erroneous. As laid out by Judge Batchelder, in concurring in part and dissenting in part from the majority's holding:

> "As a federal court applying state law, we anticipate how the ... state's highest court would rule in the case and ... [i]f [that] court has not yet addressed the issue, ... render a prediction by looking to all the available data." *Vance v. Amazon.com*, 852 F.3d 601,



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> 610 (6th Cir. 2017) (quotation marks and citations omitted). In this case, I would expect the Nevada Supreme Court to find that Nevada's wage-and-hour statutes do not differ materially from the FLSA, so they implicitly incorporate the Portal-to-Portal Act's exclusions, and therefore time spent undergoing security checks is not compensable. Because the majority sees this differently, I must respectfully dissent from its analysis of the Nevada-law claims.

*Id.* at 408. "[W]hen interpreting state provisions that have analogous federal counterparts, Nevada courts look to federal law unless the state statutory language is 'materially different' from or inconsistent with federal law." *Id.* at 398 (citation omitted). The Nevada Supreme Court in *Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879 (2014) harmonized Nevada's minimum wage law with the FLSA, citing that "the Legislature has not clearly signaled its intent that Nevada's minimum wage scheme should deviate from the federally set course." As Judge Batchelder noted, however, while the Nevada Supreme Court is willing to deviate from federal law, "it appears to limit that willingness to situations in which it finds 'substantive reason to break with the federal courts.'" 905 F.3d at 408 (quoting *Terry*, 336 P.3d at 957). Judge Batchelder properly found "no such reason here." *Id.*

There is ample reason to predict that the Nevada Supreme Court would, in fact, find that the provisions of the Portal-to-Portal Act have been integrated into Nevada law. As Judge Batchelder noted, aside from *Terry, supra*, the Nevada Supreme Court in *Csomos v. Venetian Casino Resort, LLC*, 128 Nev. 891, 381 P.3d 605, *3 (2012) (Table), found that NRS 608.018 tracks the FLSA. *In Re Amazon*, 905 F.3d at 408-09. As Judge Batchelder further noted, the Nevada Supreme Court likewise decided the meaning of "work" under NRS 608.016 based on the FLSA and federal case law. *Rite of Passage v. Nevada Department of Business and Industry*, No. 66388, 2015 WL 9484735, at *1 (Nev. Dec. 23, 2015). Plaintiff here makes claims under both NRS 608.016 and NRS 608.018.

Aside from the foregoing, which Judge Batchelder cited specifically, there is a wealth of support for her prediction. The Nevada Attorney General recognized in 2005, "it is apparent that the [Nevada] Legislature intended to enact state overtime compensation law that was generally consistent with federal law on the same topic." 05-04 Op. Att'y Gen. 12, 24-25 (2005). The Nevada Labor Commissioner's established practice is to rely on federal regulations when they are not inconsistent with Nevada's laws. *See, e.g.* Office of the Labor Commissioner, Advisory Opinion, June 21, 2013 (relying on FLSA regulations with respect to rounding as NRS 608.016 did not address it and "[f]or

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this office to take a different position would result in an additional burden on Nevada employers and deny them a practical and effective tool for calculating time worked that is available to all other employers throughout the country.");[5] Office of the Labor Commissioner, Advisory Opinion, December 22, 2016 (approving use of the federal fluctuating workweek method for determining overtime).[6] Further, Nevada defines a "Week of work", for all intents and purposes, identically with federal law. *Compare* NRS 608.0123 ("7 consecutive periods of 24 hours which may begin on any day and at any hour of the day.") *with* 29 C.F.R. §778.105 ("An employee's workweek is a fixed and regularly recurring period of 168 hours - seven consecutive 24-hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day.")

Numerous cases demonstrate that Nevada law mirrors the FLSA absent some explicit statutory command to the contrary. *See Rivera v. Pen & Sons Farms, Inc.*, 735 F.3d 892, 900-01 (9th Cir. 2013) (finding that Nevada courts would likely "interpret Nevada law to follow federal law" on wage and hour issues where the state and federal statutes do not "contain materially different language"); *Johnson v. Pink Spot Vapors Inc.*, 2015 WL 433503, *6, Case No. 2-14-cv-1960-JCM-GWF (D. Nev., Feb. 3, 2015) (holding that "analysis of plaintiffs' FLSA claims is also applicable to [plaintiffs'] claim" under NRS 608.250). Indeed, the Nevada legislature has amended at least one of its statutes (that did explicitly conflict with the FLSA) specifically in order to track federal law. *See Csomos*, 2012 WL 642460, at *2 (noting that "the Legislature amended NRS 608.018,[7] according to the legislative history, to make it consistent with federal law") (citing Hearing on A.B. 44 Before the Assembly Commerce and Labor Comm., 73rd Leg. (Nev., March 9, 2005), which stated that the intent of the

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[5] The June 21, 2013 Advisory Opinion can be found at: http://labor.nv.gov/uploadedFiles/labornvgov/content/About/AO%20Time%20Clock%20Rounding%20to%20Calculate%20Employee%20Pay.pdf (last visited April 2, 2022).

[6] The December 22, 2016 Advisory Opinion can be found at: http://labor.nv.gov/uploadedFiles/labornvgov/content/About/AO%20Fluctuating%20Workweek.pdf (last visited April 2, 2022).

[7] NRS 608.018 governs an employee's entitlement to overtime compensation and has been amended several times recently to comport with the FLSA. The 2005 amendment eliminated an overtime exemption that covered employees who were paid at least one and one-half times the minimum wage. *Csomos*, 2012 WL 642460, at *2-3. Likewise, a 2009 amendment altered another exemption to mirror the FLSA as to commissioned employees in a retail sales business. *Id.*

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amendments was to "mirror federal law" and including comments from the Labor Commissioner that the exceptions under NRS 608.018 "generally track the exceptions that are in the Fair Labor Standards Act").

Finally, the temporal progression of the relevant statutes provides further indicia that the term "work" in Nevada wage statutes should be understood consistently with federal regulation, including the amendments to the FLSA codified in the Portal-to-Portal Act. As noted above, the FLSA was amended by the Portal-to-Portal Act in *1947*. 29 U.S.C. § 251 et seq. Accordingly, when the Nevada legislature passed its overtime statute NRS 608.018 *in 1975*, and especially when it passed NRS 608.016 *in 1985*, using the term "work," robust federal case law had developed interpreting and discussing the concept of compensable "work." Critically, the Nevada Supreme Court has stated that when interpreting a statute, "it is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." *City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118–19 (1985) (citing three United States Supreme Court cases addressing federal law and noting the "well-known history of arbitration and a traditional use of the terms 'arbitrator' and 'final and binding' in the context of labor relations."). Given Nevada's overt reliance on federal interpretation and guidance in understanding its wage statutes and given the decades of caselaw and regulation under federal law, the most reasoned explanation for Nevada's not otherwise defining "work" is that the term was already sufficiently defined under federal law.

In the end, Nevada statutes define "work" time consistently with the FLSA and Nevada clearly follows federal guidance in understanding the concept. It was error, one this Court should not replicate, for the Sixth Circuit to treat Nevada law as not following the provisions of the Portal-to-Portal Act. Amazon respectfully submits that this Court should find that Nevada law incorporates the principles of the Portal-to-Portal Act in determining what constitutes work.

**d. The Covid-19 Screenings Are Non-Compensable As They Are Not Integral and Indispensable to Plaintiff's Job Duties.**

The Supreme Court has held that security screenings of workers who "retrieve products from warehouse shelves and package those products for shipment to Amazon customers" are not compensable under the Portal-to-Portal Act as those screenings are "not an intrinsic element of



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retrieving products from warehouse shelves or packaging them for shipment" and the company "could have eliminated the screenings altogether without impairing the employees' ability to complete their work." *Busk*, 574 U.S. at 35. Critically, the test is not "whether an employer *required* a particular activity. *Id.* at 36. (emphasis in original). Rather, "[t]he integral and indispensable test is tied to the productive work that the employee is *employed to perform*." *Id.* (emphasis in original). Critically, there is "no distinction between the searches conducted for the safety of the employees and those conducted for the purpose of preventing theft" as neither are compensable under the Portal–to–Portal Act. *Busk*, 574 U.S. at 36. That the Covid screening protects Amazon's employees, among numerous others, does not make it compensable. Undergoing a screening for Covid-19 is no more "integral and indispensable" to Plaintiff's job of 'moving boxes, stacking packages, and loading boxes' (FAC., ¶ 14) than is the security screening that the *Busk* court has already held is not integral and indispensable.

The decision in *Pipich v. O'Reilly Auto Enterprises, LLC*, Case No.: 21cv1120-L-LL, 2022 WL 788671 (March 15, 2022 S.D. Cal.) is instructive. Similar to the instant case, Pipich was engaged in manual work and his "job duties included loading and transporting auto parts". *Id.* at *4. As the Court held in dismissing his FLSA claim for time spent in Covid-19 screenings, the defendant "did hire [its] employees to undergo health screenings" and, thus, the screenings "do not share the required nexus with Plaintiff's duties . . . to make the screening a compensable activity." *Id.; see also Perez*, 2021 WL 5741484, at *3 (Covid-19 screenings were not integral and indispensable to plaintiff's position where her job duties "include[d] stocking and unloading; assist[ing] customers find products; perform[ing] cashier and front-end services; and acknowledg[ing] and greet[ing] customers"); *Adegbite v. United States*, 156 Fed. Cl. 495, 506 (2021) (holding that the "time spent passing through the Covid-19 screening" was not "integral to the Plaintiffs' principal activities as correctional officers"); *Alvarez v. United States*, No. 20-1533C, 2021 WL 6163405, at *4 n.2 (Ct. Fed. Cl. Dec. 30, 2021) (same); *Adair v. United States*, No. 20-1148C, 2021 WL 6163407, at *5 n.2 (Ct. Fed. Cl. Dec. 30, 2021) (same).

**B. Plaintiff's First Cause of Action Claim Under NRS 608.016 and NRS 608.140 Fails Because NRS 608.016 Applies Only to Trial / Break-In Periods.**

NRS 608.016 applies only to trials or break-in periods and should not be read in a vacuum:

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> **NRS 608.016 Payment for each hour of work; trial or break-in period not excepted.** Except as otherwise provided in NRS 608.0195 and 608.215, an employer shall pay to the employee wages for each hour the employee works. An employer shall not require an employee to work without wages during a trial or break-in period.

The text of the statute makes clear that it is intended to prevent employers from forcing employees to work without getting paid during a trial or break-in period. There is no indication in the language of NRS 608.016 that it was ever intended to require "gap time" pay[8] in addition to minimum wage and overtime. That is hardly surprising since, as a practical matter, there was no need to pass NRS 608.016 in order to ensure employees were paid their agreed-upon wages or straight time. Employees already had a cause of action – breach of contract or quasi-contract – for unpaid agreed-upon wages outside of minimum wage or overtime.

The legislative history of NRS 608.016 makes clear that the law was passed to ensure that employers did not compel prospective employees to agree to forego pay when they first started working, under the guise of a trial period. *See* testimony and exhibits from Nevada Labor Commissioner Frank MacDonald.[9] Indeed, in one of the Attorney General Opinions supplied by Commissioner MacDonald in support of passage, the Nevada Attorney General restated the Commissioner's inquiry as: "You have advised this office that certain employers in Nevada are requiring new employees to break in on the job by working for a certain indefinite period without pay. Your question is whether such procedure contravenes the provisions of NRS 608.250 and 609.030." After analyzing the language of the then-existing minimum wage statute in NRS 608.250 and the previous female workers' hours statute in NRS 608.030, the Nevada Attorney General opined:

> These sections cover minimum wages to both sexes. An employer is obligated to pay not less than the *minimum statutory wages for all hours* that he knowingly suffers or permits an employee to work. The agreement of the employee, as a condition of securing the job, *that he will work without compensation for a break in period is not voluntary, but coercive, and thus runs afoul of Nevada statutes*.

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[8] "Gap time" refers to time, allegedly uncompensated, "that fall[s] between the minimum wage and the overtime provisions of the" law. *See, e.g., Adair v. City of Kirkland*, 185 F.3d 1055, 1062 (9th Cir.1999).

[9] The legislative history for AB 127, Section 9 of which became NRS 608.016, may be found at: https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1985/AB127,1985.pdf.



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> The insecurity of such an arrangement is emphasized by the fact that an employer *does not guarantee the employee a gainful employment after the break in period*. The employer may, and often does, release the employee at the end of the break in period, thus opening the door to securing another employee on the same terms. It may readily be seen that *such procedure could lead to free service by employees ad infinitum*.

(emphasis added)

There is nothing in the legislative history supporting that NRS 608.016 was ever meant to address anything other than unpaid break-in periods, let alone supporting off-the-clock straight time gap claims. Any such interpretation would require complete rejection of the legislative history and extensive modification to rework the statute with existing minimum wage, overtime, and breach of contract laws. NRS 608.016 does not apply to unpaid work outside a trial or break-in period.

Plaintiff does not claim, and could not claim, that he worked an unpaid trial or break-in period. Plaintiff's NRS 608.016 claim must be dismissed.

### C. On the Face of the Complaint, Plaintiff Was Paid Minimum Wage and, Thus, His Second Cause of Action for Failure to Pay Minimum Wage Fails.

The Nevada Minimum Wage Amendment to the Constitution of the State of Nevada, Article 15, Section 16, is subject to NRS 608 provisions that qualify the rate under the current two-tiered minimum wage. In 2020, Nevada's minimum wage was $8.00 per hour if an employer offered health benefits to the employee, and $9.00 per hour if it did not. NRS 608.250(1)(b)(1-2).

Here, Plaintiff alleges that he was paid an hourly rate between $15.80 - $16.10 per hour and worked for Amazon from approximately August 2020 until April 2021. FAC, ¶ 14. Plaintiff contends his normal schedule was five shifts for 10 hours each shift, i.e. 50 hours of work each week. *Id.* At most, Plaintiff alleges he spent up to 15 minutes per day in Covid-19 screenings. *Id.* at ¶ 20. Even assuming Plaintiff spent 15 minutes each day/1.25 hours each week in screenings and that time is compensable – which Amazon does not concede – Amazon still paid Plaintiff more than the minimum wage. For example, when taking the lowest rate Plaintiff alleges that he was paid, $15.80, Plaintiff earned $790 in straight pay each week ($15.80 x 50 = $790) and $869 per week, inclusive of overtime at time-and-a-half ($15.80 x 40 + $23.70 x 10 = $869).[10] Critically, adding in 1.25 hours each week for alleged screening time does not establish a violation of the minimum wage as even using the straight time figure of $790, plaintiff still made $15.41 per hour ($790 / 51.25 = $15.41), far more than

[10] Plaintiff does not allege that he was not paid time-and-a-half for his recorded time.



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the $9.00 per hour upper tier minimum wage.[11]

Amazon expects that Plaintiff will cite *In Re Amazon* to assert that the Court cannot properly analyze whether Plaintiff was paid minimum wage under Nevada law by reviewing his total earnings for the week; i.e. by utilizing the "workweek method." 905 F.3d at 406. As discussed in Section IV.A.2, however, this Sixth Circuit case is not binding on this Court. Moreover, its holding with respect to the workweek method is wrongly decided. It is well-settled that an employer does not violate the minimum wage requirements of the FLSA provided that the employee's pay "when averaged across their total time worked, still paid them above the minimum wage." *See Adair*, 185 F.3d at 1063. The analysis is the same under the minimum wage statute (NRS 608.250) as it is under the FLSA. *See Johnson v. Pink Spot Vapors Inc.*, 2015 WL 433503, *6, Case No. 2-14-cv-1960-JCM-GWF (D. Nev., Feb. 3, 2015); *but see In Re Amazon,* 905 F.3d at 406.

It is axiomatic that in interpreting statutes, the Courts "have a duty to consider the statute[s] within the broader statutory scheme harmoniously with one another *in accordance with the general purpose of those statutes*." *Neville v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 133 Nev. 777, 783 (2017) (emphasis added). Indeed, "when possible, any conflict is [to be] harmonized." *Doe Dancer I v. La Fuente, Inc.*, 481 P.3d 860, 871 (Nev. 2021) (citation omitted). The Sixth Circuit's decision fails to harmonize the relevant Nevada statutes and, indeed, leads to an absurd result, contrary to Nevada's statutory interpretation rules. *See, e.g. Gallagher v. City of Las Vegas*, 114 Nev. 595, 599-600 (1998) ("Our interpretation should be in line with what reason and public policy would indicate the legislature intended, *and should avoid absurd results*.") (emphasis added).

Nevada Administrative Code § 608.115 states:

> 1. An employer shall pay an employee for all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee.
>
> 2. If an employer pays an employee by salary, piece rate or any other wage rate except for a wage rate based on an hour of time, *the employer shall pay an amount that is at least equal to the minimum wage when the amount paid to an employee in a pay period is divided by the number of hours worked by the employee during the pay period*.

(emphasis added).

[11] Similarly, when using the $869 amount, adding in an additional 1.25 hours each week does not demonstrate a violation of the minimum wage because plaintiff would have made $16.10 per hour ($869 / 51.25 = $16.10).



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The Sixth Circuit dismissed the emphasized portion of this regulation in finding that Nevada did not permit the workweek method, noting that on the regulation's face it only applied to employees not paid by the hour. *In Re: Amazon*, 905 F.3d at 406-07. By rejecting the workweek method for employees paid by the hour, however, the Court was holding that Nevada had created an absurd, two-tiered minimum wage scheme in which two non-salaried employees could work the exact same number of hours and be paid the exact same amount, yet one would have claims for failure to pay minimum wage and be entitled to daily overtime, but the other would not, with the sole distinction between them being *how* they were paid. Taking $9.00 per hour as the minimum wage as it was for Plaintiff's employment, under the Court's theory if two employees worked 40 hours and were paid $360.00, but one was paid by piece rate and the other by the hour, the latter was not paid minimum wage claim if he worked 15 minutes a day off-the-clock (i.e. had 38.75 hours on the clock and 1.25 hours off), while the former was paid minimum wage.

As to overtime, Nevada law provides for daily overtime for employees making less than 1.5 times minimum wage. NRS 608.018. Nevada law further provides that for purposes of determining overtime under 608.018, the minimum wage rate for persons "paid by salary, piece rate or any other wage rate" is determined "by dividing the amount paid to [the] employee in a week by the number of hours worked by the employee during the week." NAC 608.125(2). Taking the example discussed above of two employees working 40 hours and receiving the same pay, albeit now $540 ($9.00 x 1.5 x 40), the upshot of the Sixth Circuit's holding that Nevada does not follow the workweek method is that the hourly employee in this example is entitled to daily overtime (because of his off-the-clock time) and the piece rate worker is not. That is despite the fact that Nevada's overtime scheme makes how much the employee was paid the determining factor for daily overtime, not how they were paid.[12]

Amazon respectfully submits that the Sixth Circuit's rejection of the workweek method was

[12] The Sixth Circuit's suggestion that NRS 608.016 also mitigates against a finding that the workweek method is proper under Nevada law, 905 F.3d at 406, is flawed for the same reasons. As discussed above, the former applies only to break-in / trial periods and its reference to paying "wages for each hour the employee works" must be seen accordingly. Further, that provision must be harmonized with NAC 608.115 which permits paying employees via piece rate. Under the Sixth Circuit's reading, an employer could not pay piece rate because it would not be paying the employee "for each hour" worked.



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erroneous because rather than harmonizing Nevada's wage law, it creates disharmony and absurd results. This Court should, instead, harmonize Nevada law by applying the workweek method to Plaintiff's minimum wage claims. Plaintiff's minimum wage claims must be dismissed.

**D. Plaintiff's Third Cause of Action for Overtime Fails As He Has Not Sufficiently Pled a Claim for Weekly Overtime.**

Plaintiff's claim for weekly overtime under Nevada law must be dismissed because it fails to satisfy the pleading standard established by *Twombly* and *Iqbal*. The Ninth Circuit articulated the appropriate pleading standard for overtime claims in the case *Landers v. Quality Communications, Inc.*, and Plaintiff has failed to meet that standard. 771 F.3d 638, 640 (9th Cir. 2014), *as amended* (Jan. 26, 2015), *cert. denied*, No. 14-969, 2015 WL 569003 (Apr. 20, 2015). "[I]n order to survive a motion to dismiss, a plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours *in a given workweek* without being compensated for the overtime hours worked during that workweek." *Id.* at 644-45 (emphasis added). "Although plaintiffs in these types of cases cannot be expected to allege 'with mathematical precision,' the amount of . . . compensation owed by the employer, *they should be able to allege facts demonstrating there was at least one workweek in which they [were not fully compensated]." Id*. at 646 (citation omitted) (emphasis added). This same test is applied for a Nevada state law claim. *See Nye v. Burberry Ltd.,* No. 2:16-cv-00702-RFB-CWH, 2017 WL 1228408, at *3-4 (D. Nev. Apr. 2, 2017) (applying the federal pleading standard to dismiss overtime and minimum wage claims under Nevada law).

Plaintiff does not identify a "given workweek" in which he was denied overtime. Instead, he makes the generalized allegation that he "*normally* worked five days per week and his *normal* shift was ten hours per day on average" and asserts that he "*normally* worked "approximately" 50 hours per week." FAC, ¶ 14 (emphasis added). Those allegations are conclusory and, thus, insufficient. *See Pink Spot Vapors Inc*., 2015 WL 433503 at *6. In the *Pink Spot Vapors* suit, the Court explained that the plaintiffs' allegation that they "routinely worked more than forty hours per week" but were not paid overtime "is conclusory" and "nearly identical to complaints . . . the *Landers* court deemed properly dismissed." *Id.* at *4. The assertion from one of the *Pink Spot Vapors* plaintiffs "that she was routinely told to stay between fifteen minutes to an hour after her shift had ended" failed to bridge the "factual gap" to provide sufficient specificity to survive dismissal under the *Landers* standard. *Id*. In

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specifically considering plaintiffs' claims under Nevada state law, the Court held:

> [] Its analysis of plaintiffs' FLSA claims is also applicable to this claim. Plaintiffs have not alleged any additional facts for this claim. Instead, they have merely alleged that in addition to not paying them overtime wages, defendants did not pay the plaintiffs any wages for hours worked above forty hours a week, thus denying plaintiffs even a minimum wage. As discussed above, . . . plaintiff DeAlba's failure to 'develop factual allegations with sufficient specificity' for her FLSA claim indicates the same failure to satisfy the pleading standard in her [state wage] claim. The motion to dismiss will therefore be . . . granted as to DeAlba's claim.

*Id*. at *6; *see also Sargent*, 2019 WL 1117905, at *9 ("Allegations that merely raise the possibility of undercompensation fail to rise to the plausibility standard."). Accordingly, Plaintiff has failed to meet even the minimum plausibility standard set forth in *Landers* and the Court should dismiss Plaintiff's claim for weekly overtime.

**E. Plaintiff's Fourth Claim for Final Paycheck Penalties Under NRS 608.020-608.050 Fails Because It is Derivative of His Other Claims All of Which Fail and Because, As a Matter of Law, No Penalties Have Accrued.**

**1. Plaintiff's Penalties Claim Fails As It Is Derivative of His Other Claims.**

In *Turner v. Mandalay Sports Ent., LLC*, the Nevada Supreme Court explained that when a derivative claim is dependent on the success of an underlying claim and the underlying claim has not been established, the derivative claim "must fail as well." 124 Nev. 213, 222 n.31 (2008) (quoting *Gunlock v. New Frontier Hotel*, 78 Nev. 182, 185 n. 1 (1962)). Plaintiff's claim for Final Paycheck penalties is entirely dependent on his claim that the time spent in protective Covid-19 screenings prior to the start of his shift is work time for which he was uncompensated. For the reasons discussed above, that claim and each of the statutory/constitutional claims built from it, fail and, thus, Plaintiff's Fourth Cause of Action fails as well.

**2. Plaintiff's Claim For Final Paycheck Penalties for "Late" Final Pay Fails Because No Penalties Have Accrued.**

Plaintiff's claim for "late" final pay fails because Amazon has not failed to pay Plaintiff wages or compensation that has been determined is due to him. Simply put, unless and until this case is decided in Plaintiff's favor and the amount of unpaid wages is ascertained, wages are not *due*.

In 2017, the Nevada Supreme Court held there is a private right of action for unpaid wages. *Neville*, 133 Nev. at 778. Although reaching this conclusion, the Nevada Supreme Court did not examine the application of continuing rate penalties under NRS 608.020-050 for off-the-clock allegations where at no time prior to the employee's termination and final paycheck did the amounts

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become due. *See* NRS 608.020 (Discharge of employee: Immediate payment); NRS 608.030 (Payment of employee who resigns or quits employment); NRS 608.040 (Penalty for failure to pay discharged or quitting employee); NRS 608.050 (Wages to be paid at termination of service: Penalty; employee's lien) (collectively, the "Final Paycheck Laws"). Specifically, NRS 608.040(1) mandates continuing rate penalties are assessed when an employer fails to pay:

> (a) Within 3 days after the wages or compensation of a discharged employee *becomes due*; or
>
> (b) On the day the wages or compensation *is due* to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quit or was discharged until paid or for 30 days, whichever is less.

(emphasis added). Under the language of NRS 608.040, the provision that wages or compensation "continues at the same rate" only applies if the employee is "discharged" or "resigns or quits", i.e. only upon the final paycheck due following separation.

Where the amount of wages allegedly due at the time of termination is unascertainable by both the employer and the employee, those wages simply cannot "become[] due" to an employee. For example, in off-the-clock complaints where an employee alleges work that has not been reported to the employer and the employer has no knowledge of the alleged off-the-clock work, there is no way the employer can determine the amount, if any, "due" to the employee. In the FAC, Plaintiff makes two equally ridiculous allegations in an effort to overcome this problem: (1) the amount due at the time of termination is "ascertainable" because Amazon "could have" had employees clock-in before joining the line for Covid screening; and (2) the amount of time the Covid screenings took is "readily ascertainable from surveillance footage." FAC, ¶ 81-82. As to the former, the *sine qua non* of Plaintiff's claim is that Amazon did *not* have employees clock in for the Covid screening. Amazon cannot use non-existent clock-ins to ascertain the time spent in line. As to the latter, it is conclusory and entirely implausible. Plaintiff alleges that "Amazon employs more than 10,000 Nevadans". *Id.*, ¶ 13. It is entirely implausible that Amazon even *could* identify more than 10,000 different people just by seeing them on video. The implausibility of the assertion that Amazon could use these videos, at the time of termination, to determine time worked is further seen from consideration of the amount of time it would take just to review these videos, day-by-day, for every one of thousands of employees.



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The allegation that this time is ascertainable is not plausible.

The Final Paycheck Laws contemplate that the employer is put on notice of the exact amount due because the employer can cut off or cure the accrual of such penalties by paying that amount before the expiration of the 30-day period. In this regard, NRS 608.040(1)(b) specifically holds that "wages or compensation of the employee *continues* at the same rate from the day the employee resigned, quit or was discharged *until paid* or for 30 days, *whichever is less*." NRS 608.040(1)(b) (emphasis added). Thus, under this provision of NRS 608.040, if an employer does not pay wages that are "due" within 3 days of discharge, that employer can still pay after those 3 days have expired to incur the "less[er]" penalty of the number of days payment was delayed "until paid" if that is less than 30 days. *Id.*

Consistent with the mechanics of the Final Paycheck Laws, in breach of employment contract or quasi-contract cases the amount due is generally immediately ascertainable by reading the relevant contract or from the equivalent understanding between the parties. Similarly, in situations where an employer does not pay the correct statutory wage rate, the employee will immediately be able to demand the amount "due" from a cursory review of their pay and rate, *e.g.* an employee who was supposed to be paid $10.00 per hour but sees on their paycheck that they were only paid $5.00 an hour. Suits alleging off-the-clock work, which is what this suit ultimately claims to be, on the other hand, where employees never made any demand for incorrect payment prior to separation, do not have any wages "due" unless a court issues an order or judgment to that effect. Further illustrating this point, if Plaintiff's unknown amount of wages were "due" at the time of discharge, then the maximum penalties in the Final Paycheck Laws would automatically apply in *every* off-the-clock case because the employer would need to wait for the court judgment to know the amount to pay plaintiffs – making the payment outside the times allotted in NRS 608.020 and 030. This is an absurd result clearly not intended by the Nevada legislature as it fails to give the employer the opportunity to pay in a timely fashion and cut-off or cure potential penalties as contemplated by NRS 608.040.

A 1994 Nevada Attorney General opinion regarding NRS 608.040 is instructive. Opinion No. 94-25, 1994 Nev. AG LEXIS 25 at 1 (Dec. 31, 1994). The Nevada Attorney General examined if employees could be "paid their final paycheck in accordance with the terms of the CBA" which

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allowed final payment as late as 12 days after layoff. *Id*. In analyzing this claim, the Nevada Attorney General delved into the history of both NRS 608.040 and 608.050 along with the 1932 ruling in *Doolittle v. District Court*, 54 Nev. 319, 322 (1932). *Id*.

In *Doolittle*, Pat Burns was indebted to Theresa Doolittle for $200. *Doolittle* at 320. To pay this debt back, Burns entered into a contract with Doolittle to complete her house. *Id*. Unknown to Doolittle, Burns hired a third party, F.M. Gaylord, who brought suit under NRS 608.040 when he was not paid. *Id*. at 320. The Court found that Gaylord's NRS 608.040 claim was actually a NRS 608.050 claim. *Id*. at 321. In distinguishing the two statutes, the Court noted that NRS 608.050 did not amend or repeal NRS 608.040. Additionally, under NRS 608.050, the court stated:

> 3. Counsel urges that the act of 1925 [NRS § 608.050] works great hardships. We cannot see that it does. When a person employs another, if he is honest, he expects to pay for the service, and should be ready to do so upon the completion of the work, *or have an understanding to the contrary before the employment is entered into*. The statute itself contemplates payment when the same becomes due *under the contract of employment*. But if the act does work a hardship, that is something to be considered by the legislature and not by the courts.

*Id*. at 322. (Emphasis added).

Using the analysis in *Doolittle*, the Nevada Attorney General distinguished NRS 608.050 as applying to employees who were "laid off" and where "timing of payment is controlled by a *contract*." Opinion No. 94-25, 1994 Nev. AG LEXIS 25 at 6-7. (emphasis added). Thus, an employer could pay employees as far as 12 days out as long as the employees were subject to contractual "payment timing rules contained in the CBAs." *Id*. at 8. NRS 608.040, on the other hand, had to be "read in conjunction with NRS 608.020 and NRS 608.030, since all three statutes were passed together in 1919." *Id*. at 5. Unlike NRS 608.050 situations where payment timing is included in the terms of a contract of employment, NRS 608.040 was more of a "set of general rules" regarding the payment of wages upon an employee being "fired" or "after he quits." *Id*. at 5-6.

These analyses of NRS 608.020 through 608.050 by the Nevada Attorney General and the court in *Doolittle* are telling for several reasons. First, it shows that the history and structure of NRS 608.020 - NRS 608.050 indicate that they are to be read together as a set of rules for the distribution of a final paycheck to fired or quitting employees and *not* for after-the-fact allegations of off-the-clock work which are brought after the time of termination and after the expiration of the 30-day period in



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which an employer can cure nonpayment. Second, the *Doolittle* holding shows that even in 1932, seven years after the passage of NRS 608.050 and thirteen years after the passage of NRS 608.040, the Court analyzed both statutes strictly under the terms of a contractual employment situation, which is also consistent with this Court's later application in *Descutner v. v. Newmont USA Ltd.*, because contractual or quasi-contractual employment allows the parties to assess amounts "due" based on the agreed upon hours or payment for work. *Descutner v. Newmont USA Ltd.*, No. 3:12-cv-00371-RCJ-VPC, 2012 WL 5387703, at *1 (D. Nev. Nov. 1, 2012). Third, the *Doolittle* Court stated that NRS 608.050 (referred to as the 1925 act) did not amend nor repeal any portion of NRS 608.040 showing that even in 1932, the Court noted that the statutes in NRS Chapter 608 could be amended to interact with each other – which of course, was not done to apply the Final Paycheck statutes to each hour of work under NRS 608.016 or overtime under NRS 608.018 which were passed many decades later in 1985 and 1975 respectively. It was historically impossible for the Nevada Legislature to have contemplated the application of the 1919-1925 NRS 608.020-608.050 Final Paycheck Laws to 1985's NRS 608.016 and 1975's NRS 608.018.

In the Nevada Supreme Court's finding of a private right of action for NRS 608.020-050 in *Neville*, there is no analysis of this historical impossibility or of the difference between a due contractual amount and a yet-to-be-ascertained off-the-clock amount. Further, the Nevada Supreme Court also did not address the application of NRS 608.020-608.050 where amounts have not "become due" as required by the language of the statute or where claims are brought after the period in which the statute allows the employer to cure by limiting wages to "continues at the same rate. . . paid or for 30 days, whichever is less." Thus, even in *Neville*, there is no finding that Final Paycheck Laws include unascertained wage claims which are based on amounts not "due" at the time of discharge or resignation.

Here, in Plaintiff's Fourth Cause of Action, he seeks to try to combine four statutes to fabricate a claim for relief where none exists. There is ample historical evidence that NRS 608.020 – NRS 608.050 were created to address the timing of payment of a "final paycheck" in situations that have nothing to do with wage claims in which no ascertainable amount has "become due" upon termination or separation. As shown in the *Doolittle* case, the historical application of NRS 608.040 and 608.050



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was in the context of ascertainable amounts that "become due" such as in an employment contract. Therefore, the history, structure and plain language of NRS 608.020 – NRS 608.050 show that they were never intended to apply to wage claims where such amounts are not ascertainable and the employer has no ability to cure nonpayment.

**3. In the Alternative, Plaintiff's Fourth Cause of Action Should Be Dismissed Because He Has Not Sufficiently Pled a Failure to Pay Wages Due on Termination Under NRS 608.020-.050**

To the extent the Court were to apply NRS 608.020 – NRS 608.050 to claims for amounts not "due" after separation, Plaintiff has failed to set forth sufficient facts to support a plausible claim for violation of the Nevada rules for the distribution of a final paycheck under NRS 608.020-608.050. Plaintiff's allegations in this regard are nothing more than a formulaic recitation of the elements of a claim for failure to pay wages due on termination coupled with a conclusory allegation that Defendant violated the law. Simply stating, "Amazon has failed to timely remit all wages due and owing to Plaintiff and Class Members who have separated their employment with Amazon during the relevant time period" does not sufficiently allege a claim under these statutes. FAC, ¶ 85. This is an insufficient factual basis as a matter of law for the Court to be able to determine whether Plaintiff was in fact owed wages at termination or separation and that these wages were not timely paid. Accordingly, Plaintiff's' Fourth Cause of action should be dismissed. *See Twombly*, 550 U.S. at 570.

## V. CONCLUSION

Amazon respectfully requests that this Court dismiss Plaintiff's Amended Complaint.

Dated: May 9, 2022

Respectfully submitted,

MONTGOMERY Y. PAEK, ESQ.
AMY L. THOMPSON, ESQ.
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# EXHIBIT A

**Emergency Regulations Issued by Nevada Department of Public Safety**

# EXHIBIT A

**Emergency Regulations Issued by Nevada Department of Public Safety**

| SECRETARY OF STATE FILING DATA | For Filing Administrative Regulations | FOR EMERGENCY REGULATIONS ONLY |
|---|---|---|
| FILED,NV.SOS 2020 MAY 20 PM4:46 | Agency...Department of Public Safety, Division of Emergency Management | Effective date.....03/20/2020..... Expiration date.....04/16/2020..... ..... Governor's Signature |

Classification: [ ] PROPOSED [ ] ADOPTED BY AGENCY [X] EMERGENCY

Brief description of action..... Emergency amendment of NAC 414

The Department of Public Safety, Division of Emergency Management has adopted the emergency regulation as a result of the COVID-19 Pandemic. This addition to NAC 414 will define essential and non-essential businesses, as well as, parameters for essential businesses to conduct business in this State under the Governor's March 12, 2020, Declaration of Emergency and related directives. Through the enclosed emergency regulation, businesses, as well as, state and local governments, will have the guidance to determine which businesses are essential and which are non-essential during the COVID-19 Pandemic.

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Authority citation other than 233B NRS 414.060; NRS 414.070; Declaration of Emergency, Directive 003, March 20, 2020

Notice date ,March 20, 2020 Date of Adoption by Agency March 20, 2020

Hearing date Not practicable

Steve Sisolak
*Governor*

Nevada Department of
**Public Safety**
DEDICATION PRIDE SERVICE

George Togliatti
*Director*

Sheri Brueggemann
*Deputy Director*

Justin Luna
*Chief*

Division of Emergency Management
Homeland Security
2478 Fairview Drive
Carson City, Nevada 89701
Telephone (775) 687-0300 / Fax (775) 687-0322
DEM Website – http://dem.nv.gov

**STATEMENT OF EMERGENCY**

**Pursuant to NRS 414.060(3)(a); NRS 414.070(7); Declaration of Emergency, Directive 003, March 20, 2020**

March 20, 2020

The Honorable Steve Sisolak
Governor of the State of Nevada
Executive Chambers
101 N. Carson Street, Suite 1
Carson City, Nevada 89701

RE: Emergency Regulation Concerning COVID-19 Pandemic

Dear Governor Sisolak,

The continued operation of non-essential businesses is impairing the State's ability to prevent the further transmission of COVID-19 and lives are at stake. The Department of Public Safety, Division of Emergency Management has determined that an immediate need exists for an emergency regulation defining essential and non-essential businesses, as well as, parameters for essential businesses to conduct business in this State under your March 12, 2020, Declaration of Emergency and related directives.

Through the enclosed emergency regulation, businesses, as well as, state and local governments, will have the guidance to determine which businesses are essential and which are non-essential. Further, essential businesses will have clear direction on the expectations for their ability to continue providing goods and services to our communities during the existence of the COVID-19 pandemic.

This emergency regulation is necessary and your immediate endorsement is requested.

Respectfully,

Justin Luna, Chief

**DEPARTMENT OF PUBLIC SAFETY**
**DIVISION OF EMERGENCY MANAGEMENT**
**EMERGENCY REGULATION**
**NAC 414**

**Informational Statement per NRS 233B.066(2)**

1. A clear and concise explanation of the need for the adopted regulation as required by NRS 233B.066(1)(a):

   *The continued operation of non-essential businesses is impairing the State's ability to prevent the further transmission of COVID-19 throughout the State. The Department of Public Safety, Division of Emergency Management has determined that an immediate need exists for an emergency regulation defining essential and non-essential businesses, as well as, parameters for essential businesses to conduct business in this State under the Governor's March 12, 2020, Declaration of Emergency and related directives. Through the enclosed emergency regulation, businesses, as well as, state and local governments, will have the guidance to determine which businesses are essential and which are non-essential. Further, essential businesses will have clear direction on the expectations for their ability to continue providing goods and services to our communities during the existence of the COVID-19 Pandemic.*

2. The estimated economic effect of the regulation on the business which it is to regulate and on the public as required by NRS 233B.066(1)(g).

   Business:
   *Immediate and long-term effects are to protect public health and safety. As a result of this regulation, businesses may be deemed non-essential businesses during the COVID-19 Pandemic. Depending on whether a business is deemed essential or non-essential, businesses may be required to cease operations or modify their operations to prevent the continued spread of COVID-19 throughout the State, if ordered to do so through the Governor's March 12, 2020, Declaration of Emergency and related directives.*

   Public:
   *Immediate and long-term effect is to protect public health and safety. This regulation is tailored to permit essential businesses to continue to safety provide essential goods and services to our communities during the COVID-19 Pandemic.*

2. The estimated cost to the agency for enforcement of the proposed regulation as required by NRS 233B.066(1)(h).

   *Not applicable.*

4. A description of any regulations of other state or government agencies which the proposed regulation overlaps or duplicates and a statement explaining why the duplication or overlapping is necessary. If the regulation overlaps or duplicates a federal regulation, name the regulating federal agency as required by NRS 233B.066(1)(i).

*Not applicable.*

5. If the regulation includes provisions which are more stringent than a federal regulation which regulates the same activity, a summary of such provisions as required by NRS 233B.066(1)(j).

*Not applicable*

6. If the regulation establishes a new fee or increases an existing fee, a statement indicating the total annual amount the agency expects to collect and the manner in which the money will be used as required by NRS 233B.066(1)(k).

*Not applicable*

Dated this 20th day of March, 2020:

Justin Luna, Chief
Nevada Division of Emergency Management

I hereby endorse this Statement prepared by the Chief of the Division of Emergency Management pursuant to NRS 233B.0613(1).

Dated this 20th day of March, 2020:

Steve Sisolak, Governor
State of Nevada

**EMERGENCY REGULATION OF THE**

**DEPARTMENT OF PUBLIC SAFETY**

**DIVISION OF EMERGENCY MANAGEMENT**

March 20, 2020

EXPLANATION – Matter in ***italics*** is new; matter in brackets [~~omitted material~~] is material to be omitted.

Filing of an Emergency Administrative Regulation

AUTHORITY: NRS 414.060; NRS 414.070; Declaration of Emergency, Directive 003, March 20, 2020

A REGULATION relating to the Governor's March 12, 2020, Declaration of Emergency and related directives.

**Explanation:**

Due to the recent COVID-19 pandemic, the Governor, through the March 12, 2020 Declaration of Emergency and related directives, has ordered non-essential businesses to cease operations and has ordered essential businesses to follow additional guidelines to reduce the likelihood of transmitting COVID-19. This regulation will provide clarity as to which businesses are considered essential and which are considered non-essential during the existing COVID-19 pandemic. Further, essential businesses will have clear direction on operational expectations while continuing to provide goods and services to Nevada communities.

Section 1. **Chapter 414 of the NAC is hereby amended by adding thereto a new section to read as follows:**

**NAC 414.XXX Businesses During Times of Declared Emergency** (NRS 414.060, 414.070)

*1. "Essential Licensed Business" means a business operating in the state of Nevada that provides:*

*(a) Essential healthcare operations, including, hospitals, medical offices, clinics, healthcare suppliers, home health care providers, mental health providers, dentists, orthodontists, oral surgeons, physical or occupational therapists, speech therapists and pathologists, chiropractors, licensed homeopathic medical providers, biomedical facilities, non-governmental*

*emergency service providers, optometrist and ophthalmologist offices, offices for certified nurse-midwives, veterinary services, and pharmaceuticals;*

*(b) Essential infrastructure operations, including construction, agriculture, farming, housing construction, airport operations, water, sewer, gas, electrical, mining, public transportation, solid waste collection and removal, recycling services, energy, including solar, internet, telecommunication services, manufacturing, and food processing;*

*(c) Grocery stores, including, supermarkets, food banks, food pantries, soup kitchens, convenience stores, farm and produce stands, and other retail sale of canned and dry goods, fresh produce, frozen foods, fresh meats, fish, and poultry;*

*(d) Retailers that sell food items and other household consumer products for cleaning and personal care to promote safety, sanitation, and essential operations of households;*

*(e) Businesses that ship or deliver goods directly to residences;*

*(g) Businesses that sell or rent medical supplies;*

*(h) Licensed Cannabis entities, including dispensaries, producers, and cultivators;*

*(i) Pet supply stores;*

*(j) Animal shelters;*

*(k) Banks and Financial Institutions;*

*(l) Pawnbrokers as defined in NRS 646.010;*

*(m) Restaurants and food establishments that offer meals on a take-out, curbside pickup, delivery, or drive-through basis only and food distribution pods to provide meals to students;*

*(n) Businesses and other entities that provide food, shelter, or social services for economically disadvantaged individuals, vulnerable populations, or victims of crime;*

*(o) Hardware Stores, including home improvement centers;*

*(p) Auto-supply, automobile repair facilities, and tire shops;*

*(q) Laundromats and Dry Cleaners;*

*(r) Warehouse and Storage facilities;*

*(s) Transportation services, including taxicabs and rideshare services;*

*(t) Mail and shipping services, including PO Boxes;*

*(u) Businesses that supply products necessary for people to work from home on a curbside pickup or delivery to consumer basis only;*

*(v) Plumbers, electricians, exterminators, home security, and other service providers who provide services necessary to maintain the safety, sanitation, and essential operations of residences or businesses;*

*(w) Professional or technical services including legal, accounting, tax, payroll, real estate, and property management services;*

*(x) Child care facilities;*

*(y) Residential facilities and shelters for seniors, adults, and children, including retirement homes and assisted living facilities;*

*(z) Newspapers, television, radio, and other media services;*

*(aa) Hotels, motels, or short-term rentals, RV Parks, campgrounds, dormitories, and commercial lodging; and*

*(bb) Gas Stations, with or without attached convenience store.*

2. *"Non-Essential Business" means a business operating in Nevada that provides:*

*(a) Recreational activities, including, but not limited to, recreation and community centers, sporting event venues, fitness facilities, gyms, clubhouses, racetracks, zoos, aquariums, golf and country clubhouses not to include golf activities outside clubhouse settings, bowling centers, cinemas and movie theaters, skiing facilities, theme parks, and amusement parks;*

*(b) Brothels and houses of prostitution;*

*(c) Live entertainment venues, including theaters and adult entertainment establishments;*

*(d) Retail facilities that are not specified in Section 1 as essential businesses and are unable to sell goods through shipping or direct delivery to consumers;*

*(e) Restaurant services providing in-house dining only;*

*(f) Nightclubs;*

*(g) Pubs, wineries, bars, and breweries;*

*(h) Gaming machines and gaming operations;*

*(i) Aesthetic services and schools of aesthetics services, including, hair dressing, barbering, cosmetology services, nail salons, tanning and air brush salons, massage (not provided by a physical therapist), waxing, diet and weight loss centers, and other cosmetic services;*

*(j) Spas;*

*(k) Sporting good and hobby shops; and*

*(l) Museums and art galleries.*

*3. All Essential Licensed businesses must:*

*(a) Comply with social distancing guidance issued by the Centers for Disease Control and Prevention document entitled "Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission," the Governor's Medical Advisory Team, a Governor's Directive, any other Nevada state regulatory agency or board; and*

*(b) Cease operating and shut down all gaming machines, devices, tables, games, and any equipment related to gaming activity, excluding licensed online gaming or mobile wagering operations; and*

*(c) Cease all door-to-door solicitation, even if the good or service offered for sale is*

*considered essential, excluding the delivery of a good or service that has been ordered by a resident or business; and*

*(d) In addition to the general requirement described in 3(a), (b), & (c), specific Essential Businesses described in NAC 414.XXX(1) must comply with the following additional requirements:*

*(1) Essential Businesses described in NAC 414.XXX(1)(b) must:*

*(I) Maintain strict social distancing practices to facilitate a minimum of six feet of separation between workers and adopt policies and practices that ensure minimum contact between the workforce and the general public. Social distancing restrictions shall not be construed to supersede any safety practices imposed on the industry by state or federal law.*

*(II) All applicable COVID-19 risk mitigation policies and any precautionary measures and guidance that shall be promulgated by Nevada Department of Business and Industry and any other state regulatory body.*

*(2) Essential businesses described in NAC 414.XXX(1)(c) must adopt COVID-19 risk mitigation policies, including whenever possible adopting contactless payment systems; requiring food workers to strictly abide by all applicable hygiene guidelines including handwashing and glove requirements; following United States Centers for Disease Control and Prevention sanitization recommendations, including disinfecting surfaces routinely and at frequent intervals; and prohibiting self-serve food and beverage, such as condiments and samples. Contactless payment systems are credit cards and debit cards, key fobs, smart cards, or other devices, including smartphones and other mobile devices, that use radio-frequency identification (RFID) or near field communication (NFC, e.g. Samsung Pay, Apple Pay, Google Pay, Fitbit Pay, or any bank mobile application that supports contactless) for making secure payments, as opposed to the direct transfer of cash between buyer and seller.*

*(3) Essential businesses described in NAC 414.XXX(1)(g) must ensure that rental medical equipment and supplies are cleaned and sanitized in accordance with the United States Centers for Disease Control and Prevention sanitization recommendations.*

*(4) Essential businesses described in NAC 414.XXX(1)(h) must:*

*(I) Ensure sales to consumers are by direct delivery under guidance that shall be issued by the Department of Taxation in conjunction with the Cannabis Compliance Board.*

*(II) Ensure that producers and cultivators strictly adhere to the social distancing protocol.*

*(5) Essential businesses described in NAC 414.XXX(1)(m) must adopt COVID-19 risk mitigation policies, including whenever possible adopting contactless payment systems; requiring food workers to strictly abide by all applicable hygiene guidelines including handwashing and glove requirements; following United States Centers for Disease Control and Prevention sanitization recommendations, including disinfecting surfaces routinely and at frequent intervals; and prohibiting self-serve food and beverage, including as condiments shared between unrelated customers and samples not distributed by a food worker. Contactless payment systems are credit cards and debit cards, key fobs, smart cards, or other devices, including smartphones and other mobile devices, that use radio-frequency identification (RFID) or near field communication (NFC, e.g. Samsung Pay, Apple Pay, Google Pay, Fitbit Pay, or any bank mobile application that supports contactless) for making secure payments, as opposed to the direct transfer of cash between buyer and seller.*

*(6) Essential businesses described in NAC 414.XXX(1)(s) may only serve one customer or group of customers that originate at the same address at the same time or are members of the same household. "Pooling" customers is prohibited.*

*(7) Essential businesses described in NAC 414.XXX(1)(x) must conform to any further regulation and guidelines promulgated by the Nevada Department of Health and Human services.*

*(e) In addition to the general requirement described in 3(a), (b), & (c), the following Non-Essential Businesses described in Section 2 are subject to the following restrictions:*

*(1) Zoos and aquariums, referenced in 2(a), must close to the public but may maintain essential operations by staff members for the health and safety of animals.*

*(2) Pubs, wineries, bars, and breweries, as referenced in 2(g), may provide meals on a take-out, curbside pickup, delivery, or drive-through basis.*

*(3) Gaming machines and gaming operations, as referenced in 2(h), do not include online gaming or mobile wagering operations.*

# EXHIBIT B

**April 14, 2020 Letter**
**Issued by Nevada**
**OSHA**

# EXHIBIT B

**April 14, 2020 Letter**
**Issued by Nevada**
**OSHA**

STEVE SISOLAK
*Governor*

TERRY REYNOLDS
*Director*

**STATE OF NEVADA**

VICTORIA CARREÓN
*Interim Administrator*

JESS LANKFORD
*Interim Deputy Administrator*

**DEPARTMENT OF BUSINESS AND INDUSTRY**
**DIVISION OF INDUSTRIAL RELATIONS**
**OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION**

April 14, 2020

To Whom It May Concern,

On April 8, 2020 the Governor of Nevada announced the release of Declaration of Emergency Directive #013 to further the fight against the spread of Coronavirus – 19. Section 5 of Directive #013 sets specific responsibilities for Nevada's Occupational Safety and Health Administration (NV OSHA) in the battle against this public health crisis. Section 5 of this Directive states:

> *"The Nevada Occupational Safety and Health Administration of the Division of Industrial Relations shall ensure that businesses continuing operations during the state of emergency provide adequate protections to their workers and adopt sanitation protocols that minimize the risk of spread of COVID-19 among their workforce."*

To accomplish these responsibilities NV OSHA is providing this memorandum, and the recommendations found within, for essential businesses that remain open. The measures contained in the document are recommended of each business and shall be applied to all employees of that business. As we battle the coronavirus pandemic, this guidance may continue to evolve.

The NV OSHA recommendations/guidance for all essential includes, but is not limited to, the following:

- Establish effective social distancing protocols, which ensure that staff maintain a 6 foot personal separation from other staff during meetings, discussions, or other job tasks. (**Required**/Ref. Declaration of Emergency Directive #003)

- Prohibit gatherings of 10 or more people. (**Required**/Ref. Declaration of Emergency Directive #007, Section 1)

- Promote frequent and thorough hand washing, including providing workers, customers, and worksite visitors with a place to wash their hands. If soap and running water are not immediately available, provide alcohol-based hand rubs containing at least 60% alcohol. (**Required**/Ref. Declaration of Emergency Directive #003)

- Provide face masks to service runners who deliver ordered materials to curbside pick-up locations, attend to drive through windows, or any other immediately exposing tasks. (**Recommended/** Ref. Federal OSHA Guidance for Retail Workers (OSHA 3996))

- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces and equipment with Environmental Protection Agency-approved cleaning chemicals from List N or that have label claims against the coronavirus. See: https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2 (**Required**/Ref. Declaration of Emergency Directive #003)

- Provide sanitation and cleaning supplies for addressing common surfaces in multiple user mobile equipment and multiple user tooling. Recommended based on the specifics of a business's services and procedures. (Ref. - Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 2020)

- Maintain 6 foot separation protocols for labor transportation services, such as buses, vans, etc. (**Required**/Ref. Declaration of Emergency Directive #003)

- Conduct daily surveys of changes to staff/labor health conditions. **NV OSHA is emphasizing the need for business leadership to be working with and aware of the health and well-being of its staff.** (**Required**/Ref. - Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 2020)

- Ensure that any identified first responders in the labor force are provided and use the needed Personal Protective Equipment (PPE) and equipment for protection from communicable or infections disease. (**Required**/29 CFR 1910.1030)

- Provide access to potable and sanitary water (**Required**/29 CFR 1926.15 or 29 CFR 1910.141)

For any further guidance use the following links:

Federal OSHA - https://www.osha.gov/SLTC/covid-19/

Federal OSHA Guidance for Retail Workers (OSHA 3996)
https://www.osha.gov/Publications/OSHA3996.pdf

Center for Disease Control and Prevention - https://www.cdc.gov/coronavirus/2019-nCoV/index.html

State of Nevada- https://nvhealthresponse.nv.gov/

Mine Safety and Health Administration: https://www.msha.gov/

Nevada OSHA Information: http://dir.nv.gov/OSHA/Home/

**THIS GUIDANCE IS SUBJECT TO REVISION AS ADDITIONAL INFORMATION IS GATHERED. PLEASE CHECK HERE FREQUENTLY FOR UPDATES.**

Sincerely,
Jess Lankford
Chief Administrative Officer
Phone # 702.486.9020

# EXHIBIT C

**Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 2020**

# EXHIBIT C

**Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 2020**

# Guidance on Preparing Workplaces for COVID-19

OSHA 3990-03 2020

www.osha.gov

**Occupational Safety and Health Act of 1970**

"To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health."

This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace. The Occupational Safety and Health Act requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.



This information will be made available to sensory-impaired individuals upon request. Voice phone: (202) 693-1999; teletypewriter (TTY) number: 1-877-889-5627.

# Guidance on Preparing Workplaces for COVID-19

U.S. Department of Labor
Occupational Safety and Health Administration

OSHA 3990-03 2020

U.S. Department of Labor

# Contents

## Introduction

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the SARS-CoV-2 virus. It has spread from China to many other countries around the world, including the United States. Depending on the severity of COVID-19's international impacts, outbreak conditions—including those rising to the level of a pandemic—can affect all aspects of daily life, including travel, trade, tourism, food supplies, and financial markets.

To reduce the impact of COVID-19 outbreak conditions on businesses, workers, customers, and the public, it is important for all employers to plan now for COVID-19. For employers who have already planned for influenza pandemics, planning for COVID-19 may involve updating plans to address the specific exposure risks, sources of exposure, routes of transmission, and other unique characteristics of SARS-CoV-2 (i.e., compared to pandemic influenza viruses). Employers who have not prepared for pandemic events should prepare themselves and their workers as far in advance as possible of potentially worsening outbreak conditions. Lack of continuity planning can result in a cascade of failures as employers attempt to address challenges of COVID-19 with insufficient resources and workers who might not be adequately trained for jobs they may have to perform under pandemic conditions.

The Occupational Safety and Health Administration (OSHA) developed this COVID-19 planning guidance based on traditional infection prevention and industrial hygiene practices. It focuses on the need for employers to implement engineering, administrative, and work practice controls and personal protective equipment (PPE), as well as considerations for doing so.

This guidance is intended for planning purposes. Employers and workers should use this planning guidance to help identify risk levels in workplace settings and to determine any appropriate control measures to implement. Additional guidance may be needed as COVID-19 outbreak conditions change, including as new information about the virus, its transmission, and impacts, becomes available.

The U.S. Department of Health and Human Services' Centers for Disease Control and Prevention (CDC) provides the latest information about COVID-19 and the global outbreak: www.cdc.gov/coronavirus/2019-ncov.

The OSHA COVID-19 webpage offers information specifically for workers and employers: www.osha.gov/covid-19.

This guidance is advisory in nature and informational in content. It is not a standard or a regulation, and it neither creates new legal obligations nor alters existing obligations created by OSHA standards or the *Occupational Safety and Health Act* (OSH Act). Pursuant to the OSH Act, employers must comply with safety and health standards and regulations issued and enforced either by OSHA or by an OSHA-approved State Plan. In addition, the OSH Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm. OSHA-approved State Plans may have standards, regulations and enforcement policies that are different from, but at least as effective as, OSHA's. Check with your State Plan, as applicable, for more information.

## About COVID-19

### Symptoms of COVID-19

Infection with SARS-CoV-2, the virus that causes COVID-19, can cause illness ranging from mild to severe and, in some cases, can be fatal. Symptoms typically include fever, cough, and shortness of breath. Some people infected with the virus have reported experiencing other non-respiratory symptoms. Other people, referred to as *asymptomatic cases*, have experienced no symptoms at all.

According to the CDC, symptoms of COVID-19 may appear in as few as 2 days or as long as 14 days after exposure.

## How COVID-19 Spreads

Although the first human cases of COVID-19 likely resulted from exposure to infected animals, infected people can spread SARS-CoV-2 to other people.

The virus is thought to spread mainly from person-to-person, including:

- Between people who are in close contact with one another (within about 6 feet).
- Through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.

***Medium exposure risk*** jobs include those that require frequent and/or close contact with (i.e., within 6 feet of) other people who may be infected with SARS-CoV-2.

It may be possible that a person can get COVID-19 by touching a surface or object that has SARS-CoV-2 on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the primary way the virus spreads.

People are thought to be most contagious when they are most symptomatic (i.e., experiencing fever, cough, and/or shortness of breath). Some spread might be possible before people show symptoms; there have been reports of this type of asymptomatic transmission with this new coronavirus, but this is also not thought to be the main way the virus spreads.

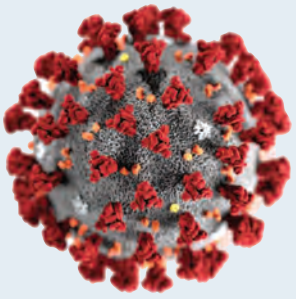
Although the United States has implemented public health measures to limit the spread of the virus, it is likely that some person-to-person transmission will continue to occur.

The CDC website provides the latest information about COVID-19 transmission: www.cdc.gov/coronavirus/2019-ncov/about/transmission.html.

## How a COVID-19 Outbreak Could Affect Workplaces

Similar to influenza viruses, SARS-CoV-2, the virus that causes COVID-19, has the potential to cause extensive outbreaks. Under conditions associated with widespread person-to-person spread, multiple areas of the United States and other countries may see impacts at the same time. In the absence of a vaccine, an outbreak may also be an extended event. As a result, workplaces may experience:

- **Absenteeism.** Workers could be absent because they are sick; are caregivers for sick family members; are caregivers for children if schools or day care centers are closed; have at-risk people at home, such as immunocompromised family members; or are afraid to come to work because of fear of possible exposure.
- **Change in patterns of commerce.** Consumer demand for items related to infection prevention (e.g., respirators) is likely to increase significantly, while consumer interest in other goods may decline. Consumers may also change shopping patterns because of a COVID-19 outbreak. Consumers may try to shop at off-peak hours to reduce contact with other people, show increased interest in home delivery services, or prefer other options, such as drive-through service, to reduce person-to-person contact.
- **Interrupted supply/delivery.** Shipments of items from geographic areas severely affected by COVID-19 may be delayed or cancelled with or without notification.



This illustration, created at the Centers for Disease Control and Prevention (CDC), reveals ultrastructural morphology exhibited by the 2019 Novel Coronavirus (2019-nCoV). Note the spikes that adorn the outer surface of the virus, which impart the look of a corona surrounding the virion, when viewed electron microscopically. This virus was identified as the cause of an outbreak of respiratory illness first detected in Wuhan, China.

*Photo: CDC / Alissa Eckert & Dan Higgins*

## Steps All Employers Can Take to Reduce Workers' Risk of Exposure to SARS-CoV-2

This section describes basic steps that every employer can take to reduce the risk of worker exposure to SARS-CoV-2, the virus that causes COVID-19, in their workplace. Later sections of this guidance—including those focusing on jobs classified as having low, medium, high, and very high exposure risks—provide specific recommendations for employers and workers within specific risk categories.

### Develop an Infectious Disease Preparedness and Response Plan

If one does not already exist, develop an infectious disease preparedness and response plan that can help guide protective actions against COVID-19.

Stay abreast of guidance from federal, state, local, tribal, and/or territorial health agencies, and consider how to incorporate those recommendations and resources into workplace-specific plans.

Plans should consider and address the level(s) of risk associated with various worksites and job tasks workers perform at those sites. Such considerations may include:

- Where, how, and to what sources of SARS-CoV-2 might workers be exposed, including:
  - The general public, customers, and coworkers; and
  - Sick individuals or those at particularly high risk of infection (e.g., international travelers who have visited locations with widespread sustained (ongoing) COVID-19 transmission, healthcare workers who have had unprotected exposures to people known to have, or suspected of having, COVID-19).
- Non-occupational risk factors at home and in community settings.

- Workers' individual risk factors (e.g., older age; presence of chronic medical conditions, including immunocompromising conditions; pregnancy).
- Controls necessary to address those risks.

Follow federal and state, local, tribal, and/or territorial (SLTT) recommendations regarding development of contingency plans for situations that may arise as a result of outbreaks, such as:

- Increased rates of worker absenteeism.
- The need for social distancing, staggered work shifts, downsizing operations, delivering services remotely, and other exposure-reducing measures.
- Options for conducting essential operations with a reduced workforce, including cross-training workers across different jobs in order to continue operations or deliver surge services.
- Interrupted supply chains or delayed deliveries.

Plans should also consider and address the other steps that employers can take to reduce the risk of worker exposure to SARS-CoV-2 in their workplace, described in the sections below.

## Prepare to Implement Basic Infection Prevention Measures

For most employers, protecting workers will depend on emphasizing basic infection prevention measures. As appropriate, all employers should implement good hygiene and infection control practices, including:

- Promote frequent and thorough hand washing, including by providing workers, customers, and worksite visitors with a place to wash their hands. If soap and running water are not immediately available, provide alcohol-based hand rubs containing at least 60% alcohol.
- Encourage workers to stay home if they are sick.
- Encourage respiratory etiquette, including covering coughs and sneezes.

- Provide customers and the public with tissues and trash receptacles.
- Employers should explore whether they can establish policies and practices, such as flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts), to increase the physical distance among employees and between employees and others if state and local health authorities recommend the use of social distancing strategies.
- Discourage workers from using other workers' phones, desks, offices, or other work tools and equipment, when possible.
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces, equipment, and other elements of the work environment. When choosing cleaning chemicals, employers should consult information on Environmental Protection Agency (EPA)-approved disinfectant labels with claims against emerging viral pathogens. Products with EPA-approved emerging viral pathogens claims are expected to be effective against SARS-CoV-2 based on data for harder to kill viruses. Follow the manufacturer's instructions for use of all cleaning and disinfection products (e.g., concentration, application method and contact time, PPE).

## Develop Policies and Procedures for Prompt Identification and Isolation of Sick People, if Appropriate

- Prompt identification and isolation of potentially infectious individuals is a critical step in protecting workers, customers, visitors, and others at a worksite.
- Employers should inform and encourage employees to self-monitor for signs and symptoms of COVID-19 if they suspect possible exposure.
- Employers should develop policies and procedures for employees to report when they are sick or experiencing symptoms of COVID-19.

- Where appropriate, employers should develop policies and procedures for immediately isolating people who have signs and/or symptoms of COVID-19, and train workers to implement them. Move potentially infectious people to a location away from workers, customers, and other visitors. Although most worksites do not have specific isolation rooms, designated areas with closable doors may serve as isolation rooms until potentially sick people can be removed from the worksite.
- Take steps to limit spread of the respiratory secretions of a person who may have COVID-19. Provide a face mask, if feasible and available, and ask the person to wear it, if tolerated. Note: A face mask (also called a surgical mask, procedure mask, or other similar terms) on a patient or other sick person should not be confused with PPE for a worker; the mask acts to contain potentially infectious respiratory secretions at the source (i.e., the person's nose and mouth).
- If possible, isolate people suspected of having COVID-19 separately from those with confirmed cases of the virus to prevent further transmission—particularly in worksites where medical screening, triage, or healthcare activities occur, using either permanent (e.g., wall/different room) or temporary barrier (e.g., plastic sheeting).
- Restrict the number of personnel entering isolation areas.
- Protect workers in close contact with (i.e., within 6 feet of) a sick person or who have prolonged/repeated contact with such persons by using additional engineering and administrative controls, safe work practices, and PPE. Workers whose activities involve close or prolonged/repeated contact with sick people are addressed further in later sections covering workplaces classified at medium and very high or high exposure risk.

## Develop, Implement, and Communicate about Workplace Flexibilities and Protections

- Actively encourage sick employees to stay home.
- Ensure that sick leave policies are flexible and consistent with public health guidance and that employees are aware of these policies.
- Talk with companies that provide your business with contract or temporary employees about the importance of sick employees staying home and encourage them to develop non-punitive leave policies.
- Do not require a healthcare provider's note for employees who are sick with acute respiratory illness to validate their illness or to return to work, as healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.
- Maintain flexible policies that permit employees to stay home to care for a sick family member. Employers should be aware that more employees may need to stay at home to care for sick children or other sick family members than is usual.
- Recognize that workers with ill family members may need to stay home to care for them. See CDC's Interim Guidance for Preventing the Spread of COVID-19 in Homes and Residential Communities: www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-prevent-spread.html.
- Be aware of workers' concerns about pay, leave, safety, health, and other issues that may arise during infectious disease outbreaks. Provide adequate, usable, and appropriate training, education, and informational material about business-essential job functions and worker health and safety, including proper hygiene practices and the use of any workplace controls (including PPE). Informed workers who feel safe at work are less likely to be unnecessarily absent.

- Work with insurance companies (e.g., those providing employee health benefits) and state and local health agencies to provide information to workers and customers about medical care in the event of a COVID-19 outbreak.

## Implement Workplace Controls

Occupational safety and health professionals use a framework called the "hierarchy of controls" to select ways of controlling workplace hazards. In other words, the best way to control a hazard is to systematically remove it from the workplace, rather than relying on workers to reduce their exposure. During a COVID-19 outbreak, when it may not be possible to eliminate the hazard, the most effective protection measures are (listed from most effective to least effective): engineering controls, administrative controls, safe work practices (a type of administrative control), and PPE. There are advantages and disadvantages to each type of control measure when considering the ease of implementation, effectiveness, and cost. In most cases, a combination of control measures will be necessary to protect workers from exposure to SARS-CoV-2.

In addition to the types of workplace controls discussed below, CDC guidance for businesses provides employers and workers with recommended SARS-CoV-2 infection prevention strategies to implement in workplaces: www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-business-response.html.

### *Engineering Controls*

Engineering controls involve isolating employees from work-related hazards. In workplaces where they are appropriate, these types of controls reduce exposure to hazards without relying on worker behavior and can be the most cost-effective solution to implement. Engineering controls for SARS-CoV-2 include:

- Installing high-efficiency air filters.
- Increasing ventilation rates in the work environment.
- Installing physical barriers, such as clear plastic sneeze guards.

- Installing a drive-through window for customer service.
- Specialized negative pressure ventilation in some settings, such as for aerosol generating procedures (e.g., airborne infection isolation rooms in healthcare settings and specialized autopsy suites in mortuary settings).

### *Administrative Controls*

Administrative controls require action by the worker or employer. Typically, administrative controls are changes in work policy or procedures to reduce or minimize exposure to a hazard. Examples of administrative controls for SARS-CoV-2 include:

- Encouraging sick workers to stay at home.
- Minimizing contact among workers, clients, and customers by replacing face-to-face meetings with virtual communications and implementing telework if feasible.
- Establishing alternating days or extra shifts that reduce the total number of employees in a facility at a given time, allowing them to maintain distance from one another while maintaining a full onsite work week.
- Discontinuing nonessential travel to locations with ongoing COVID-19 outbreaks. Regularly check CDC travel warning levels at: www.cdc.gov/coronavirus/2019-ncov/travelers.
- Developing emergency communications plans, including a forum for answering workers' concerns and internet-based communications, if feasible.
- Providing workers with up-to-date education and training on COVID-19 risk factors and protective behaviors (e.g., cough etiquette and care of PPE).
- Training workers who need to use protecting clothing and equipment how to put it on, use/wear it, and take it off correctly, including in the context of their current and potential duties. Training material should be easy to understand and available in the appropriate language and literacy level for all workers.

### *Safe Work Practices*

Safe work practices are types of administrative controls that include procedures for safe and proper work used to reduce the duration, frequency, or intensity of exposure to a hazard. Examples of safe work practices for SARS-CoV-2 include:

- Providing resources and a work environment that promotes personal hygiene. For example, provide tissues, no-touch trash cans, hand soap, alcohol-based hand rubs containing at least 60 percent alcohol, disinfectants, and disposable towels for workers to clean their work surfaces.
- Requiring regular hand washing or using of alcohol-based hand rubs. Workers should always wash hands when they are visibly soiled and after removing any PPE.
- Post handwashing signs in restrooms.

### *Personal Protective Equipment (PPE)*

While engineering and administrative controls are considered more effective in minimizing exposure to SARS-CoV-2, PPE may also be needed to prevent certain exposures. While correctly using PPE can help prevent some exposures, it should not take the place of other prevention strategies.

Examples of PPE include: gloves, goggles, face shields, face masks, and respiratory protection, when appropriate. During an outbreak of an infectious disease, such as COVID-19, recommendations for PPE specific to occupations or job tasks may change depending on geographic location, updated risk assessments for workers, and information on PPE effectiveness in preventing the spread of COVID-19. Employers should check the OSHA and CDC websites regularly for updates about recommended PPE.

All types of PPE must be:

- Selected based upon the hazard to the worker.
- Properly fitted and periodically refitted, as applicable (e.g., respirators).

- Consistently and properly worn when required.
- Regularly inspected, maintained, and replaced, as necessary.
- Properly removed, cleaned, and stored or disposed of, as applicable, to avoid contamination of self, others, or the environment.

Employers are obligated to provide their workers with PPE needed to keep them safe while performing their jobs. The types of PPE required during a COVID-19 outbreak will be based on the risk of being infected with SARS-CoV-2 while working and job tasks that may lead to exposure.

Workers, including those who work within 6 feet of patients known to be, or suspected of being, infected with SARS-CoV-2 and those performing aerosol-generating procedures, need to use respirators:

- National Institute for Occupational Safety and Health (NIOSH)-approved, N95 filtering facepiece respirators or better must be used in the context of a comprehensive, written respiratory protection program that includes fit-testing, training, and medical exams. See OSHA's Respiratory Protection standard, 29 CFR 1910.134 at www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.134.
- When disposable N95 filtering facepiece respirators are not available, consider using other respirators that provide greater protection and improve worker comfort. Other types of acceptable respirators include: a R/P95, N/R/P99, or N/R/P100 filtering facepiece respirator; an air-purifying elastomeric (e.g., half-face or full-face) respirator with appropriate filters or cartridges; powered air purifying respirator (PAPR) with high-efficiency particulate arrestance (HEPA) filter; or supplied air respirator (SAR). See CDC/NIOSH guidance for optimizing respirator supplies at: www.cdc.gov/coronavirus/2019-ncov/hcp/respirators-strategy.

- Consider using PAPRs or SARs, which are more protective than filtering facepiece respirators, for any work operations or procedures likely to generate aerosols (e.g., cough induction procedures, some dental procedures, invasive specimen collection, blowing out pipettes, shaking or vortexing tubes, filling a syringe, centrifugation).
- Use a surgical N95 respirator when both respiratory protection and resistance to blood and body fluids is needed.
- Face shields may also be worn on top of a respirator to prevent bulk contamination of the respirator. Certain respirator designs with forward protrusions (duckbill style) may be difficult to properly wear under a face shield. Ensure that the face shield does not prevent airflow through the respirator.
- Consider factors such as function, fit, ability to decontaminate, disposal, and cost. OSHA's Respiratory Protection eTool provides basic information on respirators such as medical requirements, maintenance and care, fit testing, written respiratory protection programs, and voluntary use of respirators, which employers may also find beneficial in training workers at: www.osha.gov/SLTC/etools/respiratory. Also see NIOSH respirator guidance at: www.cdc.gov/niosh/topics/respirators.
- Respirator training should address selection, use (including donning and doffing), proper disposal or disinfection, inspection for damage, maintenance, and the limitations of respiratory protection equipment. Learn more at: www.osha.gov/SLTC/respiratoryprotection.
- The appropriate form of respirator will depend on the type of exposure and on the transmission pattern of COVID-19. See the NIOSH "Respirator Selection Logic" at: www.cdc.gov/niosh/docs/2005-100/default.html or the OSHA "Respiratory Protection eTool" at www.osha.gov/SLTC/etools/respiratory.

## Follow Existing OSHA Standards

Existing OSHA standards may apply to protecting workers from exposure to and infection with SARS-CoV-2.

While there is no specific OSHA standard covering SARS-CoV-2 exposure, some OSHA requirements may apply to preventing occupational exposure to SARS-CoV-2. Among the most relevant are:

- OSHA's Personal Protective Equipment (PPE) standards (in general industry, 29 CFR 1910 Subpart I), which require using gloves, eye and face protection, and respiratory protection. See: www.osha.gov/laws-regs/regulations/standardnumber/1910#1910_Subpart_I.
  - When respirators are necessary to protect workers or where employers require respirator use, employers must implement a comprehensive respiratory protection program in accordance with the Respiratory Protection standard (29 CFR 1910.134). See: www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.134.
- The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 USC 654(a)(1), which requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." See: www.osha.gov/laws-regs/oshact/completeoshact.

OSHA's Bloodborne Pathogens standard (29 CFR 1910.1030) applies to occupational exposure to human blood and other potentially infectious materials that typically do not include respiratory secretions that may transmit SARS-CoV-2. However, the provisions of the standard offer a framework that may help control some sources of the virus, including exposures to body fluids (e.g., respiratory secretions) not covered by the standard. See: www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.1030.

The OSHA COVID-19 webpage provides additional information about OSHA standards and requirements, including requirements in states that operate their own OSHA-approved State Plans, recordkeeping requirements and injury/illness recording criteria, and applications of standards related to sanitation and communication of risks related to hazardous chemicals that may be in common sanitizers and sterilizers. See: www.osha.gov/SLTC/covid-19/standards.html.

## Classifying Worker Exposure to SARS-CoV-2

Worker risk of occupational exposure to SARS-CoV-2, the virus that causes COVID-19, during an outbreak may vary from very high to high, medium, or lower (caution) risk. The level of risk depends in part on the industry type, need for contact within 6 feet of people known to be, or suspected of being, infected with SARS-CoV-2, or requirement for repeated or extended contact with persons known to be, or suspected of being, infected with SARS-CoV-2. To help employers determine appropriate precautions, OSHA has divided job tasks into four risk exposure levels: very high, high, medium, and lower risk. The Occupational Risk Pyramid shows the four exposure risk levels in the shape of a pyramid to represent probable distribution of risk. Most American workers will likely fall in the lower exposure risk (caution) or medium exposure risk levels.

**Occupational Risk Pyramid for COVID-19**

## Very High Exposure Risk

*Very high exposure risk* jobs are those with high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures. Workers in this category include:

- Healthcare workers (e.g., doctors, nurses, dentists, paramedics, emergency medical technicians) performing aerosol-generating procedures (e.g., intubation, cough induction procedures, bronchoscopies, some dental procedures and exams, or invasive specimen collection) on known or suspected COVID-19 patients.
- Healthcare or laboratory personnel collecting or handling specimens from known or suspected COVID-19 patients (e.g., manipulating cultures from known or suspected COVID-19 patients).
- Morgue workers performing autopsies, which generally involve aerosol-generating procedures, on the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death.

## High Exposure Risk

*High exposure risk* jobs are those with high potential for exposure to known or suspected sources of COVID-19. Workers in this category include:

- Healthcare delivery and support staff (e.g., doctors, nurses, and other hospital staff who must enter patients' rooms) exposed to known or suspected COVID-19 patients. (Note: when such workers perform aerosol-generating procedures, their exposure risk level becomes *very high*.)
- Medical transport workers (e.g., ambulance vehicle operators) moving known or suspected COVID-19 patients in enclosed vehicles.
- Mortuary workers involved in preparing (e.g., for burial or cremation) the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death.

### Medium Exposure Risk

*Medium exposure risk* jobs include those that require frequent and/or close contact with (i.e., within 6 feet of) people who may be infected with SARS-CoV-2, but who are not known or suspected COVID-19 patients. In areas without ongoing community transmission, workers in this risk group may have frequent contact with travelers who may return from international locations with widespread COVID-19 transmission. In areas where there *is* ongoing community transmission, workers in this category may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings).

### Lower Exposure Risk (Caution)

*Lower exposure risk (caution)* jobs are those that do not require contact with people known to be, or suspected of being, infected with SARS-CoV-2 nor frequent close contact with (i.e., within 6 feet of) the general public. Workers in this category have minimal occupational contact with the public and other coworkers.

## Jobs Classified at Lower Exposure Risk (Caution): What to Do to Protect Workers

For workers who do not have frequent contact with the general public, employers should follow the guidance for "Steps All Employers Can Take to Reduce Workers' Risk of Exposure to SARS-CoV-2," on page 7 of this booklet and implement control measures described in this section.

### Engineering Controls

Additional engineering controls are not recommended for workers in the lower exposure risk group. Employers should ensure that engineering controls, if any, used to protect workers from other job hazards continue to function as intended.

### Administrative Controls

- Monitor public health communications about COVID-19 recommendations and ensure that workers have access to that information. Frequently check the CDC COVID-19 website: www.cdc.gov/coronavirus/2019-ncov.
- Collaborate with workers to designate effective means of communicating important COVID-19 information.

### Personal Protective Equipment

Additional PPE is not recommended for workers in the lower exposure risk group. Workers should continue to use the PPE, if any, that they would ordinarily use for other job tasks.

## Jobs Classified at Medium Exposure Risk: What to Do to Protect Workers

In workplaces where workers have medium exposure risk, employers should follow the guidance for "Steps All Employers Can Take to Reduce Workers' Risk of Exposure to SARS-CoV-2," on page 7 of this booklet and implement control measures described in this section.

### Engineering Controls

- Install physical barriers, such as clear plastic sneeze guards, where feasible.

### Administrative Controls

- Consider offering face masks to ill employees and customers to contain respiratory secretions until they are able leave the workplace (i.e., for medical evaluation/care or to return home). In the event of a shortage of masks, a reusable face shield that can be decontaminated may be an acceptable method of protecting against droplet transmission. See CDC/NIOSH guidance for optimizing respirator supplies, which discusses the use of surgical masks, at: www.cdc.gov/coronavirus/2019-ncov/hcp/respirators-strategy.

- Keep customers informed about symptoms of COVID-19 and ask sick customers to minimize contact with workers until healthy again, such as by posting signs about COVID-19 in stores where sick customers may visit (e.g., pharmacies) or including COVID-19 information in automated messages sent when prescriptions are ready for pick up.
- Where appropriate, limit customers' and the public's access to the worksite, or restrict access to only certain workplace areas.
- Consider strategies to minimize face-to-face contact (e.g., drive-through windows, phone-based communication, telework).
- Communicate the availability of medical screening or other worker health resources (e.g., on-site nurse; telemedicine services).

## Personal Protective Equipment (PPE)

When selecting PPE, consider factors such as function, fit, decontamination ability, disposal, and cost. Sometimes, when PPE will have to be used repeatedly for a long period of time, a more expensive and durable type of PPE may be less expensive overall than disposable PPE. Each employer should select the combination of PPE that protects workers specific to their workplace.

Workers with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles. PPE ensembles for workers in the medium exposure risk category will vary by work task, the results of the employer's hazard assessment, and the types of exposures workers have on the job.

***High exposure risk*** jobs are those with high potential for exposure to known or suspected sources of COVID-19.

***Very high exposure risk*** jobs are those with high potential for exposure to known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures that involve aerosol generation or specimen collection/handling.

In rare situations that would require workers in this risk category to use respirators, see the PPE section beginning on page 14 of this booklet, which provides more details about respirators. For the most up-to-date information, visit OSHA's COVID-19 webpage: www.osha.gov/covid-19.

## Jobs Classified at High or Very High Exposure Risk: What to Do to Protect Workers

In workplaces where workers have high or very high exposure risk, employers should follow the guidance for "Steps All Employers Can Take to Reduce Workers' Risk of Exposure to SARS-CoV-2," on page 7 of this booklet and implement control measures described in this section.

### Engineering Controls

- Ensure appropriate air-handling systems are installed and maintained in healthcare facilities. See "Guidelines for Environmental Infection Control in Healthcare Facilities" for more recommendations on air handling systems at: www.cdc.gov/mmwr/preview/mmwrhtml/rr5210a1.htm.
- CDC recommends that patients with known or suspected COVID-19 (i.e., person under investigation) should be placed in an airborne infection isolation room (AIIR), if available.
- Use isolation rooms when available for performing aerosol-generating procedures on patients with known or suspected COVID-19. For postmortem activities, use autopsy suites or other similar isolation facilities when performing aerosol-generating procedures on the bodies of people who are known to have, or suspected of having, COVID-19 at the time of their death. See the CDC postmortem guidance at: www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-postmortem-specimens.html. OSHA also provides guidance for postmortem activities on its COVID-19 webpage: www.osha.gov/covid-19.

- Use special precautions associated with Biosafety Level 3 when handling specimens from known or suspected COVID-19 patients. For more information about biosafety levels, consult the U.S. Department of Health and Human Services (HHS) "Biosafety in Microbiological and Biomedical Laboratories" at www.cdc.gov/biosafety/publications/bmbl5.

## Administrative Controls

If working in a healthcare facility, follow existing guidelines and facility standards of practice for identifying and isolating infected individuals and for protecting workers.

- Develop and implement policies that reduce exposure, such as cohorting (i.e., grouping) COVID-19 patients when single rooms are not available.
- Post signs requesting patients and family members to immediately report symptoms of respiratory illness on arrival at the healthcare facility and use disposable face masks.
- Consider offering enhanced medical monitoring of workers during COVID-19 outbreaks.
- Provide all workers with job-specific education and training on preventing transmission of COVID-19, including initial and routine/refresher training.
- Ensure that psychological and behavioral support is available to address employee stress.

## Safe Work Practices

- Provide emergency responders and other essential personnel who may be exposed while working away from fixed facilities with alcohol-based hand rubs containing at least 60% alcohol for decontamination in the field.

### Personal Protective Equipment (PPE)

Most workers at high or very high exposure risk likely need to wear gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks.

Those who work closely with (either in contact with or within 6 feet of) patients known to be, or suspected of being, infected with SARS-CoV-2, the virus that causes COVID-19, should wear respirators. In these instances, see the PPE section beginning on page 14 of this booklet, which provides more details about respirators. For the most up-to-date information, also visit OSHA's COVID-19 webpage: www.osha.gov/covid-19.

PPE ensembles may vary, especially for workers in laboratories or morgue/mortuary facilities who may need additional protection against blood, body fluids, chemicals, and other materials to which they may be exposed. Additional PPE may include medical/surgical gowns, fluid-resistant coveralls, aprons, or other disposable or reusable protective clothing. Gowns should be large enough to cover the areas requiring protection. OSHA may also provide updated guidance for PPE use on its website: www.osha.gov/covid-19.

**NOTE:** Workers who dispose of PPE and other infectious waste must also be trained and provided with appropriate PPE.

The CDC webpage "Healthcare-associated Infections" (www.cdc.gov/hai) provides additional information on infection control in healthcare facilities.

## Workers Living Abroad or Travelling Internationally

Employers with workers living abroad or traveling on international business should consult the "Business Travelers" section of the OSHA COVID-19 webpage (www.osha.gov/covid-19), which also provides links to the latest:

- CDC travel warnings: www.cdc.gov/coronavirus/2019-ncov/travelers
- U.S. Department of State (DOS) travel advisories: travel.state.gov

Employers should communicate to workers that the DOS cannot provide Americans traveling or living abroad with medications or supplies, even in the event of a COVID-19 outbreak.

As COVID-19 outbreak conditions change, travel into or out of a country may not be possible, safe, or medically advisable. It is also likely that governments will respond to a COVID-19 outbreak by imposing public health measures that restrict domestic and international movement, further limiting the U.S. government's ability to assist Americans in these countries. It is important that employers and workers plan appropriately, as it is possible that these measures will be implemented very quickly in the event of worsening outbreak conditions in certain areas.

More information on COVID-19 planning for workers living and traveling abroad can be found at: www.cdc.gov/travel.

## For More Information

Federal, state, and local government agencies are the best source of information in the event of an infectious disease outbreak, such as COVID-19. Staying informed about the latest developments and recommendations is critical, since specific guidance may change based upon evolving outbreak situations.

Below are several recommended websites to access the most current and accurate information:

- Occupational Safety and Health Administration website: www.osha.gov
- Centers for Disease Control and Prevention website: www.cdc.gov
- National Institute for Occupational Safety and Health website: www.cdc.gov/niosh

## OSHA Assistance, Services, and Programs

OSHA has a great deal of information to assist employers in complying with their responsibilities under OSHA law. Several OSHA programs and services can help employers identify and correct job hazards, as well as improve their safety and health program.

### Establishing a Safety and Health Program

Safety and health programs are systems that can substantially reduce the number and severity of workplace injuries and illnesses, while reducing costs to employers.

Visit www.osha.gov/safetymanagement for more information.

#### *Compliance Assistance Specialists*

OSHA compliance assistance specialists can provide information to employers and workers about OSHA standards, short educational programs on specific hazards or OSHA rights and responsibilities, and information on additional compliance assistance resources.

Visit www.osha.gov/complianceassistance/cas or call 1-800-321-OSHA (6742) to contact your local OSHA office.

#### *No-Cost On-Site Safety and Health Consultation Services for Small Business*

OSHA's On-Site Consultation Program offers no-cost and confidential advice to small and medium-sized businesses in all states, with priority given to high-hazard worksites. On-Site consultation services are separate from enforcement and do not result in penalties or citations.

For more information or to find the local On-Site Consultation office in your state, visit www.osha.gov/consultation, or call 1-800-321-OSHA (6742).

Under the consultation program, certain exemplary employers may request participation in OSHA's **Safety and Health Achievement Recognition Program (SHARP)**. Worksites that receive SHARP recognition are exempt from programmed inspections during the period that the SHARP certification is valid.

### *Cooperative Programs*

OSHA offers cooperative programs under which businesses, labor groups and other organizations can work cooperatively with OSHA. To find out more about any of the following programs, visit www.osha.gov/cooperativeprograms.

#### *Strategic Partnerships and Alliances*

The OSHA Strategic Partnerships (OSP) provide the opportunity for OSHA to partner with employers, workers, professional or trade associations, labor organizations, and/or other interested stakeholders. Through the Alliance Program, OSHA works with groups to develop compliance assistance tools and resources to share with workers and employers, and educate workers and employers about their rights and responsibilities.

#### *Voluntary Protection Programs (VPP)*

The VPP recognize employers and workers in the private sector and federal agencies who have implemented effective safety and health programs and maintain injury and illness rates below the national average for their respective industries.

## Occupational Safety and Health Training

OSHA partners with 26 OSHA Training Institute Education Centers at 37 locations throughout the United States to deliver courses on OSHA standards and occupational safety and health topics to thousands of students a year. For more information on training courses, visit www.osha.gov/otiec.

### OSHA Educational Materials

OSHA has many types of educational materials to assist employers and workers in finding and preventing workplace hazards.

All OSHA publications are free at www.osha.gov/publications and www.osha.gov/ebooks. You can also call 1-800-321-OSHA (6742) to order publications.

Employers and safety and health professionals can sign-up for *QuickTakes*, OSHA's free, twice-monthly online newsletter with the latest news about OSHA initiatives and products to assist in finding and preventing workplace hazards. To sign up, visit www.osha.gov/quicktakes.

## OSHA Regional Offices

**Region 1**
Boston Regional Office
(CT*, ME*, MA, NH, RI, VT*)
JFK Federal Building
25 New Sudbury Street, Room E340
Boston, MA 02203
(617) 565-9860 (617) 565-9827 Fax

**Region 2**
New York Regional Office
(NJ*, NY*, PR*, VI*)
Federal Building
201 Varick Street, Room 670
New York, NY 10014
(212) 337-2378 (212) 337-2371 Fax

**Region 3**
Philadelphia Regional Office
(DE, DC, MD*, PA, VA*, WV)
The Curtis Center
170 S. Independence Mall West, Suite 740 West
Philadelphia, PA 19106-3309
(215) 861-4900 (215) 861-4904 Fax

**Region 4**
Atlanta Regional Office
(AL, FL, GA, KY*, MS, NC*, SC*, TN*)
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW, Room 6T50
Atlanta, GA 30303
(678) 237-0400 (678) 237-0447 Fax

**Region 5**
Chicago Regional Office
(IL*, IN*, MI*, MN*, OH, WI)
John C. Kluczynski Federal Building
230 South Dearborn Street, Room 3244
Chicago, IL 60604
(312) 353-2220 (312) 353-7774 Fax

**Region 6**
Dallas Regional Office
(AR, LA, NM*, OK, TX)
A. Maceo Smith Federal Building
525 Griffin Street, Room 602
Dallas, TX 75202
(972) 850-4145 (972) 850-4149 Fax

**Region 7**
Kansas City Regional Office
(IA*, KS, MO, NE)
Two Pershing Square Building
2300 Main Street, Suite 1010
Kansas City, MO 64108-2416
(816) 283-8745 (816) 283-0547 Fax

**Region 8**
Denver Regional Office
(CO, MT, ND, SD, UT*, WY*)
Cesar Chavez Memorial Building
1244 Speer Boulevard, Suite 551
Denver, CO 80204
(720) 264-6550 (720) 264-6585 Fax

**Region 9**
San Francisco Regional Office
(AZ*, CA*, HI*, NV*, and American Samoa,
Guam and the Northern Mariana Islands)
San Francisco Federal Building
90 7th Street, Suite 2650
San Francisco, CA 94103
(415) 625-2547 (415) 625-2534 Fax

**Region 10**
Seattle Regional Office
(AK*, ID, OR*, WA*)
Fifth & Yesler Tower
300 Fifth Avenue, Suite 1280
Seattle, WA 98104
(206) 757-6700 (206) 757-6705 Fax

*These states and territories operate their own OSHA-approved job safety and health plans and cover state and local government employees as well as private sector employees. The Connecticut, Illinois, Maine, New Jersey, New York and Virgin Islands programs cover public employees only. (Private sector workers in these states are covered by Federal OSHA). States with approved programs must have standards that are identical to, or at least as effective as, the Federal OSHA standards.

Note: To get contact information for OSHA area offices, OSHA-approved state plans and OSHA consultation projects, please visit us online at www.osha.gov or call us at 1-800-321-OSHA (6742).

## How to Contact OSHA

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. OSHA's role is to help ensure these conditions for America's working men and women by setting and enforcing standards, and providing training, education and assistance. For more information, visit www.osha.gov or call OSHA at 1-800-321-OSHA (6742), TTY 1-877-889-5627.

**For assistance, contact us.**
**We are OSHA. We can help.**

OSHA®
www.osha.gov

U.S. Department of Labor

**For more information:**

OSHA® Occupational Safety and Health Administration

**www.osha.gov (800) 321-OSHA (6742)**

# EXHIBIT D

**Declaration of Emergency**
**Directive #018**

# EXHIBIT D

**Declaration of Emergency**
**Directive #018**

Skip to Main Content

Nevada Governor Steve Sisolak

# DECLARATION OF EMERGENCY DIRECTIVE 018

***WHEREAS,*** *in late 2019, the United States Centers for Disease Control and Prevention began monitoring an outbreak of respiratory illness caused by a novel coronavirus first identified in Wuhan, Hubei Province, China; and*

***WHEREAS,*** *on February 11, 2020, the International Committee on Taxonomy of Viruses named this novel coronavirus "severe acute respiratory syndrome coronavirus 2 (SARS-Co V-2);" and*

***WHEREAS,*** *on February 11, 2020, the World Health Organization named the disease caused by SARSCo V-2, "COVID-19:" and*

***WHEREAS,*** *the World Health Organization advises that the novel coronavirus that causes COVID-19 virus is highly contagious, and spreads through respiratory transmission, and direct and indirect contact with infected persons and surfaces; and*

***WHEREAS,*** *the World Health Organization advises that respiratory transmission occurs through both droplet and airborne transmission, where droplet transmission occurs when a person is within 6 feet of someone who has respiratory symptoms like coughing or sneezing, and airborne transmission may occur when aerosolized particles remain suspended in the air and is inhaled; and*

***WHEREAS,*** *the World Health Organization advises that contact transmission occurs by direct contact with infected people or indirect contact with surfaces contaminated by the novel coronavirus; and*

***WHEREAS,*** *some persons with COVID-19 may exhibit no symptoms but remain highly infectious; and*

***WHEREAS,*** *on March 5, 2020, Clark County and Washoe County both reported the first known cases of COVID-19 in the State of Nevada; and*

***WHEREAS,*** *on March 11, 2020, the World Health Organization declared COVID-19 a pandemic; and*

***WHEREAS,*** *on March 12, 2020, I, Steve Sisolak, Governor of the State of Nevada issued a Declaration of Emergency to facilitate the State's response to the COVID-19 pandemic; and*

***WHEREAS,*** *on March 13, 2020, Donald J. Trump, President of the United States declared a nationwide emergency pursuant to Sec. 501 (b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5207 (the "Stafford Act"); and*

***WHEREAS,*** *on March 14, 2020, I formed a medical advisory team to provide medical guidance and scientifically based recommendations on measures Nevada could implement to better contain and mitigate the spread of COVID-19; and*

***WHEREAS,*** *on March 15, 2020, the State of Nevada experienced its first COVID-19 related fatality; and*

***WHEREAS,*** *in the 53 days since Nevada's first COVID-19 death, as of May 7, 2020, the number of deaths in the State of Nevada has climbed to 286; and*

***WHEREAS,*** *as of May 7, 2020, Johns Hopkins University's Coronavirus Resource Center has attributed 75,423 deaths in the United States of America to COVID-19; and*

***WHEREAS,*** *infectious disease and public health experts advised that minimizing interpersonal contact slows the rate at which the disease spreads, and is necessary to avoid overwhelming healthcare systems, commonly referred to as "flattening the curve"; and*

***WHEREAS,*** *since the March 12, 2020 Declaration of Emergency, I have issued 17 Directives pursuant to that order to provide for the safety, wellbeing, and public health of Nevadans and the administration of the State of Nevada; and*

***WHEREAS,*** *these Directives were promulgated to reduce interpersonal contact and promote social distancing to flatten the curve; and*

***WHEREAS,*** *data showed that Nevada was one of the top five states in the United States for social distancing; and*

***WHEREAS,*** *Nevada's medical experts indicate that the rate at which COVID-19 is spreading in the State of Nevada has effectively slowed to a level that does not jeopardize the state's healthcare system due, in part, to Nevadans following strict social distancing measures individually and pursuant to Directives I issued pursuant to the March 12, 2020, Declaration of Emergency; and*

***WHEREAS,*** *although the danger to Nevadans from the COVID-19 disease has abated, the disease has not been eliminated and measures that protect safety, wellbeing, and public health of Nevadans must remain in effect; and*

***WHEREAS,*** *on April 21, 2020, the National Governors Association issued guidance for a staged reopening that protects the public's health while laying a strong foundation for long-term economic recovery; and*

***WHEREAS,*** *on April 30, 2020, I introduced the* ***Nevada United: Roadmap to Recovery plan*** *that outlined a phased approach to reopening Nevada businesses and industry; and*

***WHEREAS,*** *the* ***Nevada United: Roadmap to Recovery plan*** *set forth a collaborative partnership between state and local governments that included the formation of the Local Empowerment Advisory Panel ("LEAP") to serve as a resource to local governments and local communities; and*

***WHEREAS,*** *NRS 414.060 outlines powers and duties delegated to the Governor during the existence of a state of emergency, including without limitation, directing and controlling the conduct of the general public and the movement and cessation of movement of pedestrians and vehicular traffic during, before and after exercises or an emergency or disaster, public meetings or gatherings; and*

***WHEREAS,*** *NRS 414.070 outlines additional powers delegated to the Governor during the existence of a state of emergency, including without limitation, enforcing all laws and regulations relating to emergency management and assuming direct operational control of any or all forces, including, without limitation, volunteers and auxiliary staff for emergency management in the State; providing for and compelling the evacuation of all or part of the population from any stricken or threatened area or areas within the State and to take such steps as are necessary for the receipt and care of those persons; and performing and exercising such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population; and*

***WHEREAS,*** *the Nevada Attorney General opined in Opinion Number 95-03 that in times of emergency when the Governor's authority under Nevada Revised Statutes Chapter 414 is in effect, the powers of political subdivisions to control business activity is limited; and*

***WHEREAS,*** *NRS 414.060(3)(f) provides that the administrative authority vested to the Governor in times of emergency may be delegated; and*

***WHEREAS,*** *Article 5, Section 1 of the Nevada Constitution provides: "The supreme executive power of this State, shall be vested in a Chief Magistrate who shall be Governor of the State of Nevada;" and*

***NOW, THEREFORE,*** *by the authority vested in me as Governor by the Constitution and the laws of the State of Nevada and the United States, and pursuant to the March 12, 2020, Emergency Declaration,*

IT IS HEREBY ORDERED THAT:

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| **Section 1:** | To the extent this Directive conflicts with earlier Directives or regulations promulgated pursuant to the March 12, 2020 Declaration of Emergency, the provisions of this Directive shall prevail. |
| | For the purposes of this Directive, ''vulnerable persons" are defined as those who are at heightened risk of complications from COVID-19 disease, and include:<br>1. Individuals who are 65 years of age and older; |

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| **Section 2:** | 2. Individuals with chronic lung disease or moderate to severe asthma;<br>3. Individuals who have serious heart conditions;<br>4. Individuals who are immunocompromised;<br>5. Pregnant women; or<br>6. Individuals determined to be high risk by a licensed healthcare provider. |
| **Section 3:** | All vulnerable persons are strongly encouraged to stay at home to the greatest extent possible, except when necessary to provide, support, perform, or operate necessary activities, minimum basic operations, critical government functions, necessary travel, or essential businesses. |
| **Section 4:** | The phrase "social distancing" includes guidance promulgated by the United States Centers for Disease Control and Prevention, including without limitation, maintaining at least six feet of social distancing from other individuals. The phrase "sanitation requirements" or "sanitation measures" includes without limitation, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands. |
| **Section 5:** | Section 2 of Directive 010 is hereby amended to provide that effective May 9, 2020, all Nevadans are strongly encouraged to stay in their residences to the greatest extent possible. Recognizing that COVID-19 is still present in Nevada and highly contagious, Nevadans are advised that they are safer at home and should avoid interpersonal contact with persons not residing in their households to the extent practicable. To reduce the spread of COVID-19 via respiratory transmission, the Nevada public should utilize face coverings in public spaces. |
| **Section 6:** | Pursuant to NRS 441A.180, persons testing positive for COVID-19 shall stay at home and "self-quarantine" for a minimum of two weeks, except as necessary to care for themselves or seek medical care. Persons determined to be in contact with an individual who tested positive for COVID-19 must quarantine and stay at home for two weeks, or until a negative test result has been received. |
| **Section 7:** | Section 1 of Directive 007 is hereby amended to provide that effective May 9, 2020, the Nevada general public shall not gather in groups of ten or more in any indoor or outdoor area, whether publicly owned or privately owned where the public has access by right or invitation, express or implied, whether by payment of money or not, including without limitation, parks, basketball courts, volleyball courts, baseball fields, football fields, rivers, lakes, beaches, streets, convention centers, libraries, parking lots, and private clubs. This provision shall not be construed to apply to the gathering of persons living within the same household, persons working at or patronizing businesses operating pursuant to this Directive, or providing essential services to the public. |
| **Section 8:** | The Nevada Labor Commissioner shall provide guidance to employers on labor laws related to COVID-19, including without limitation, sick leave policies, required postings for employers, and bulletins, guides, and forms for employers and employees. |
| **Section 9:** | All employers must take proactive measures to ensure compliance with the social distancing and sanitation guidelines. All employers shall require employees who interact with the public to wear face coverings, to the maximum extent possible, and shall abide by all other guidelines promulgated by the Nevada State Occupational Safety and Health Administration (NV OSHA). |
| **Section 10:** | All businesses must adopt measures that meet or exceed the standards promulgated by NV OSHA to minimize the risk of spread of COVID-19. All businesses are encouraged to permit their employees to work from home to the maximum extent practicable. The Nevada State Occupational Safety and Health Administration shall continue to ensure that businesses reopened pursuant to this Directive or otherwise operating during the state of emergency provide adequate protections to their workers and adopt sanitation protocols that minimize the risk of spread of COVID-19 among their workforce. NV OSHA shall enforce all violations of its guidance, protocols, and regulations. |
| | To the maximum extent practicable, employers and employees are strongly encouraged to incorporate the following protocols into their business operations:<br>1. Encourage customers to wear face coverings<br>2. Continue to encourage telework, whenever possible and feasible with business operations<br>3. Return to work in phases<br>4. Close common areas where personnel are likely to congregate and interact, or |

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| **Section 11:** | 4. Close common areas where personnel are likely to congregate and interact, or enforce strict social distancing protocols<br>5. Strongly consider special accommodations for personnel who are members of a vulnerable population<br>6. Consider encouraging employees to do a self-assessment each day in order to check if they have any COVID-19 type symptoms, for example, fever, cough or shortness of breath<br>7. Practice hand hygiene<br>8. Perform frequent enhanced environmental cleaning of commonly touched surfaces<br>9. Implement separate operating hours for vulnerable populations<br>10. Provide signage advising the public of appropriate social distancing within the facility, including six feet of social distancing from other individuals; and<br>11. Provide readily available hand sanitizer or other sanitizing products for employees and customers |
| **Section 12:** | All employers are encouraged to accommodate vulnerable persons and workers caring for a child whose school or place of care is closed, or childcare provider is unavailable, for reasons related to COVID-19, by promoting telecommuting or other remote work options, flexible schedules, or other means. To the greatest extent possible, employers should extend similar accommodations to workers who live in the same household as a vulnerable person. Upon request, all employers covered by the Families First Coronavirus Response Act ("FFCRA") must provide leave to eligible employees as provided by the Act. Employers covered by the FFCRA must notify covered employees seeking accommodations of their eligibility. The provisions of this Section shall be in effect for the duration that the March 12, 2020 Declaration of Emergency shall be in effect, unless specifically terminated by a subsequent Directive. |
| **Section 13:** | Effective May 9, 2020, all businesses that engage in retail sales may, in addition to providing retail sales on a curbside or home delivery basis, allow customer access, with a maximum occupancy of 50% based on listed fire code capacity. Businesses are strongly encouraged to promote home delivery, curbside delivery, walk-up, drive-through, or window service whenever possible. Businesses must adopt measures promulgated by NV OSHA to minimize the risk of spread of COVID-19 including social distancing and sanitation measures, and abide by all other guidance promulgated pursuant to this and other Directives. To the maximum extent practicable, businesses must provide services in a manner disallowing the formation of queues whereby persons congregate in a manner that violates the social distancing guidelines above. All businesses are encouraged to permit their employees to work from home to the maximum extent practicable. Retail businesses operating in open-air malls or strip malls are expressly permitted to operate under the conditions set forth in this Directive. Retail businesses operating pursuant to this Directive at indoor malls may provide retails sales to any extent they can do so on a home delivery basis, or for curbside delivery outside the mall under the conditions set forth in this Directive. |
| **Section 14:** | Effective May 9, 2020, drive in theaters may resume operations for movies and drive-in religious services under strict social distancing guidelines pursuant to this Directive. Movie theaters operating on a non-drive-in basis shall remain closed to the public until further notice. |
| **Section 15:** | Section 3 of Directive 013 is hereby rescinded. Effective May 9, 2020, automobile, off-highway vehicle, and recreational vehicle sales showrooms may reopen to customers on a limited basis. The number of customers in showroom areas may not exceed 50% of the area's listed fire code capacity. Dealerships are encouraged to operate on an appointment only basis to reduce interpersonal contact to the greatest extent possible. Test drives should be limited to the customer and the customer's household members, and vehicles must be sanitized after each test drive. |
| | Section 7 of Directive 013 is hereby rescinded. Effective May 9, 2020, nail care salons, hair salons, and barber shops licensed by the Nevada Board of Cosmetology or State Barber's Health and Sanitation Board may reopen to customers provided that:<br>1. Salons and barber shops with walls or partitions between stations or chairs may utilize all stations, but under no circumstances may more than on customer or client be seated at any given station or chair.<br>2. Salons and barber shops without walls or partitions between stations may only seat customers or clients at every other station or chair, or arrange stations or |

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| **Section 16:** | chairs so that a minimum of 6 feet of separation between customers is maintained.<br>3. Salons and barber shops may not accept customers or clients on a walk-in basis, and technicians, stylists and barbers may not serve or accept appointments for more than one customer at any given time.<br>4. Customers waiting for appointments must wait outside the facility and must practice social distancing by maintaining a minimum of 6 feet of separation between customers not residing in the same household.<br>5. Technicians, stylists, barbers and other employees must wear face coverings at all times.<br>6. Persons licensed by the Nevada Board of Cosmetology or State Barber's Health and Sanitation Board must abide by all guidelines promulgated by their respective boards. Boards are directed to impose disciplinary measures against licensees who violate this provision.<br><br>Persons licensed by the Nevada Board of Cosmetology or State Barber's Health and Sanitation Board may perform in-home beauty services to persons other than those in their household if their licenses permit them to do so, but must abide by all sanitation practices required by their respective licensing board, and must wear face coverings while servicing customers and clients. |
| **Section 17:** | The prohibition on onsite dining at restaurants and food establishments in Section 3 of Directive 003 is hereby amended. All restaurants and food establishments operating during the state of emergency due to the COVID-19 pandemic are strongly encouraged to accommodate vulnerable persons by providing to-go, curbside, and delivery options for customers. Restaurants and food establishments, including bars and taverns licensed to serve food, may provide onsite dining subject to the following provisions:<br>1. The maximum occupancy for onsite dining shall be 50% of the maximum seating capacity under normal circumstances, excluding bar seating.<br>2. Tables or available booths must be spaced, or customers seated a minimum of 6 feet apart from other customers.<br>3. Bar tops and bar areas shall remain closed to customers, but bar beverages may be served at tables for onsite consumption.<br>4. Customers waiting to dine onsite must wait. outside the establishment until they can be seated and must practice social distancing by maintaining a minimum of 6 feet of separation between customers not residing in the same household.<br>5. To the maximum extent practicable, restaurants and food establishments should require reservations to manage occupancy.<br><br>Restaurants and food establishments unable to comply with Items 1-4, above, may not open for onsite dining, but may continue to offer to go, curbside and home delivery to customers. Buffets, cafeterias, and self-serve dining facilities shall remain closed until further notice. All other provisions of Section 3 of Directive 003 not in conflict with this Section shall remain in effect. |
| **Section 18:** | Breweries, distilleries, and wineries not licensed to serve food may offer curbside delivery, and home delivery where permitted by local code or ordinance. Breweries, distilleries, and wineries may continue all operations necessary to produce product, consistent with worker safety guidelines promulgated by the Nevada State Occupational Safety and Health Administration. |
| **Section 19:** | The following non-essential businesses shall remain closed during Phase One of the Nevada United: Roadmap to Recovery plan:<br>1. Nightclubs<br>2. Bars, pubs, and taverns not covered by Sections 17 or 18 of this Directive<br>3. Gyms and fitness facilities<br>4. Recreation and community centers including public pools<br>5. Museums and art galleries<br>6. Zoos and aquariums, but may remain open to staff members to maintain essential operations for the health and safety of animals<br>7. Entertainment venues, including sports venues, movie theaters with the exception of drive-in theaters covered in Section 14 of this Directive, museums, bowling alleys, arcades and other amusement venues, and miniature golf<br>8. Brothels<br>9. Adult entertainment facilities<br>10. Massage parlors, not to include massages for physical therapy or that are |

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| | medically necessary as prescribed by a licensed healthcare provider<br>11. Spas, not to include nail salons, hair salons, and barber shops covered in Section 16 of this Directive<br>12. Body art facilities<br>13. Body piercing facilities<br>14. Tanning salons |
| **Section 20:** | Nevada State parks are hereby directed to open to the public for day use, subject to usage that does not pose a public health risk through overcrowding, or other violations of social distancing standards. Park rangers and staff shall develop and implement park access control measures to proactively prevent overcrowding, including by limiting capacity at or closing parks as necessary to enforce public safety and public health protocols. The Nevada public is advised to maintain all COVID-19 risk mitigation social distancing protocols, and utilize face coverings whenever possible. |
| **Section 21:** | Section 13 of Directive 016 is hereby amended. Gaming operations, not including licensed online gaming or mobile wagering operations, shall remain closed through Phase One. The Gaming Control Board shall promulgate guidance for a phased and incremental resumption of gaming operations. |
| **Section 22:** | Section 3 of Directive 016 is hereby amended to provide that in addition to curbside or home delivery, licensed cannabis dispensaries may additionally engage in retail sales on an in-store basis, effective May 9, 2020, pursuant to guidance that shall be issued by the Department of Taxation in conjunction with the Cannabis Compliance Board, and subject to all local ordinances or municipal code. Retail cannabis dispensaries must continue to abide by measures promulgated by NV OSHA to minimize the risk of spread of COVID- 19 including social distancing and sanitation measures. All retail cannabis dispensaries are encouraged to permit their employees to work from home to the maximum extent practicable. |
| **Section 23:** | Previous Directives not specifically referenced herein remain in effect for the duration specified in those specific Directives or subsequent extensions, unless specifically terminated or extended renewed by subsequent Directive. Directive 016 and all Directives incorporated by reference within Directive 016 with specific expiration dates are extended until May 30, 2020. |
| **Section 24:** | Pursuant to NRS 414.060(3)(f), I hereby delegate to each county of this state to include the consolidated municipality of Carson City, and local municipalities, the authority to adopt additional protective measures intended to combat the spread of COVID-19, including without limitation, stay at home and face covering orders, so long as those measures are at least as restrictive as those imposed by all Directives promulgated pursuant to the Declaration of Emergency for COVID-19 issued on March 12, 2020. Additional restrictive measures adopted by counties and municipalities may be implemented without additional approval by the State. |
| **Section 25:** | Pursuant to NRS 414.060(3)(f), I hereby authorize all local, city, and county governments to enforce this Directive and regulations promulgated thereunder, including but is not limited to, suspending licenses, revoking licenses, or issuing penalties for violating business, professional, liquor, tobacco, or gaming licenses issued by the local jurisdiction for actions that jeopardize the health, safety, or welfare of the public; conduct which may injuriously affect the public health, safety, or welfare; conduct that may be detrimental to the public peace, health, or morals; or any other applicable ordinance or requirement for such a license. |
| **Section 26:** | The State of Nevada shall retain all authority vested in the Governor pursuant to NRS Chapter 414. |
| **Section 27:** | This Directive shall remain in effect through May 30, 2020, unless terminated or extended by a subsequent Directive promulgated pursuant to the March 12, 2020 Declaration of Emergency to facilitate the State's response to the COVID-19 pandemic. |

COVID-19 Declaration of Emergency Directive 018 Orders


IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Nevada to be affixed at the State Capitol in Carson City, this 7th day of May, in the year two thousand twenty.



2020-05-15 - COVID-19 Phase One Reopening - Industry-Specific Guidance (Revised)
2020-05-13 - COVID-19 Phase One Reopening: General Guidance

**Executive**
- Governor
- Lt. Governor
- Secretary of State
- Attorney General
- State Treasurer
- State Controller

**Legislature**
- Legislature Website
- NELIS
- Legislature Meetings
- Find Your Legislator
- Nevada State Senate
- Nevada State Assembly

**Alerts**
- Amber Alerts
- Consumer Affairs
- Weather Alerts
- 211- Service Information
- 511 - Road Conditions
- 911 - Emergency Help

Select Language ▼

Has Met Section 508 WCAG 2.0 ADA Compliance

# EXHIBIT E

**May 8, 2020 Letter Issued by Nevada OSHA**

# EXHIBIT E

**May 8, 2020 Letter Issued by Nevada OSHA**

STEVE SISOLAK
*Governor*

TERRY REYNOLDS
*Director*

STATE OF NEVADA

VICTORIA CARREÓN
*Interim Administrator*

JESS LANKFORD
*Interim Deputy Administrator*

DEPARTMENT OF BUSINESS AND INDUSTRY
DIVISION OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION

May 8, 2020

To Whom It May Concern,

**Scope: Updated Guidance for Essential Businesses & Phase 1 Businesses**

This guidance applies to all essential businesses and non-essential businesses opening or continuing operations in Phase 1 of the Governor's Roadmap to Recovery for Nevada. This guidance supersedes previous guidance released on April 23, 2020 for essential businesses.

On May 8th, 2020 the Governor of Nevada announced the release of Declaration of Emergency Directive #018, which initiates the re-opening of non-essential business within Nevada by a "phased-in" process. The declaration, summarized in the guidance document titled "Roadmap to Recovery for Nevada," requires that during Phase 1:

> *All essential and non-essential businesses opening or continuing operations in Phase One must adopt measures promulgated by the Nevada State Occupational Safety and Health Administration (NV OSHA) to minimize the risk of spread of COVID-19, including social distancing and sanitation measures, and abide by all other guidance promulgated pursuant to the Phase One directive.*

In addition, Section 10 of Declaration of Emergency Directive #018 states:

> *Section 10: All businesses must adopt measures that meet or exceed the standards promulgated by NV OSHA to minimize the risk of spread of COVID-19. All businesses are encouraged to permit their employees to work from home to the maximum extent practicable. The Nevada State Occupational Safety and Health Administration shall continue to ensure that businesses reopened pursuant to this Directive or otherwise operating during the state of emergency provide adequate protections to their workers and adopt sanitation protocols that minimize the risk of spread of COVID-19 among their workforce. NV OSHA shall enforce all violations of its guidance, protocols, and regulations.*

To accomplish these responsibilities NV OSHA is providing this guidance, and the recommendations/requirements found within, for essential businesses and non-essential businesses that are open or will be opening during Phase 1. The measures contained in the document are recommended/required of each business and should be applied to all employees of that business. As we battle the coronavirus pandemic, this guidance may continue to evolve.

The NV OSHA recommendations/requirements for all essential businesses and non-essential businesses opened during Phase 1 include, but are not limited to, the following:

**General Operations:**

- All employers must provide face coverings for employees assigned to serving the public and shall require these employees to wear the face coverings. (**Required**/Ref. Declaration of Emergency Directive #018, Section 9)
- Prohibit gatherings of 10 or more people. (**Required**/Ref. Declaration of Emergency Directive #007, Section 1)
- Promote frequent and thorough hand washing, including providing workers, customers, and worksite visitors with a place to wash their hands. If soap and running water are not immediately available, provide alcohol-based hand rubs containing at least 60% alcohol. (**Required**/Ref. Declaration of Emergency Directive #003)
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces and equipment with Environmental Protection Agency-approved cleaning chemicals from List N or that have label claims against the coronavirus. See: https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2 (**Required**/Ref. Declaration of Emergency Directive #003)
- Provide sanitation and cleaning supplies for addressing common surfaces in multiple user mobile equipment and multiple user tooling. Recommended based on the specifics of a business's services and procedures. (Ref. - Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 2020)
- Conduct daily surveys of changes to staff/labor health conditions. **NV OSHA is emphasizing the need for business leadership to be working with and aware of the health and well-being of its staff.** (**Required**/Ref. - Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 2020)
- Ensure that any identified first responders in the labor force are provided and use the needed Personal Protective Equipment (PPE) and equipment for protection from communicable or infections disease. (**Required**/29 CFR 1910.1030)
- Provide access to potable and sanitary water (**Required**/29 CFR 1926.15 or 29 CFR 1910.141)

Further, any guidance that is produced by the State of Nevada to support the Roadmap to Recovery for Nevada will be enforced by NV OSHA. Specifically, any guidance that pertains to a particular industry sector may/will have a column of "mandatory" measures that apply to that industry sector. Any mandatory measures found in the states promulgated guidance will be deemed enforceable if not specifically addressed in previously published guidance, regulations, or memorandums. Following these guidelines does not constitute, and is not a substitute for, compliance with all laws and regulations applicable at any particular time. Individuals and businesses are responsible to ensure that they comply with all laws and regulations that apply to them, including, but not limited to, federal and state health and safety requirements. Additionally, compliance with these regulations does not ensure against the spread of infections from COVID-19 or any other cause.

**Social Distancing:**

Declarations of Emergency Directives #003 and #018 allow for essential industries/businesses to continue operations and allows some non-essential business to reopen. The following measures are required to be implemented by the employer when employees are conducting specific job functions where 6 feet of social distancing is infeasible/impractical.

- A Job Hazard Analysis (JHA) may be completed for each task, procedure, or instance that is identified where social distancing is infeasible/impractical. Any JHA drafted for this purpose must be equivalent in detail and scope as identified in Federal OSHA publication 3071. https://www.osha.gov/Publications/osha3071.pdf
- A JHA developed for this purpose must identify the task being addressed, hazard being addressed (spread of COVID-19), and controls to be used to address the hazard.
- Any policy, practice, or protocol developed pursuant to the JHA must be as effective or more effective as the 6 feet social distancing mandate in Declaration of Emergency Directive #003.
- Engineering controls, administrative controls, and PPE identified and developed through the JHA to address the hazard must be supplied by the employer.
- Training must be provided to staff for any policy, practice, or protocol that is used to address the hazard via a JHA.
- Training must be provided to staff for any equipment, engineered process, administrative control, or PPE that was identified and developed through the JHA to address the social distancing requirements or alternative policies, practices, or protocols implemented when social distancing is infeasible/impractical.

**Social Distancing during breaks, lunches/dinners, and other slack periods:**

NV OSHA is aware that social distancing requirements are not always followed by employees despite the efforts of the employer. The following measures are recommended for all essential businesses.

- Employers are recommended to monitor employees during break, lunch/dinner, and slack periods to ensure that they are maintaining proper social distancing protocols.
- If an employer representative identifies an instance where proper social distancing protocols are not being followed, the employee will be subject to the employer's existing methods established for ensuring compliance with safety rules and work practices per NAC 618.540(1)(e).
- These observations apply to parking lots, staging areas, and any other location identified by the employer to be a supportive part of the overall business.

**NV OSHA emphasizes that slowing/addressing the spread of COVID-19 is a required aspect of all activities/task/services associated with open businesses and will continue to enforce or promote the use of identified measures to address this public health crisis.**

NV OSHA seeks to ensure that all essential businesses and non-essential businesses implement the aforementioned mandates and also seeks to distribute this information so that all included sectors of business are fully aware of these requirements. If your business, group, or association is receiving this memo, then please recognize this memo as notice to your business, group, or association that the previously mentioned mandates and guidance may be adopted and put into effect.

For any further guidance, use the following links:

Federal OSHA - https://www.osha.gov/SLTC/covid-19/

Federal OSHA Guidance for Retail Workers (OSHA 3996)
https://www.osha.gov/Publications/OSHA3996.pdf

Center for Disease Control and Prevention - https://www.cdc.gov/coronavirus/2019-nCoV/index.html

State of Nevada- https://nvhealthresponse.nv.gov/

State of Nevada Roadmap to Recovery for Nevada - https://nvhealthresponse.nv.gov/wp-content/uploads/2020/05/Roadmap-to-Recovery-Phase-One-Initial-Guidance.pdf

Mine Safety and Health Administration: https://www.msha.gov/msha-response-covid-19

NV OSHA Information: http://dir.nv.gov/OSHA/Home/

**THIS GUIDANCE IS SUBJECT TO REVISION AS ADDITIONAL INFORMATION IS GATHERED. PLEASE CHECK HERE FREQUENTLY FOR UPDATES.**

Sincerely,
Jess Lankford
Chief Administrative Officer
Phone # 702.486.9020

# EXHIBIT F

## Nevada OSHA Sample Covid-19 Screening Questions for Employees

# EXHIBIT F

## Nevada OSHA Sample Covid-19 Screening Questions for Employees

NEVADA HEALTH RESPONSE

# COVID-19 SCREENING FOR EMPLOYEES

A SCREENING IS CONDUCTED EACH TIME AN EMPLOYEE ENTERS THIS FACILITY

If an employee answers "YES" to any of the following questions, they should be advised to go home, stay away from other people, contact their supervisor to discuss options for telework or leave, and contact their primary care provider or local health authority for further instructions

## Please answer "YES" or "NO" to each question:

1. **Have you experienced any of the following symptoms in the past 48 hours?:**
   - Fever or chills
   - Cough
   - Shortness of breath or difficulty breathing
   - Muscle or body aches
   - Headache
   - New loss of taste or smell
   - Sore throat
   - Congestion or runny nose
   - Nausea or vomiting
   - Diarrhea
2. **Within the past 14 days, have you been in close physical contact (6 feet or closer for at least 15 minutes) with a person who is known to have a confirmed case of COVID-19 or with anyone who has any symptoms consistent with COVID-19?**
3. **Are you isolating or quarantining because you may have been exposed to a person with COVID-19 or are worried that you may be sick with COVID-19?**
4. **Are you currently waiting on the results of a COVID-19 test?**

# EXHIBIT G

**May 14, 2021 Letter Issued by Nevada OSHA**

# EXHIBIT G

**May 14, 2021 Letter Issued by Nevada OSHA**

STEVE SISOLAK
*Governor*

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STATE OF NEVADA

VICTORIA CARREÓN
*Administrator*

PERRY FAIGIN
*Interim Deputy Administrator*

JESS LANKFORD
*Chief Administrative Officer*

DEPARTMENT OF BUSINESS AND INDUSTRY
DIVISION OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION

May 14, 2021

To Whom It May Concern:

**Scope: Updated Guidance for Business Operations under the State of Nevada's Declaration of Emergency and Centers for Disease Control and Prevention Guidance**

This guidance, effective May 14, 2021, applies to all businesses currently authorized to operate in Nevada and includes updates from provisions of Declaration of Emergency Directive #045 and new guidance from the Centers for Disease Control and Prevention (CDC) issued on May 13, 2021. This guidance supersedes previous guidance released on May 10, 2021.

Declaration of Emergency Directives #045, along with #024, #028 and #044, require businesses to comply with guidelines promulgated by the Nevada Occupational Safety and Health Administration (NV OSHA) to minimize the risk of spread of COVID-19, including sanitation measures and face coverings. Directive #044 also encourages employers to take proactive measures to implement social distancing guidelines promulgated by the US Centers for Disease Control (CDC). NV OSHA is also responsible for enforcing all violations of its guidelines, protocols, and regulations promulgated pursuant to the Governor's Directives.

To support the continued efforts of the State of Nevada, NV OSHA is providing this guidance, and the requirements found within, for businesses authorized to operate under current Directives. The measures contained in the document are required of each business and should be applied to all employees of that business. As we battle the coronavirus pandemic, this guidance may continue to evolve.

The NV OSHA requirements for all businesses currently authorized to operate include, but are not limited to, the following:

**General Operations Requirements:**

- Employers should encourage employees to receive a COVID-19 vaccine and may implement incentives such as:
  - Providing onsite vaccination clinics,
  - Providing paid leave for employees to get vaccinated,
  - Using promotional posters/flyers to advertise locations offering COVID-19 vaccination, and
  - Posting articles in employer communications about the importance of COVID-19 vaccination and where to get the vaccine in the community.

  (Recommended/CDC FAQs about COVID-19 Vaccination in the Workplace: For Employers (cdc.gov))

- Face coverings:
  - Pursuant to CDC guidance released on May 13, 2021, "fully vaccinated people no longer need to wear a mask or physically distance in any setting, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance." See: https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html
  - Private entities and organizations may have mask policies that are more restrictive than the CDC guidance. Employers will need to conduct a job hazard analysis to determine if face coverings need to be worn by vaccinated employees to prevent the spread of COVID-19. See the Job Hazard Analysis section of this guidance for more information.
  - All employers must provide face coverings* for unvaccinated employees and shall require these employees to wear the face coverings* in all instances where required by emergency directives and associated guidance issued on the NVHealthResponse website or by Nevada OSHA. (Required/Ref. Declaration of Emergency Directive #021, section 12; Declaration of Emergency Directive #044, section 6; Declaration of Emergency Directive #045, section 6)
  - All employers shall require unvaccinated employees to wear a face covering* in any space visited by the general public, even if no one else is present. (Required/Ref. NVHealthResponse Guidance on Directive 024: Face Coverings, Declaration of Emergency Directive #044, section 6; Declaration of Emergency Directive #045, section 6)
  - All employers must require unvaccinated employees to wear a face covering* in any space where food is prepared or packaged, for sale, or generally distributed to others. (Required/Ref. NVHealthResponse Guidance on Directive 024: Face Coverings)
- Close or limit access to common areas where employees are likely to congregate and interact. When in common areas, face coverings* are required for unvaccinated employees. (Required/ Ref. NVHealthResponse Guidance on Directive 024: Face Coverings)
- Maintain regular housekeeping practices, including routine cleaning and disinfecting of surfaces and equipment with Environmental Protection Agency-approved cleaning chemicals from List N or that have label claims against the coronavirus. See: https://www.epa.gov/pesticide-registration/list-n-disinfectants-use-against-sars-cov-2
- Provide sanitation and cleaning supplies for addressing common surfaces in multiple users' mobile equipment and multiple user tooling. Recommended based on the specifics of a business's services and procedures. (Required/Ref. Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 2020)
- Conduct daily surveys of changes to staff/labor health conditions. **NV OSHA is emphasizing the need for business leadership to be working with and aware of the health and well-being of its staff.** (Required/Ref. - Guidance on Preparing Workplaces for COVID-19, OSHA 3990-03 2020)
- Ensure that any identified first responders in the labor force are provided and use the

needed Personal Protective Equipment (PPE) and equipment for protection from communicable or infectious disease. (Required/29 CFR 1910.1030)

- Provide access to potable and sanitary water. (Required/29 CFR 1926.15 or 29 CFR 1910.141)
- Post signage with the latest CDC mask guidance for vaccinated and unvaccinated guests. Recommended/Nevada Health Response Press Release 5/13/2021)

**Section 4 of Nevada Declaration of Emergency Directive #024 states "For the purposes of this Directive, "face covering" is defined as a covering that fully covers a person's nose and mouth, including without limitation, cloth face masks, surgical masks, towels, scarves, and bandanas." For employees, Nevada OSHA does not recognize face shields as an alternative to or as an effective "face covering." The face covering must effectively control the breathing zone and restrain any expelled or exhaled water droplets within the covering.*

Further, any guidance, protocol, plan or regulation that is produced by the State of Nevada or County shall be enforced by Nevada OSHA per Section 7 of Declaration of Emergency #044. Following these guidelines does not constitute, and is not a substitute for, compliance with all laws and regulations applicable at any particular time. Individuals and businesses are responsible to ensure that they comply with all laws and regulations that apply to them, including, but not limited to, federal and state health and safety requirements. Additionally, compliance with these regulations does not ensure against the spread of infections from COVID-19 or any other cause.

**COVID-19 Prevention Plan:**

Nevada OSHA considers COVID-19 a recognized hazard. Nevada OSHA will continue to require all businesses to protect employees from all recognized hazards which includes COVID-19. Employers shall implement COVID-19 Prevention Programs in the workplace. The most effective programs engage workers and their union or other representatives in the program's

identifying a combination of measures that limit the spread of COVID-19 in the workplace; adopting measures to ensure that workers who are infected or potentially infected are separated and sent home from the workplace; and implementing protections from retaliation for workers who raise COVID-19 related concerns.

The COVID – 19 Prevention Program will be recognized by and added to the Written Workplace Safety Program (WWSP) required by Nevada Revised Statutes 618.383 and Nevada Administrative Code 618.538 for businesses with more than 10 employees. Businesses with 10 or fewer employees are highly encouraged to have a written COVID – 19 Prevention Program.

**Job Hazard Analysis:**

- A Job Hazard Analysis (JHA) will be completed for each task, procedure, or instance that is identified where transmission of the COVID 19 virus is an immediate concern. Any JHA drafted for this purpose must be equivalent in detail and scope as identified in Federal OSHA publication 3071. https://www.osha.gov/Publications/osha3071.pdf
- A JHA developed for this purpose must identify the task being addressed, hazard being addressed (spread of COVID-19), and controls to be used to address the hazard.

- Engineering controls, administrative controls, and PPE identified and developed through the JHA to address the hazard must be supplied by the employer.
- Training must be provided to staff for any policy, practice, or protocol that is used to address the hazard via a JHA.
- Training must be provided to staff for any equipment, engineered process, administrative control, or PPE that was identified and developed through the JHA to address the social distancing requirements or alternative policies, practices, or protocols implemented when social distancing is infeasible/impractical.

**NV OSHA emphasizes that slowing/addressing the spread of COVID-19 is a required aspect of all activities/tasks/services associated with open businesses and will continue to enforce or promote the use of identified measures to address this public health crisis.**

NV OSHA seeks to ensure that all businesses authorized to operate under current Directives implement the aforementioned mandates and also seeks to distribute this information so that all included sectors of business are fully aware of these requirements. If your business, group, or association is receiving this memo, then please recognize this memo as notice to your business, group, or association that the previously mentioned mandates and guidance may be adopted and put into effect.

**Need Additional Assistance?**

The Division of Industrial Relations Safety Consultation and Training Section (SCATS) offers free consultations to businesses to help them understand and implement the requirements in order to comply with the health and safety guidance and directives for all businesses, and specific requirements for each industry. SCATS can be reached by calling 1-877-4SAFENV.

For further guidance, please see the following links:

- Federal OSHA COVID – 19 Prevention Program resources-
  - https://www.osha.gov/coronavirus/safework
  - https://www.osha.gov/coronavirus/guidance/industry
- Centers for Disease Control and Prevention - https://www.cdc.gov/coronavirus/2019-nCoV/index.html
- State of Nevada- https://nvhealthresponse.nv.gov/
- Mine Safety and Health Administration: https://www.msha.gov/coronavirus
- NV OSHA Information: http://dir.nv.gov/OSHA/Home/

**THIS GUIDANCE IS SUBJECT TO REVISION. PLEASE CHECK HERE FREQUENTLY FOR UPDATES.**

If you have questions, please call the number below.

Sincerely,
Jess Lankford
Chief Administrative Officer
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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEVADA**

DWIGHT MALLOY, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

AMAZON.COM SERVICES, LLC,

Defendant.

**Case No. 2:22-CV—286-ART-VCF**

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

This case concerns a potential class action arising from Amazon's illegal policy of failing to pay for the time spent by its employees in COVID-19 screenings each shift. In particular, following the outbreak of the COVID-19 pandemic, Amazon instituted a company-wide policy requiring each of its hourly paid employees at its warehouses to complete a COVID-19 screening *prior* to clocking-in each shift. Under Amazon's policy, each of its employees were required to wait in line and undergo a screening without pay. Prior to this case being filed, two other lawsuits were brought against Amazon: (1) *Boone v. Amazon.com Services, LLC*, No. 1:21-CV-0241-DAD-BAM, and (2) *Vaccaro v. Amazon.com.dedc, LLC*, No Civ. A. 18-11852 (FLW). In both cases, Amazon opposed the claim for compensation for the time spent in the COVID-19 screenings. In both cases, Amazon's arguments were rejected by the courts. In this case, Amazon has filed yet another misguided Motion to Dismiss.

Amazon's Motion to Dismiss should be denied because each of the arguments raised by Amazon has been previously rejected. Indeed, Amazon's Motion is not well taken because Amazon has simply repeated the same, tired arguments that have been soundly denied. Accordingly, Amazon's Motion to Dismiss should also be denied in this case.

## II. ARGUMENTS AND AUTHORITIES

Nevada's wage-hour statute is to be liberally construed in favor of employees. Nevada's wage and hour statute under Nev. Rev. Stat. Chapter 608 is remedial in nature. *See Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 956 (2014). As such, Nev. Rev. Stat. Chapter 608 must be liberally construed in order to effectuate the purpose of the legislation. *Intl Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 179 P.3d 556, 560-61 (2008) ("[R]emedial statutes. . . should be liberally construed to effectuate the intended benefit."). With this principal in mind, Amazon has failed to raise a valid argument that supports a dismissal of Plaintiff's First Amended Complaint.

**A. Amazon's Motion to Dismiss must be denied because the time spent in COVID-19 screenings is "work" time that must be paid by Amazon. Two federal courts have already held that a viable claim exists for compensation for the time spent in the COVID-19 screenings at Amazon's warehouses.**

Amazon argues that the time spent by its employees completing the daily COVID-19 screenings prior to clocking-in each shift is not compensable. (*See* Dkt. 22 at pgs. 5-6). Amazon's argument is without merit. Under the Nevada Administrative Code ("NAC"), "hours worked" includes "all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee." NAC § 608.115(1) (emphasis added). Given that the Nevada legislature has not defined the term "work," in this instance, it is appropriate to look to the Fair Labor Standards Act ("FLSA") for guidance.

Under the FLSA, "work" is defined broadly to include the "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003) (citing *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)). Thus, "work" encompasses two factors: (1) the activity is controlled or required by the employer, and (2) pursued necessarily and primarily for the benefit of the employer. *See id.* Amazon does not dispute that the COVID-19 screenings were "controlled or required" by Amazon. Instead, Amazon argues that the COVID-19 screenings were not "work" because the screenings were not conducted primarily for Amazon's benefit. (Dkt. 22 at pgs. 5-7). Amazon's argument is without merit.

***i. Plaintiff has pled sufficient facts demonstrating that the COVID-19 screenings were conducted primarily for Amazon's benefit.***

The seminal case addressing the concept of "work" and the activities that are compensable under the FLSA is *Steiner v. Mitchell*, 350 U.S. 247 (1956). In *Steiner*, the Supreme Court held that time spent by battery plant workers showering at the end of each shift was compensable under the FLSA. In *Steiner*, the employer operated a plant where batteries were manufactured. *Id*. at 249. During the manufacturing process, chemicals used in the plant spilled, dropped, or became part of the dust in the air. *Id.* These dangerous chemical attached to the skin, clothing, and hair of the employees. *Id*. at 250. To protect the workers and their families, the workers were required to shower at the end of their shifts. *Id*. The Supreme Court held that the time spent showering by the workers at the end of their shifts directly benefited the employer by making the "plant as safe a

place as is possible under the circumstances and thereby increase the efficiency of its operation." *Id*. at 251-252. The Supreme Court then held that the time spent showering at the end of the shifts was compensable under the FLSA. *Id*. at 256. The Supreme Court stated as follows:

> We find no difficulty in fitting the facts of this case to that conclusion because it would be difficult to conjure up an instance where changing clothes and showering are more **clearly an integral and indispensable part of the principal activity** of the employment than in the case of these employees.

*Id*. (emphasis added).

The facts in *Steiner* are very similar to the facts in this case. Just like in *Steiner*, the COVID-19 screenings primarily benefitted Amazon because the screenings were (1) designed to make the workplace safe and thereby increase the efficiency of Amazon's operations, (2) were for the safety of the workers and their families, and (3) were to ensure that Amazon complied with the law. (*See* Dkt. 20 at ¶¶ 28-35). Specifically, Plaintiff pled the following facts in his Complaint.

> ¶ 28. Indeed, Amazon required Plaintiff and Class Members to undergo this screening for the purposes of overall safety in the Amazon facilities and to prevent the Plaintiff and Class Members from inadvertently and unintentionally infecting the Amazon facilities or Amazon products, and in turn, Amazon's customers. Likewise, the job duty of the Plaintiff and Class Members was to serve the customers of Amazon and the screening was necessary to ensure that Plaintiff and Class Members safely provide that service.
>
> ¶ 29. The COVID-19 examinations were necessary to ensure that the virus did not infect the Amazon facilities or customers. The examinations were also necessary to ensure that the virus did not disrupt the work performed by Plaintiff and Class Members or affect the business operations of Amazon. If Amazon did not have the COVID-19 screening, workers could inadvertently or unintentionally bring the virus into the Amazon facilities causing a mass breakout of the virus infecting hundreds to thousands of other workers of Amazon.

(Dkt. 20 at pgs. 5-6).

Amazon argues that when the "activity is related to employee health and safety," the activity can never be primarily for the benefit of the employer. (Dkt. 22 at pg. 6). However, this argument is contrary to the holding in *Steiner*. In *Steiner*, the Supreme Court made clear that ensuring the health and safety of employees primarily benefits the *employer*, as making the work place "as safe as is possible under the circumstances" "increase[s] the efficiency of its operations." *Steiner*, 250 U.S. at 251. In other words, by having a safe workplace with healthy employees, the employer is able to increase its efficiency and earn a higher profit. *See id.*

Plaintiff pled precisely these facts in his First Amended Complaint:

> ¶ 33. Under these facts, the COVID-19 screenings were also for the benefit of Amazon and its customers. The COVID-19 screenings allowed Amazon's operations to continue and therefore, allowed Amazon to earn a profit. Similarly, the COVID-19 screenings benefited Amazon's customers by allowing them to receive products in a timely basis and to receive products that were not contaminated. Indeed, the COVID-19 screenings were conducted by Amazon with the intent for Amazon to benefit, to earn more profits, and to continue its business. In fact, Amazon's business substantially grew during the pandemic and it appears that the pandemic provided a windfall for Amazon's operations.
>
> ¶ 34. The COVID-19 screenings were also primarily for the benefit of Amazon because Amazon's COVID-19 screening policy was intended to keep its fulfillment centers and distribution centers as safe of a workplace as possible given the circumstances of the global pandemic. Amazon's COVID-19 screening policy was also intended to ensure the safety of Amazon's workers and to ensure that Amazon complied with the law. By making the workplace safe, Amazon increased the efficiency of Amazon's operations and allowed it to make billions in profits during the pandemic. Indeed, having business operations continue without interruption undoubtedly increased the profits of Amazon. Similarly, complying with all laws ensured Amazon could continue to operate and earn profits. Moreover, having employees who are healthy and able to perform their work ensures that Amazon can continue to operate and earn profits.
>
> ¶ 35. The COVID-19 screenings were to ensure that the virus did not disrupt the work performed by the Plaintiff/Class Members or affect the business operations of Amazon. If Amazon facilities suffered an infection outbreak, Amazon would potentially have to find new employees or shut down its warehouses until it was safe to open again. Such an outbreak would harm Amazon directly and cause it to lose significant profits. Given this substantial risk to Amazon's business operations, Amazon primarily benefitted from the COVID-19 screenings.

(Dkt. 20 at pg. 7).

Notably, Amazon did not mention the *Steiner* decision in its Motion to Dismiss because Amazon likely knew that its arguments were contrary to the holding in *Steiner*. Instead, Amazon cited to district court cases from outside Nevada and outside the Ninth Circuit. However, those cases are inapposite to the facts of this case and do not reflect reasoned authority.[1]

[1] The *Leone* decision cited by Amazon involved workers who sought compensation for voluntarily accompanying an OSHA inspector as part of a union complaint to OSHA. These facts having nothing do with the facts in the present case. In *Wheat*, the plaintiff voluntarily underwent a sleep apnea study that was not required by the employer or any law. These facts are irrelevant to the Court's analysis in this case. In *Gibbs* and *Makinen*, police officers with substance abuse issues were required to attend counseling sessions. Those courts, at the summary judgment stage, found that there was no evidence in the record to suggest that the police department benefited from the counseling sessions. These facts are irrelevant to the facts in the present case.

Amazon also argues that the daily COVID-19 screenings were not primarily for Amazon's benefit because they were conducted in "alignment with the Governor's Emergency Directives and guidance of Nevada OSHA." (Dkt. 22 at pg. 6). Like its prior arguments, this argument is without merit. In fact, the Ninth Circuit specifically rejected this argument in *Alvarez v. IBP*. *Alvarez*, 339 F.3d at 903. In *Alvarez*, the Ninth Circuit held that the time spent by meat packing employees donning, doffing, and washing their protective gear primarily benefited the employer. *Id.* In reaching this conclusion, the Ninth Circuit found that the donning and doffing of the protective gear was "required by law." *Id*. Accordingly, the time spent donning, doffing, and washing the protective gear was primarily for the employer's benefit so that the employer could comply with the law. *Id*. The Ninth Circuit stated as follows:

> it is beyond cavil that the donning, doffing, washing, and retrieving of protective gear is, at both broad and basic levels, done for the benefit of IBP. See generally United Transp. Union Local 1745 v. City of Albuquerque, 178 F.3d 1109, 1116 (10th Cir.1999). **These plaintiff-performed activities allow IBP to satisfy its requirements under the law**, see 9 C.F.R. § 308.3 (1999); 29 C.F.R. § 1910.132(a) (1999), and these activities prevent unnecessary workplace injury and contamination, both of which would inevitably impede IBP's "disassembly" process. Under Steiner, plaintiffs' donning, doffing, and cleaning activities are "integral and indispensable" to Pasco's "principal" activity.

*Id*. (emphasis added).

Here, as Amazon concedes, the daily COVID-19 screenings were conducted to ensure that Amazon complied with the law. (*See* Dkt. 22 at pg. 6). Had Amazon not complied with the law, Amazon would have surely not been able to operate its business. If Amazon was not able to operate, Amazon would not have earned a profit, and instead, would have lost money. Under these facts, the daily COVID-19 screenings were primarily for Amazon's benefit.

It is also important to note that the Ninth Circuit in *Alvarez* held that the time spent "donning, doffing, washing, and retrieving protective gear" was primarily for the employer's benefit because these activities prevented "unnecessary workplace injury and contamination." *Alvarez*, 339 F.3d at 903. Similarly, the daily COVID-19 screenings were conducted to prevent workplace contamination and to prevent Amazon employees from being infected with the virus while at work. (Dkt. 20 at ¶¶ 29, 30).

It is truly unclear why Amazon has argued that that the COVID-19 screenings were not for Amazon's benefit. In fact, Amazon previously conceded in its federal filings in California "that a COVID-19 outbreak at an Amazon fulfillment center would be disruptive to business operations." (Exhibit "1" at pg. 8). Further, Amazon admitted that the screenings were necessary to comply with "regulations and guidelines issued by [] state agencies and the CDC." (*Id*.) Finally, Amazon admitted that the COVID-19 screenings were performed to ensure that the work at the Amazon facilities proceeded safely during the pandemic. (*Id*. at pg. 1).

Ultimately, it cannot be readily disputed that having business operations continue without interruption increases the profits of Amazon. Likewise, complying with all laws ensures that Amazon can continue to operate and earn profits. Moreover, having employees who are healthy and able to perform their work ensures that Amazon can operate efficiently, and thereby, earn profits. Under these facts, the COVID-19 screenings were primarily for the benefit of Amazon.

**ii.** ***Two prior courts have addressed whether the time spent by Amazon employees in COVID-19 screenings is compensable and have rejected Amazon's arguments. This Court should now do the same.***

In *Boone v. Amazon.com Services, LLC*, a group of Amazon warehouse employees in California brought a lawsuit seeking compensation for the time they spent completing the COVID-19 screenings before they clocked-in each day. No. Civ. A. 1:21-cv-0241-DAD-BAM, 2022 WL 780215, at *1-*2 (E.D. Cal. Mar. 11, 2022). The plaintiffs in *Boone* brought their claims for unpaid wages under both the FLSA and California Labor Code. *Id*. at *1. Amazon filed a similar motion to dismiss. *Id.* at *4. Just like in this case, Amazon argued that the time spent in the COVID-19 screenings is not "work" because the COVID-19 screenings were not primarily for Amazon's benefit. *Id.* at *7-*8. The *Boone* Court rejected Amazon's arguments and held as follows:

> **The court is not persuaded by defendant's argument that it is only an incidental beneficiary of the screenings because every other member of the community likewise benefits from the prevention of infection**…According to the allegations of the SAC, absent the screenings, "workers could inadvertently or unintentionally bring the virus into the Amazon facilities causing a mass breakout of the virus infecting hundreds to thousands of other workers of Amazon." (*Id.*) If Amazon facilities suffered an infection outbreak, defendant would potentially have to find new employees or shut down its warehouse until it was safe to open again. Such an outbreak would harm defendant Amazon directly and to a greater extent than the general public. **Given this alleged substantial risk to defendant and its**

> **business operations, it is plausibly alleged that it is defendant who primarily benefits from its decision to mitigate that risk by implementing the mandatory COVID-19 screening policy.**

*Id*. at *8-*9 (emphasis added).

A similar conclusion was reached in in *Vaccaro v. Amazon.com.dedc, LLC*, No. Civ. A. 18-11852, 2021 WL 1022699 (D.J.J. Mar. 17, 2021). In *Vaccaro*, the plaintiff sought leave to amend her complaint to bring a claim for compensation for the time she spent in "pre-shift COVID-19 screenings at Defendant's warehouses or 'fulfillment centers.'" *Id.* at *1. The plaintiff's claim was brought under the New Jersey Wage and Hour Law. *Id.* Under New Jersey law, an activity must be paid "where the following two prongs are met: (1) an activity is performed that is controlled or required by the employer; and (2) such activity serves to primarily benefit the employer." *Id.* at *2 (emphasis in original). After the plaintiff moved for leave to add the claim for compensation for the time spent in the COVID-19 screenings, Amazon opposed the motion for leave. *Id*. In opposing the motion or leave, Amazon made very similar arguments as Amazon has made in this case that the "COVID screenings are not compensable." *Id.* at *1. The District of New Jersey rejected Amazon's arguments. *Id.* at *4. The District of New Jersey stated that "it is clear that the mandatory pre-shift COVID-19 screenings are 'controlled or required by [Amazon.]'" *Id.* Next, the District of New Jersey stated that the issue of whether an activity is primarily for the employer's benefit or the employee's benefit requires discovery. *Id.* Accordingly, the *Vaccaro* Court granted the plaintiff's motion for leave and allowed the COVID-19 screening claim to continue. *Id*.

The facts in *Boone* and *Vaccaro* are identical to the facts in this case. Here, there is no reasonable dispute that Amazon required the COVID-19 screenings, controlled the COVID-19 screenings, and controlled the Plaintiff's activities during the screenings. The Plaintiff was (1) required to complete the screening each shift, (Dkt. 20 at ¶ 18); (2) was required to complete the screening on Amazon's premises, (*id*. at ¶ 24); (3) was required to submit to having his temperature taken, (*id.* at ¶¶ 18 & 19); (4) was required to answer questions about his health, (*id*.); (5) was required to put on a mask, (*id*.); and (6) was not free to use that time for his own purposes. (*Id*. at ¶ 23). Plaintiff's First Amended Complaint provides significant facts demonstrating that Amazon

primarily benefitted from the COVID-19 screenings. (*Id*. at ¶¶ 28-35). Under these facts, Amazon's Motion to Dismiss should be denied.

Rather than discuss the *Boone* and *Vaccaro* decisions, Amazon cited to *Perez v. Walmart, Inc.*, 2021 WL 5741484 (W.D. Mo. Oct. 25, 2021). However, in *Perez,* the plaintiff brought a claim under Missouri common law for unjust enrichment. *See id*. The claim raised in *Perez* was not brought under the FLSA or any wage and hour statute. *See id*. *Perez* provides no guidance for the Court because the facts and legal claims are materially distinct from those in this case. Likewise, Amazon cited to *Bonilla v. Baker Concrete Constr., Inc*., 487 F.3d 1340 (11th Cir. 2007). However, the facts in *Bonilla* are markedly different from those alleged by Plaintiff. In *Bonilla*, the court stated that the construction company did not stand to benefit from their employees undergoing a security screening required by the FAA. *See id.* at 1344. That is because the screenings in *Bonilla* had no clear nexus to the company's construction work and had the security screenings been eliminated, the plaintiffs still would have been able to perform their work. On the other hand, if Amazon eliminated the COVID-19 screenings, the Plaintiff could get infected, suffer from the virus, a mass breakout could occur at Amazon's warehouses, and ultimately, Amazon employees would not be able to perform their work. Infection among employees would directly impact Amazon's operations and profits, evidencing a clear nexus between the common spread of COVID-19 and Amazon's work. Accordingly, the facts alleged in this case are distinguishable from those in *Bonilla*. Amazon's Motion should be denied.

**B. Amazon's argument that the time spent in the COVID-19 screenings is not compensable because Nevada adopted the federal Portal-to-Portal Act, is without merit. Like Amazon's other arguments, this argument has been previously rejected. The Portal-to-Portal Act is not incorporated into Nevada law.**

There is not one decision from any Nevada state court or federal court finding that the federal Portal-to-Portal Act was incorporated into Nevada law. To the contrary, the Sixth Circuit addressed this precise issue and held that Nevada law does not incorporate the Portal-to-Portal Act. *In re: Amazon.Com Fulfillment Center FLSA and Wage and Hour Litig.*, 905 F.3d 387, 404 (6th Cir. 2018). Nevertheless, Amazon argues that the same standard for compensability that exists under the FLSA applies under Nevada law. (*See* Dkt. 22 at pg. 8). Amazon is wrong for several reasons.

Nevada's wage-hour statutes have been in existence well before the FLSA was enacted. *See, e.g.*, Nev. Rev. Stat. ("NRS") § 608.130 (passed in 1911, which was 26 years prior to the passage of the FLSA and 36 years prior to the enactment of the Portal-to-Portal Act). Nevada wage-hour law never exempted any work activities from payment; rather Nevada law mandates that employers pay employees for "all the time worked by the employee at the direction of the employer." NAC § 608.115; NRS § 608.016 ("[A]n employer shall pay to the employee wages for each hour the employee works.") (emphasis added). On the other hand, the FLSA limits the type of "work" that must be paid by an employer by means of the Portal-to-Portal Act. Nevada's statutory scheme does not contain any similar limitation on the types of work that must be paid by an employer.

Indeed, at no time has there ever been any wage-hour law in Nevada that has limited the compensability of certain work. To the contrary, Nevada statutes and regulations provide for the payment of wages for all the hours that the employee works, without exception. When one looks far and hard at the statutes, constitutional amendments, and regulations, there is no reference to anything in Nevada law akin to the Portal-to-Portal Act. *See In re: Amazon.Com Fulfillment Center FLSA and Wage and Hour Litig.*, 905 F.3d 387, 402-04 (6th Cir. 2018).

The case law is clear that Nevada courts are not to look to or apply federal law when federal law differs from the state wage-hour scheme. *See Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 956 (2014), reh'g denied (Jan. 22, 2015) (The Nevada Supreme Court "has signaled its willingness to part ways with the FLSA where the language of Nevada's statutes has so required.")(citing *Dancer I–VH v. Golden Coin, Ltd.*, 176 P.3d 271, 274-75 (2008)); *Boucher v. Shaw*, 196 P.3d 959, 963 n. 27; *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 900-01 (9th Cir. 2013) (stating that Nevada courts will not look to federal law when the state statutory language is "materially different" from or inconsistent with federal law).[2]

[2] The Nevada Supreme Court has repeatedly instructed courts that they should not look to federal law when Nevada's laws are different. *See, e.g., Dancer I–VII v. Golden Coin, Ltd.*, 176 P.3d 271, 274-75 (2008); *Boucher v. Shaw*, 196 P.3d 959 (2008). In *Dancer I–VII*, the Nevada Supreme Court held that Nevada law excluded tips from the calculation of an employee's minimum wages—contrary to the rule under the FLSA—because the language of the relevant statutes was entirely conflicting. 176 P.3d at 274-75. The Nevada Supreme Court criticized the lower court in *Dancer I–VII* for "essentially conclud[ing] that the FLSA preempted Nevada law under a conflict

The definition of "work" under the FLSA is—and always has been even after the enactment of the Portal-to-Portal Act—any activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *See Tennessee Coal, Iron & R. Co.*, 321 U.S. at 598. On the other hand, Nevada wage-hour statutes do not define the term "work." As noted earlier, it is appropriate to apply the federal definition of work to the COVID-19 screenings in light of the absence of a definition of "work" in Nevada law.

However, the concept of "work" is different than the concept of "compensability." Under the FLSA, not all "work" must be paid by an employer. That is because the Portal-to-Portal Act specifically exempts certain types of "work" from being "compensable." The passage of the Portal-to-Portal Act in 1947 did not establish a new definition of "work"; rather, it no longer required employers to compensate their employees for work that is "preliminary" or "postliminary" unless the activities are "integral and indispensable" to the employee's principal activity. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005).

Amazon cited heavily to the Supreme Court's decision in *Busk*. However, *Busk* also did nothing to change this definition of "work." In *Busk*, the Supreme Court recognized that undergoing security screening was "work" under the FLSA but held that such activities were not integral and indispensable to the principal activities of the employees at issue, and therefore, not compensable. It was for that reason, that the "work" (security screenings) were not required to be paid by the employer.

The exclusion for work that are "preliminary and postliminary activities" (unless they are integral and indispensable) does not exist in any Nevada statute regulation, or constitutional amendment. This fact alone should be the end of the inquiry.

Nevertheless, not only has Nevada chosen not to enact any "Portal-to-Portal like" limits on the compensability of certain work, Nevada has affirmatively passed laws that are in direct conflict with the Portal-to-Portal Act. There is express statutory language that provides that Nevada law is broader than the FLSA regarding the activities that must be paid by an employer. NRS § 608.016

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analysis because the NWHL applied to the same subject." *Id*. at 274. This confirms that just because Nevada regulates wages and hours—as does the FLSA—that does not mean that the two independent laws must be read together when they diverge.

provides that "an employer shall pay to the employee wages for each hour the employee works." (emphasis added). Nevada's administrative regulations further provide that "[a]n employer shall pay an employee for all time worked by the employee at the direction of the employer, including time worked by the employee that is outside the scheduled hours of work of the employee." NAC § 608.115 (emphasis added).

This express language of Nevada law is materially different and much broader than federal law. Under federal law, an employer is not required to pay for "all the hours worked" whereas under Nevada law an employer is required to do so. This clear and material distinction in language demonstrates that the Portal-to-Portal Act was not incorporated into Nevada law and thus, it is inappropriate to look to federal law when construing Nevada wage-hour law.

Moreover, the Nevada legislature expressly included references to federal regulations in multiple parts of NRS Chapter 608. *See, e.g.*, NRS § 608.060(3) (referring to 29 C.F.R. §§ 541.1, 541.2, 41.3, § 541.5, 152); NRS § 608.018(3)(f) (referring to the Motor Carrier Act of 1935); NRS § 608.0116 (29 C.F.R § 541.302; *see also* NAC § 608.100(3)(c) (stating that the Nevada minimum wage provisions do not apply to "[a] person employed as a trainee for a period not longer than 90 days, as described the United States Department of Labor pursuant to section 6(g) of the Fair Labor Standards Act"). That the Nevada legislature expressly adopted some federal regulations indicates that its failure to adopt others was intentional. *See State Dep't of Taxation v. DaimlerChrysler*, 121 Nev. 541, 119 P.3d 135, 139 (2005) ("[O]missions of subject matters from statutory provisions are presumed to have been intentional.").

As noted earlier, Nevada's wage-hour law is to be construed separately from its federal counterpart when the two laws differ. *See, e.g.*, *Rivera*, 735 F.3d at 900-01. Nevada does not reference the Portal-to-Portal Act; Nevada has not enacted any "Portal-to-Portal like" limitation on compensable work; and Nevada's wage-hour laws exceed the FLSA's requirements in almost every instance. Accordingly, there is simply no statutory basis for importing the Portal-to-Portal Act's limitation on what is deemed compensable work to Nevada wage-hour law.

Furthermore, no case has reached the conclusion that the Portal-to-Portal Act was incorporated in Nevada law. To the contrary, the Sixth Circuit held that the Portal-to-Portal Act was not

incorporated into Nevada's wage-hour law. *In re: Amazon.Com Fulfillment Center FLSA and Wage and Hour Litig.*, 905 F.3d at 403-04 (emphasis added). The Sixth Circuit determined that the Nevada legislature never adopted the Portal-to-Portal Act and as such, the time spent in post-shifty security screenings was compensable under Nevada law. *Id*. at 404.

Amazon has argued that the Portal-to-Portal Act was incorporated into Nevada law because when the Nevada legislature passed its overtime statute in 1975 and passed NRS § 608.016 in 1986, "it is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." (Dkt. 22 at pg. 12) (citations omitted). However, Amazon's argument actually hurts its position. The fact that the Nevada legislature was aware of the Portal-to-Portal Act and yet, excluded any language similar to the Portal-to-Portal Act from Nevada law proves that the Nevada legislature did not intend to adopt the Portal-to-Portal Act. The Nevada legislature knew how to incorporate federal regulations. *See, e.g.*, NRS § 608.060(3) (referring to 29 C.F.R. §§ 541.1, 541.2, 41.3, § 541.5, 152); NRS § 608.018(3)(f) (referring to the Motor Carrier Act of 1935). By expressly adopting some federal regulations but not the Portal-to-Portal Act, the Nevada legislature expressed its intent to exclude the Portal-to-Portal Act. *See State Dep't of Taxation v. DaimlerChrysler*, 121 Nev. 541, 119 P.3d 135, 139 (2005).

Finally, courts in other states have rejected similar arguments as those made by Amazon. In *Morillion v. Royal Packing Co.*, 995 P.2d 139 (Ca. 2000), the California Supreme Court expressly noted that the California labor code and wage orders "do not contain an express exemption for travel time similar to that of the Portal-to-Portal Act." *Id*. at 148. "Absent convincing evidence of the IWC [Industrial Welfare Commission]'s intent to adopt the federal standard for determining whether time spent traveling is compensable under state law, we decline to import any federal standard, which expressly eliminates substantial protections to employees, by implication." *Id*. at 150. Similarly, the Washington Court of Appeals held that "[w]e are not persuaded that the Legislature intended to adopt the Portal to Portal Act; and we do not hold that it was adopted." *Anderson v. State, Dep't of Soc. & Health Servs.*, 63 P.3d 134, 136 (Wash. Ct. App. 2003). Just like in California and Washington, there is no basis for importing the Portal-to-Portal Act into Nevada law.

**C. Assuming *arguendo* that Nevada law has adopted the Portal-to-Portal Act (which it has not), the time spent completing the daily COVID-19 screenings is still compensable because the time was "integral and indispensable" to the Plaintiff's principal activities.**

To determine whether an activity should be compensated under the FLSA (including under the Portal-to-Portal Act), courts in the Ninth Circuit generally apply a three-step inquiry. *See Alvarez*, 339 F.3d at 902-03. First, the activity must constitute "work" under the FLSA. *See id.* Second, the activity must be "an integral and indispensable part of the principal activities" performed by the employee. *See id.* Third, the activity must not be de minimis. *See id*.

As noted earlier in Section A, the Amazon COVID-19 screenings constitute "work." Further, Amazon has not argued that the time spent in the COVID-19 screenings is *de minimis* (and apparently concedes that it is not *de minimis*).[3] Instead, Amazon simply argues that the time spent in the COVID-19 screenings is not integral and indispensable to its employees' principal activities. (*See* Dkt. 22 at pgs. 12-13). Amazon's argument is meritless and was specifically rejected in *Boone*. *Boone*, 2022 WL 780215 at *10-*11.

[3] Had Amazon argued that the time spent in the COVID-19 screenings is *de minimis*, such an argument would be baseless. First, courts have determined that the *de minimis* rule is an affirmative defense that is inappropriate to challenge at the 12(b)(6) stage. *See, e.g., Mitchell v. Acosta Sales, LLC*, No. Civ. A. 11-1796 GAF, 2011 WL 13309051, at *10 (C.D. Cal. June 9, 2011). In *Mitchell*, the court stated the "Plaintiff is not bound to affirmatively allege facts showing that this time worked was more than de minimis, as Acosta bears the burden to show that the time was merely *de minimis*. Thus, [the employer] cannot win dismissal on this basis." *Id*. For this reason, courts in the Ninth Circuit deny motions to dismiss based on the *de minimis* defense. *See, e.g., Walden v. Nevada, ex. Rel. Nevada Department of Corrections*, No. Civ. A. 3:14-cv-0320, 2018 WL 1472715, at *8 (D. Nev. Mar. 26, 2018) (denying motion to dismiss based on the de minis defense). Second, Plaintiffs provided a detailed description of the COVID-19 screening and a specific estimate of the amount of time it takes to undergo the screening. (Dkt. 20 at ¶¶ 16-20). Third, the factors that courts are to consider when determining whether an activity is *de minimis* support a finding that the COVID-19 screening was compensable. *See Lindow*, 738 F.2d at 1063 (listing three factors to determine whether activity is *de minimis*). To begin, there is no practical administrative difficulty to recording the time spent by Amazon employees in the COVID-19 screening. Amazon could have easily moved the time clocks to the entrance of the screening location to allow for the time to have been recorded. (Dkt. 20 at ¶ 42). Next, the aggregate amount of time is significant – well above 10 minutes per day. (*Id*. at ¶ 20). Moreover, the COVID-19 screenings were conducted every day during the pandemic. (*Id.* at ¶¶ 17, 18). Thus, they were conducted on a regular basis. Accordingly, the time spent by the Plaintiffs completing the COVID-19 screenings was not *de minimis*.

To begin, "activities performed either before or after the regular work shift" are compensable "if those activities are an integral and indispensable part of the principal activities." *Steiner*, 350 U.S. at 256 (1956); *see also Mitchell v. King Packing Co*., 350 U.S. 260, 261 (1956); 29 C.F.R. § 790.7(h) (1999) ("[A]n activity which is a 'preliminary' or 'postliminary' activity under one set of circumstances may be a principal activity under other conditions."). Indeed, what is "integral and indispensable" is context-specific. *Alvarez*, 339 F.3d at 902. To be "integral and indispensable," an activity must be necessary to the principal work performed for the employer. *See Barrentine v. Arkansas–Best Freight Sys., Inc*., 750 F.2d 47, 50 (8th Cir.1984), cert. denied, 471 U.S. 1054 (1985); *Dunlop v. City Elec., Inc*., 527 F.2d 394, 398 (5th Cir.1976).

As noted earlier, the Supreme Court in *Steiner* held that the time spent taking showers after the workers' shifts had concluded was "integral and indispensable" to the workers' principal activities in manufacturing batteries. *Steiner*, 350 U.S. at 256. That is because the showers were necessary to ensure that the workers remained healthy and could safely perform their work. *See id.* The same conclusion was reached in *Alvarez*. In *Alvarez*, the Ninth Circuit held that the time spent donning, doffing, and washing protective gear was "integral and indispensable" because those activities "prevent unnecessary workplace injury and contamination, both of which would inevitably impede [the employer's business]." *Alvarez*, 339 F.3d at 903.

Again, the facts in this case are strikingly similarly. The COVID-19 screenings were necessary to ensure that the Amazon workers could perform their work safely, to prevent contamination from the virus, and to keep the customers of Amazon safe. (*See* Dkt. 20 at ¶¶ 28-32). If there was an outbreak of COVID-19 at Amazon's facilities, Amazon's business would be jeopardized. (*Id*. at ¶¶ 30, 33). Thus, the COVID-19 screening was necessary to ensure that the Plaintiff could perform his work for Amazon and Amazon could continue to operate. (*Id*. at ¶¶ 29-32).

In simpler terms, the Plaintiff gathered packages to be delivered to Amazon customers. (*Id*. at ¶¶ 13-14). If those packages were contaminated by COVID-19, the Plaintiff could not perform his work. (*Id*. at ¶¶ 28-30). Likewise, if an Amazon employee became infected with COVID-19 and spread the virus to other workers, the Plaintiff could not provide his services to Amazon's

customers. (*Id.* at ¶ 31). Moreover, if customers of Amazon received packages that were infected with the virus, the customers would likely no longer use Amazon's services. (*Id.* at ¶¶ 28-30). These facts demonstrate that the COVID-19 screenings were necessary for the Plaintiff to perform his work and thus, "integral and indispensable" to the Plaintiff's principal activities.

In *Boone v. Amazon*, the Court held that the time spent in the COVID-19 screenings was integral and indispensable to the principal activities of Amazon warehouse employees, stating as follows:

> **The court is not persuaded by defendant's argument in support of its motion to dismiss that the COVID-19 screenings are not integral and indispensable to employees' work at the fulfillment centers…**Based on the allegations of the SAC, the screenings prevent the COVID-19 virus from spreading throughout defendant's fulfillment centers and infecting employees and products. (SAC at ¶ 45.) While it is true that in *Busk* the Supreme Court concluded that Amazon could eliminate security screenings without impairing the employees' work, screenings meant to prevent theft are materially different from COVID-19 screenings that are meant to prevent the spread of a highly-contagious and deadly virus among employees. **Plaintiffs have plausibly alleged that foregoing the latter would substantially impair the workplace safety at the fulfillment centers.**

*Id* at *10 (emphasis added).

Amazon cited to *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014). However, the facts in *Busk* are materially distinct from the facts in the present case. In *Busk*, the plaintiffs were warehouse workers who retrieved packages from shelves to be delivered. *Id*. at 29-30. After their shifts had concluded, the workers underwent an exit screening so the employer could identify if any theft occurred. *Id.* Although the Supreme Court held that the time spent in the exit screening was not compensable, the Supreme Court did not state that such a screening can never be compensable. Instead, the Court made clear that the screening must be tied to the "productive work that the employee is employed to perform." *Id*. at 36. In *Busk*, the exit screening did not have anything to do with the workers' ability to do their jobs. *See id*. The Court stated that the company "could have eliminated the screenings altogether without impairing the employees' ability to complete their work." *Id*. at 35. In this case, however, the COVID-19 was necessary for the Plaintiff to perform his work for Amazon and had it been eliminated, the Plaintiff's ability to perform his job would have been compromised. (Dkt. 20 at ¶¶ 28-32).

Amazon also cited to *Pipich v. O'Reily Auto Enterpises, LLC*, 2022 WL 788671 (S.D. Cal. Mar. 15, 2022). However, in *Pipich*, the plaintiff failed plead sufficient facts explaining how the

COVID-19 screenings were integral and indispensable to his principal activity. The plaintiff did not describe any set of facts that would lead to the conclusion that if the COVID-19 screenings were eliminated, the plaintiff's ability to do his job would be affected. Also, the plaintiff's job was materially different than the work performed by Amazon employees in warehouses that have hundreds of employees in close proximity to one another. Accordingly, the *Pipich* case is distinguishable from the facts of this case.

It is also important to note that the Department of Labor has issued guidance providing that the time spent in the COVID-19 screenings should be compensated by employers. (Ex. "2.") The Department of Labor has stated as follows:

> your employer is required to pay you for all hours that you work, including for time before you begin your normal working hours if the task that you are required to perform is necessary for the work you do. **For many employees, undergoing a temperature check before they begin work must be paid because it is necessary for their jobs.** For example, if a nurse who performs direct patient care services at a hospital is required to check her temperature upon arrival at the hospital before her shift, the time that she spends checking her temperature upon entry to the worksite is likely compensable because such a task is necessary for her to safely and effectively perform her job during the pandemic. In other words, the temperature check is integral and indispensable to the nurse's job. Other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.

(*Id*. at pg. 5) (emphasis added).

Under this guidance, the time spent by the Plaintiff completing the COVID-19 screenings each shift is compensable because it enables the Plaintiff to perform his work for Amazon. The DOL's opinion is entirely consistent with the law. Employers have a non-delegable duty to provide a safe workplace for their employees and the time spent by workers pre-shift to gather their safety gear to ensure that the workers can safely perform their work has routinely been held to be compensable under the FLSA. *See, e.g., Sanford v. Preferred Staffing Inc.*, 447 F. Supp. 3d 752, 755 (E.D. Wis. 2020) (collecting cases). This case is no different. Accordingly, the COVID-19 screening is "integral and indispensable" to the Plaintiff's principal activities. and the time spent undergoing such screening is compensable under the FLSA.

**D. Amazon's Motion to Dismiss should be denied because Plaintiff has properly pled a cause of action under NRS § 608.016 and NRS § 608.140.**

Amazon argues that Plaintiff's cause of action under NRS § 608.016 and NRS § 608.140

should be dismissed because "NRS 608.016 applies only to trials or break-in periods." (Dkt. 22 at pg. 13). Amazon's argument is without merit. In fact, Amazon's argument is contrary to the plain text of NRS § 608.016 which states that "employers are required to pay workers for each hour worked." NRS § 608.016 (emphasis added).

When courts analyze the language of the a statute, courts "begin [] with the text." *Connell v. Lima Corp.*, 988 F.3d 1089, 1097 (9th Cir. 2021). The court's "review is guided by well-established rules of statutory interpretation. We 'begin[] with the statutory text, and end[] there as well if the text is unambiguous." *Id.* (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004)). Courts "disfavor efforts to use canons of construction to introduce ambiguity into straightforward text." *Pangang Grp. Steel Vanadium & Titanium Corp. v. United States Dist. Court*, 901 F.3d 1046, 1056 (9th Cir. 2018). Here, the plain language and meaning of the first sentence in NRS § 608.016 is clear and unambiguous. Nevada employers are to pay workers for each hour employees work, with only two limited exceptions found in NRS § 608.0195 and NRS § 608.215, neither of which apply to the facts of this case. *See* NRS § 608.016.

In no unequivocal terms, NRS § 608.016 demands that employers *shall* pay their employees "for each hour the employee works." *Id.* "The preeminent canon of statutory interpretation requires [the Court] to presume that [the] legislature says in a statute what it means and means in a statute what it says there." *McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008) (quoting *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (internal quotation marks omitted).

The first sentence of NRS § 608.016 contains no reference to the second sentence, nor any subordinating language or other indication that the general principle enshrined in the first sentence was meant to be limited to such "trial/break-in" periods; similarly, the second sentence contains no language such as "notwithstanding," "provided that," or other language indicating that the second sentence is intend to narrow the scope of the principle stated in the first sentence. *See, e.g.*, *NOAA Md., LLC v. Adm'r of the GSA*, 997 F.3d 1159, 1166 (Fed. Cir. 2021). If the Nevada legislature had intended the entirety of NRS § 608.016 to apply only to workers undergoing a "trial or break-in periods," it could have clearly stated so. It did not. Amazon does not cite to any portion

of the statute or any case law—it just simply wishes the law were different.

Amazon's attempt to rely on the legislative history is not well founded. (*See* Dkt. 22 at pg. 14). When the statutory text is clear and unambiguous, there is no reason to delve into the legislative history. *Connell*, 988 F.3d at 1097. Nevertheless, even the legislative history supports Plaintiff's position. "The definition for wages is proposed [by the Attorney General] to clarify that an employer must pay his workers for all hours worked." (*See* Minutes of Nevada State Legislature, Assembly Committee on Labor and Management, pg. 2 (Feb. 18, 1985)) (emphasis added).[4] Even in relying on legislative history for its argument, Amazon misleadingly omitted the statement indicating that NRS § 608.016 was meant to apply broadly to all employees, not just a small subset of workers undergoing a "trial" or "break-in" period.

The "trial" or "break-in" issue was included to close a potential loophole in response to a specific inquiry presented to the State. In 1969, Nevada Attorney General Dickerson issued an opinion letter addressing the following issue: "You have advised this office that certain employers in Nevada are requiring new employees to break in on the job by working for a certain indefinite period without pay. Your question is whether such procedure contravenes the provisions of NRS 608.250 and NRS 609.030." (*See* Ex. "3," Opinion No. 566, pg. 17 (Mar. 3, 1969)).[5] Attorney General Dickerson, emphasized that Nevada employers are "obligated to pay not less than the minimum statutory wages for ***all hours that*** [***they***] ***knowingly suffer***[] ***or permit***[] **an employee to work.**" (*Id.* at pg. 18) (emphasis added). Were there any doubt, Attorney General Dickerson ended that Opinion Letter by emphasizing the general principle under Nevada law that employers are "obligated to pay not less than the minimum statutory wages **for all hours worked**" by workers. (*Id.*) (emphasis added).[6] It is clear from this Opinion Letter that the Nevada legislature intended the second sentence of NRS § 608.016 to close a potential loophole by making clear to employers that work performed during "trial" or "break in" periods are considered compensable work for purposes of paying wages.

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[4] Available:https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1985/AB127,1985.pdf (last visited Apr. 11, 2022) (the "Legislative History").

[5] Page 26 out of 37 of the Legislative History.

[6] Page 28 out of 37 of the Legislative History.

Were there any doubt as to whether NRS § 608.016 was only intended to apply to "trial" or "break in" periods, the Nevada Supreme Court construed NRS § 608.016 broadly in *Rite of Passage v. State*, 131 Nev. 1338, 2015 Nev. Unpub. LEXIS 1561 (Nev. Sup Ct. Dec. 23, 2015). The Nevada Supreme Court addressed whether the language in NRS § 608.016 applied to "sleep periods."[7] *Id*. The plaintiff filed a wage complaint with the Nevada Labor Commissioner which determined that the plaintiff "worked" within the meaning of NRS § 608.016 during her sleep period, for which she should have been paid. *Id.* at *1-2. The Nevada Supreme Court affirmed that determination. *Id.* at *8.

However, nowhere in the *Rite of Passage* decision did the Court limit such compensable "sleep time" to a training or break-in period. *See id*. If the Nevada Supreme Court were to interpret NRS § 608.016 as narrow as Amazon has argued, it would not have found that the "sleep time" incurred by an already full-time employee (not an employee on a trial or break-in period) was compensable *See also Coast Hotels & Casinos v. Nev. State Labor Comm'n*, 117 Nev. 835, 840 (2001) (noting that NRS § 608.016 "requires an employer to compensate an employee for each hour of work" without limiting such a requirement to trial or break-in periods); *Porteous v. Capital One Servs. II, LLC*, 809 F. App'x. 354, 357 (9th Cir. 2020) (reversing district court and finding the plaintiff had plausibly alleged claims under NRS §§ 608.016, .018, and .020-.050 where the complaint "alleges that Plaintiff worked hours for which she should have been but was not paid" without any limitation to workers undergoing a trial or break-in period).

Recently, in *Nelson v. Wal-Mart Associates, Inc.*, No. Civ. A. 3:21-CV-0066-MMD-CLB, 2022 WL 394736 (D. Nev. Feb. 9, 2022), the court addressed a similar issue and held that: "NRS § 608.016 requires an employer to pay an employee "wages for *each* hour the employee works." *Id*. at *5 (emphasis in original). In *Nelson*, the defendant moved to dismiss the plaintiff's claim under NRS § 608.016. *Id*. The court denied the motion to dismiss finding that the plaintiff had sufficiently pled a claim for relief. *Id.* (emphasis added).

Amazon's argument that the Court should simply disregard the clear text of NRS § 608.016 is truly without merit, especially when Amazon cites no case law or other legal authority. The Court should

[7] At the time of *Rite of Passage*, NRS § 608.016 did not include an exception for sleep time. The statute has since been amended to include such an exception.

not entertain such baseless and meritless arguments from Amazon and should deny Amazon's Motion in its entirety.

**E. Amazon's Motion to Dismiss should be denied because Plaintiff has properly pled a minimum wage violation. Amazon's argument that the "workweek method" is applicable under Nevada law has been previously rejected by numerous courts.**

Amazon argues that because Plaintiff's hourly rate was in excess of Nevada's minimum wage, that Plaintiff cannot state a minimum wage claim under Nevada law. (*See* Dkt. 22 at pgs. 15-17). In making this argument, Amazon argues that the Court should apply the "workweek method" to determine whether a minimum wage violation exists. (*See id*.). In other words, Amazon has argued that unless the total wages paid to an employee during an entire workweek divided by the total number of hours worked by that employee in the same workweek yields an hourly rate of pay less than the Nevada minimum wage, then no claim can be brought for unpaid minimum wages. (*See id*.). Unfortunately for Amazon, there is no legal authority that supports Amazon's argument. In fact, the Ninth Circuit has already addressed and rejected the exact argument made by Amazon. *Porteous*, 809 F. App'x. at 357-58 (holding: "Absent contrary authority from the Nevada Supreme Court, we [the Ninth Circuit] think the MWA is best interpreted to guarantee a minimum wage for each individual hour worked, rather than as an average over a workweek"). (emphasis added). In fact, it appears to be settled law that an employee need only allege time that he/she worked for which he/she was not compensated to raise a viable claim for unpaid minimum wages under Nevada law. For instance, in in *Nelson v. Wal-Mart Associates, Inc.*, Chief Judge Du rejected an identical workweek argument and stated: "the Court is unpersuaded that Nevada law permits averaging unpaid overtime with compensated regularly scheduled work to provide cover for employers who do not pay minimum and overtime wages." *Nelson*, 2022 WL 394736 at *4-5.[8] The Sixth Circuit came to the same conclusion. *In re:*

[8] *See also Fetrow-Fix v. Harrah's Entm't, Inc.*, No. 2:10–cv–00560–RLH–PAL, 2010 WL 4774255, 3 (D. Nev. Nov. 16, 2010) (finding that "Plaintiffs' state a valid claim under N.R.S. §§ 608.250, which makes it unlawful for employers to pay less than the minimum wage established by the Nevada Labor Commissioner. Section 608.260 provides for a private right of action by an employee to recover the difference between minimum wage prescribed by N.R.S. § 608.250 and the amount actually paid to the employee. As the Court previously noted, *Plaintiffs' allege they have worked several hours for Harrah's without proper compensation. Plaintiffs' properly assert a claim under N.R.S. §§ 608.250 and 608.260 to recover the wages for those hours of extra work.* Plaintiffs' have plead sufficient facts to assert such a claim.") (emphasis added).

*Amazon.Com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation*, 905 F.3d at 406-07 (holding that "there is no basis for the conclusion that Nevada has adopted the FLSA's workweek requirement. Indeed, Nevada's statutes would seem to be inconsistent with such a requirement.")

In this case, Plaintiff alleged that he was paid not paid any money for the time spent undergoing pre-shift COVID-19 health screenings. Just like in *Porteous*, *Nelson*, and *In re: Amazon*, this Court should reject Amazon's "workweek" arguments and deny Amazon's Motion to Dismiss.

**F. Amazon's Motion to Dismiss should be denied because Plaintiff has stated a viable claim for unpaid overtime wages.**

Amazon argues that the Plaintiff failed to state a claim for unpaid overtime wages and cited to the Ninth Circuit's decision in *Landers v. Quality Commun's, Inc*. (Dkt. 22 at pg. 18). However, the pleading of detailed facts is not required under Federal Rule of Civil Procedure 8 or *Landers*. *Landers v. Quality Commun's, Inc*., 771 F.3d 638, 645 (9th Cir. 2014). "*Landers* does not require Plaintiffs to identify an exact calendar week or particular instance of denied overtime or minimum wage; instead, the allegations need only give rise to a plausible inference that such an instance exists." *Tan v. Grubhub, Inc.*, No. Civ. A. 15-cv-05128-JSC, 2016 WL 3743365, at *2 (N.D. Cal. July 13, 2016) (citing *Boon v. Canon Bus. Solutions, Inc.*, 592 F. App'x. 631, 632 (9th Cir. 2015).

In the context of wage and hour disputes, the *Landers* Court stated that a plaintiff asserting an overtime violation must only "allege that she worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek." *Landers*, 771 F.3d at 644-45. Specifically, in *Landers*, the Ninth Circuit explained that a plaintiff can plead a viable claim for unpaid overtime by "estimating the length of her average workweek during the applicable period and the average rate at which she was paid." *Id.* at 645.

Here, the Plaintiff has gone above and beyond what is required under *Landers*. First, Plaintiff has provided his start and end dates of employment with Amazon. (Dkt. 20 at ¶ 14). Second, Plaintiff provide his job title and a description of his duties. (*Id.*) Third, Plaintiff identified his hourly rates of pay. (*Id.*) Fourth, Plaintiff provided his work schedule. (*Id.* at ¶ ¶ 14-15).

Plaintiff stated that he worked a schedule that was Thursday through Monday from 7:00 pm to 5:30 am. (*Id.* at ¶ 15). Fifth, Plaintiff stated that he worked 10 hours per day. (*Id.* at ¶ 14). Thus, under this schedule he worked 10 hours per day for five days a week, which equals 50 hours per week. (*Id.*) These facts are sufficient on their face to state an overtime claim under Nevada law. Here, Plaintiff alleged that each week he worked more than 40 hours. (*See id.*) Moreover, when adding the amount of time Plaintiff spent working in the COVID-19 screenings each shift to his scheduled hours, it is mathematically impossible for Plaintiff not to have worked more than 40 hours. Therefore, Plaintiff provided his work schedule (which amounts to more than 40 hours), provided the number of hours he worked per week, and stated that he worked overtime hours each week. (*Id.* at ¶¶ 14-15). Again, the Plaintiffs' Complaint more than satisfies the pleading requirements enunciated in *Landers*.

Amazon argues that Plaintiff's factual allegations are "conclusory." (Dkt. 22 at pg. 18). Amazon's arguments is directly at odds with the language in *Landers*, which holds that "[a] plaintiff may establish a plausible claim by estimating the length of [his] average workweek during the applicable period and average rate at which []he was paid, the amount of overtime wages []he believes []he is owed, or any other facts that will permit the court to find plausibility." *Landers*, 771 F.3d at 645. Plaintiff has done just that.

Amazon points to *Johnson v. Pink Spot Vapors Inc.*, No. 2:14-CV-1960 JCM (GWF), 2015 WL 433503 (D. Nev. Feb. 3, 2015) for the proposition that Plaintiff's allegation that he worked 50 hours per week was "conclusory." However, the facts pled by the plaintiff in *Johnson* are different than the facts pled in this case. In *Johnson*, the complaint "did not allege that the plaintiffs 'were assigned at least five shifts of eight hours each workweek' . . . [and] [t]he court would therefore have needed to assume this material detail in order to ascertain whether plaintiffs worked in excess of forty hours per week without overtime pay." *Id.* at *3. The portion of the *Johnson* complaint that Judge Mahan found to be conclusory was the allegation that the plaintiffs "'routinely worked more than forty hours per week' but did not receive overtime wages." *Id.* Unlike in *Johnson*, Plaintiff has provided substantially more facts, including his work schedule, length of his shift, rate of pay, that he worked 50 hours per week, and was not paid for the 5-to-15

minutes of COVID-19 screening time each shift worked. In *Boone*, the court found virtually identical facts to state a viable claim for unpaid overtime wages. *Boone*, 2022 WL 780215 at *12 (denying Amazon's Motion to Dismiss overtime claim). The same conclusion should be reached in this case.

Ultimately, this case is not a situation where the plaintiff failed to provide any details about the overtime hours he worked. Instead, Plaintiff provided discrete facts about his schedule, hours of work, days he worked, hourly rates of pay, and the amount of time spent working without pay. Accordingly, the Plaintiff has sufficiently pled an overtime violation and Amazon's Motion to Dismiss should be denied.

**G. Plaintiff has plausibly alleged that Amazon failed to pay hourly workers for all wages due upon termination.**

Amazon argues that the statutory scheme set forth in NRS 608.020-608.050 addresses situations where an employer fails to pay an employee an amount that is owed as of the employee's separation date. (*See* Dkt. 22 at pgs. 20-24). Amazon contends that these statutes do not contemplate penalties for wage amounts that are uncertain, or that might be due under a future judgment. (*See id.*) Yet again, Amazon is attempting to graft words and meanings into the statute that is simply not there. NRS 608.020 provides that "[w]henever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately." NRS 608.020. NRS 608.030 further provides, in relevant part, that "[w]henever an employee resigns or quits his or her employment, the wages and compensation earned and unpaid at the time of the employee's resignation or quitting must be paid" on the day the employee would have regularly been paid or seven days after the employee resigns or quits, whichever is earlier. NRS 608.030. "In order to give effect to the Legislature's intent, [the Court] ha[s] a duty to consider the statute[s] within the broader statutory scheme harmoniously with one another in accordance with the general purpose of those statutes." *Bisch v. Las Vegas Metro Policy Dep't*, 129 Nev. 328, 336 (2013) (internal quotation marks omitted). Nevada wage-and-hour statutes state that "wages and compensation **earned and unpaid** at the time of the employee's resignation or quitting must be paid no later than: 1. The day on which the employee would have regularly been paid the wages or compensation; or 2. Seven days after the

employee resigns or quits, whichever is earlier." NRS 608.030 (emphasis added).

NRS 608.040 is a "'waiting penalty' statute [that] penalizes an employer's failure to render prompt payment of past-due wages to an employee who resigns, quits, or is discharged." *Lucas v. Bell Trans*, 773 F. Supp. 2d 930, 933 (D. Nev. 2011). NRS 608.040 deals with situations where an employee was not paid all the statutorily mandated wages due and owing at the time of termination, and NRS 608.050 addresses when an employee was not paid all the contractually-owed wages at the time of termination and when employers fail or refuse to pay wages. Under NRS 608.020-.050, an employer is strictly liable for waiting time penalties and no willfulness on the employer's part needs to be proven.

In *D'Amore v. Caesars Enter. Servs.*, No. 2:18-CV-1990 JCM (VCF), 2019 U.S. Dist. LEXIS 228495, at *16-17 (D. Nev. Dec. 16, 2019), the court addressed a virtually identical argument as that made by Amazon and rejected it outright. *Id.* at *17.[9] Here, however, Amazon attempts to make the same arguments, and cites to decades-old inapposite opinions that involve collective bargaining agreements and minor personal debts. These cases have nothing to do with the facts of this case. Accordingly, Amazon's Motion to Dismiss should be denied.

## III. ALTERNATIVE MOTION FOR LEAVE TO AMEND

If the Court is inclined to grant any portion of Amazon's Motion, Plaintiff asks that the Court grant him leave to amend his Complaint. The Ninth Circuit has a liberal policy favoring amendments and thus, leave to amend should be freely granted. *See., e.g., DeSoto v. Yellow Freight Sys., Inc.* 957 F.2d 655, 658 (9th Cir. 1992). If a Rule 12(b)(6) motion is granted, the Court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts. *Bellinghausen v. Tractor Supply Co.*, No. Civ. A. 13-02377 JSC, 2013 WL 6057847, at *3 (N.D. Cal. Nov. 15, 2013). Although the Plaintiffs believe that their Complaint is sufficiently pled, in the event that the Court disagrees, the Plaintiffs respectfully request that they be granted leave to cure any deficiencies found by the Court.

[9] *See also Fetrow-Fix v. Harrah's Entm't, Inc.*, No. 2:10–cv–00560–RLH–PAL, 2010 WL 4774255 (D. Nev. Nov. 16, 2010).

Date: May 23, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on May 23, 2022, I filed this document through the Court's CM/ECF system which will serve a true copy on all parties of record via electronic mail.

/s/ Don Foty
Don Foty

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| EXHIBIT | DESCRIPTION |
|---|---|
| 1 | Amazon's Motion to Dismiss in *Boone v. Amazon* |
| 2 | Department of Labor Guidance on COVID-19 and the Fair Labor Standards Act |
| 3 | Nevada Attorney General Opinion No. 566 (Mar. 3, 1969) |

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

HEATHER BOONE and ROXANNE RIVERA, on behalf of themselves and all others similarly situated

Plaintiffs,

v.

AMAZON.COM SERVICES, LLC,

Defendant.

Case No. 1:21-cv-00241-DAD-BAM

**NOTICE OF MOTION AND MOTION BY DEFENDANT AMAZON.COM SERVICES LLC TO DISMISS PURSUANT TO RULE 12(B)(1) AND 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES**

**Hearing:**
Date: July 6, 2021
Time: 9:30 AM
Place: Courtroom 5
Judge: Judge Dale A. Drozd

**NOTICE OF MOTION AND MOTION TO DISMISS**

PLEASE TAKE NOTICE that on July 6, 2021, at 9:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom 5, 7th Floor, at 2500 Tulare Street Fresno, CA 93721-4516, before the Honorable Dale A. Drozd, Defendant Amazon.com Services LLC ("Amazon"), by and through its counsel of record, will and hereby does move the Court to enter an order dismissing Plaintiffs Heather Boone and Roxanne Rivera's first, second, third, fourth, fifth, and sixth causes of action for failure to state a claim under Rule 12(b)(6) and Plaintiffs' third claim under Rule 12(b)(1) for lack of subject-matter jurisdiction.

Amazon moves to dismiss all of Plaintiffs' causes of action for failure to state a claim under Rule 12(b)(6). Plaintiffs failed to plead facts sufficient to establish any plausible claims. First, Plaintiffs' claims in their first, second, and sixth causes of action that time spent waiting for and undergoing COVID-19 screenings is compensable under the Fair Labor Standards Act and California law fail as a matter of law; COVID-19 screenings do not satisfy either law's test for when an activity must be compensated. Plaintiffs' third cause of action alleging Amazon issued inaccurate wage statements fails for multiple reasons. Plaintiffs lack standing to bring this claim and it thus should be dismissed under Rule 12(b)(1). Moreover, the claim fails under Rule 12(b)(6) because it is entirely derivative of Plaintiffs' other insufficiently pled claims, is foreclosed under California law, and lacks sufficient allegations that any violation was willful. Plaintiffs' fourth cause of action seeking waiting time penalties also should be dismissed as derivative of Plaintiffs' other insufficiently pled claims and because Plaintiffs have failed to adequately allege that any violation of the California Labor Code was willful. Plaintiffs' fifth cause of action under California's Unfair Competition Law should also be dismissed because this cause of action is derivative of Plaintiffs' other claims and because Plaintiffs do not—and cannot—establish that they lack an adequate remedy at law that would justify the Court providing them with equitable relief.

This motion is made following the conference of counsel pursuant to the Court's standing order, which took place via telephone on May 27, 2021.

Dated: June 3, 2021

JASON C. SCHWARTZ
GIBSON, DUNN & CRUTCHER LLP

By: */s/ Jason C. Schwartz*

*Attorney for Defendant Amazon.com Services LLC*

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**MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

This lawsuit is a misguided attempt to hold Amazon.com Services LLC ("Amazon") liable for actions it took to keep its associates and the community-at-large safe during the COVID-19 pandemic in accordance with government-mandated requirements. Plaintiffs Heather Boone and Roxanne Rivera have sued on behalf of a sprawling putative California class and nationwide collective group, alleging that Amazon associates should have been paid for time they allegedly spent in pre-shift COVID-19 screenings, and asserting a bevy of derivative claims based on that core allegation. The Court should dismiss these meritless and insufficiently alleged claims.

*First*, Plaintiffs seek to recover under the Fair Labor Standards Act ("FLSA") for time spent in and waiting for COVID-19 screenings. But only time spent on *work* is compensable under the FLSA—i.e., activities controlled or required by the employer that primarily benefit the employer. COVID-19 screenings are not conducted primarily for Amazon's benefit, but rather are California-mandated health precautions designed to ensure the wellbeing and safety of all Amazon associates and the community-at-large, and thus do not constitute compensable work time. Even if the screenings primarily benefit Amazon, however, they are preliminary to the principal activities for which Amazon fulfillment center associates are employed and therefore are not compensable under the Portal-to-Portal Act. *See Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 35 (2014). It is also abundantly clear that the time associates spend waiting to be screened is not compensable, *see IBP, Inc. v. Alvarez*, 546 U.S. 21, 41–42 (2005), and Plaintiffs have failed to allege any facts demonstrating that the time employees spend being screened, when separated from the time allegedly spent *waiting* to be screened, is anything other than *de minimis*, *see Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). Plaintiffs' claims under California law for time spent waiting for and in COVID-19 screenings fail for similar reasons. Under the test for compensable time established in *Frlekin v. Apple Inc.*, 8 Cal. 5th 1038 (Cal. 2020), Amazon does not exercise the requisite level of control over its associates during the screenings to make that time constitute "hours worked."

*Second*, Plaintiffs' claim that they are due statutory penalties under California law for allegedly inaccurate wage statements also suffers from myriad deficiencies. The claim is entirely derivative of

Plaintiffs' other insufficiently pled claims. Moreover, Plaintiffs have failed to allege an injury-in-fact resulting from the allegedly inaccurate wage statements and thus lack Article III standing to pursue this claim. Plaintiffs also must show actual injury to state a claim under California Labor Code section 226 based on a failure to document wages they claim they were owed but not paid. *See Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1337 (2018) ("The purpose of section 226 is to *document* the *paid* wages to ensure the employee is fully informed regarding the calculation of those wages." (quotation marks omitted)). Even if the wage statements were legally deficient, relief would still be unavailable because Plaintiffs have provided no factual allegations from which the Court can infer that any error on the wage statements was the result of willful conduct on Amazon's part.

*Third*, Plaintiffs seek waiting time penalties under California law. But this claim, too, is derivative and should be dismissed in light of Plaintiffs' failure to adequately plead their other claims. Plaintiffs also offer only conclusory allegations about whether Amazon willfully denied them all wages due at the time they were discharged, a necessary prerequisite for recovery. And all of the disputed payments are clearly the subject of good faith disagreements, which bars assessment of penalties.

*Finally*, Plaintiffs seek equitable relief under California's Unfair Competition Law ("UCL"). But they fail to allege that the legal remedies available to them are inadequate, thereby dooming the prayer for equitable relief. *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020). This claim also fails because it is derivative of the other claims.

For all of these reasons, the Court should dismiss Plaintiffs' First Amended Complaint ("FAC") in its entirety, with prejudice, because further amendment would be futile. *See, e.g., Snowden v. Cty. of Valaveras*, 2019 WL 4829480, at *9 (E.D. Cal. Sept. 30, 2019) (Drozd, J.) (dismissing a FAC with prejudice where "amendment is futile").

## II. BACKGROUND

### A. Plaintiffs' Allegations and Causes of Action

Plaintiffs Heather Boone and Roxanne Rivera filed this action against Amazon on behalf of themselves, a putative California class, and a putative nationwide collective under the FLSA. Plaintiffs later amended their complaint to remove certain claims related to alleged security screening and the calculation of overtime rates of pay. The California class is defined as "[a]ll current and former hourly

paid employees of Amazon who underwent a COVID-19 screening during at least one week in the four-year period before the filing of this Complaint to the present." FAC ¶ 54 (the "California Class"). The FLSA collective is defined as "[a]ll current and former hourly paid employees of Amazon who underwent a COVID-19 screening during at least one week in the three-year period before the filing of this Complaint to the present." *Id.* ¶ 64 (the "FLSA Collective").[1] Plaintiff Boone alleges that she worked for Amazon from June 2018 through July 2020 and that her job duties included "gathering packages from the Amazon warehouse, scanning them, placing them in boxes, and labelling the items." *Id.* ¶ 24. Plaintiff Rivera alleges that she worked for Amazon from November 2018 to January 2019, and again from May 2020 to October 2020, and that her job duties included "gathering items and placing them in the right location in the warehouse." *Id.* ¶ 25.

Plaintiffs allege that Amazon has required its associates to be screened for symptoms of COVID-19 before they may clock-in for their shifts. *Id.* ¶ 27. They allege that Amazon has used two processes for COVID-19 screenings. Under one process, associates "approach a security booth," where they "swipe[] [their] employee badge[s]," and are asked a handful of questions; they then have their temperature taken by a body scanner, after which they may proceed to clock-in. *Id.* ¶¶ 28–29. Under the other process, associates allegedly "form a line," then "one by one" are asked a handful of questions while having their temperature taken manually by another associate; if there is a red flag, the associate is moved to another area and asked some additional questions. *Id.* ¶¶ 30–31. According to the FAC, "The amount of time it takes to undergo the COVID-19 examination is approximately 10 minutes to 15 minutes on average. This amount of time could be longer depending upon the number of other Amazon employees in line for the COVID-19 screening." *Id.* ¶ 32.

Plaintiffs assert six causes of action. Claims 1 through 4 allege violations of the California Labor Code on behalf of themselves and the California Class they purport to represent, including: (1) failure to pay all hours worked in violation of California Labor Code sections 204, 1194, 1194.2, 1197, 1197.1, and 1198 (FAC ¶¶ 83, 85); (2) failure to pay overtime in violation of Wage Order No.

[1] Plaintiffs' claims are all dependent on screening associates for COVID-19 upon entry to Amazon facilities "[f]ollowing the outbreak of the Coronavirus." FAC ¶ 22. Amazon notes that that class definitions are thus temporally overbroad, given the COVID-19 pandemic did not begin until 2020.

4-2001 and California Labor Code sections 510, 558, and 1194 (FAC ¶ 90); (3) failure to furnish wage statements in violation of California Labor Code section 226 (FAC ¶ 98); and (4) failure to pay all wages upon separation from employment in violation of California Labor Code sections 201, 202, 203, and 218 (FAC ¶ 104). Claim 5 seeks equitable relief under the UCL, Cal. Bus. & Prof. Code § 17200 *et seq.*, on behalf of Plaintiffs and the California Class. FAC ¶¶ 109–11. Finally, claim 6 alleges violations of the FLSA on behalf of Plaintiffs and the FLSA Collective they purport to represent for failure to pay overtime. *Id.* ¶ 116.

**B. Public Health Measures to Stop the Spread of COVID-19**

Central to Plaintiffs' claims are the measures Amazon has taken to help combat the spread of COVID-19—measures which have been extensively shaped and in many instances dictated by guidance and regulations issued by public health authorities. Under regulations promulgated by the California Division of Occupational Safety and Health ("Cal/OSHA") that took effect on December 1, 2020, all employers are required to "develop and implement a process for screening employees for and responding to employees with COVID-19 symptoms." Cal. Code Regs. tit. 8, § 3205(c)(2)(B). Before that, guidance issued jointly by both Cal/OSHA and the California Department of Public Health ("CDPH") as far back as July 2020 instructed businesses operating in nearly every industry to "provide temperature and/or symptom screenings for all workers at the beginning of their shift and any vendors, contractors, or other workers entering the establishment," or, as an alternative, to require workers to self-screen at home before leaving for the workplace. Amazon's Request for Judicial Notice ("RJN"), Ex. 1, CDPH and Cal/OSHA, *Industry guidance to reduce risk*. And starting in April 2020, the City of Fresno (where the facility Plaintiff Boone alleges she worked at is located), ordered all "Essential and Authorized Businesses" to establish a process for "screening employees and visitors, but not customers," in accordance with guidelines set by Fresno County. RJN, Ex. 2, *City of Fresno Emergency Order 2020-13*.

Cal/OSHA began citing employers for COVID-related violations—including for failures to implement proper screening procedures for employees—far before its COVID-specific regulation was promulgated. *See* RJN, Ex. 3, *Citations for COVID-19 Related Violations*; RJN, Ex. 4, *Cal/OSHA Issues Citations to Multiple Employers for COVID-19 Violations*. And since at least May 2020, the

Centers for Disease Control and Prevention ("CDC") has urged employers to consider implementing COVID-19 screening. *See* RJN, Ex. 5, *Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19).*

## III. STANDARD OF REVIEW

In order to avoid dismissal under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Similarly, under Rule 12(b)(1), a defendant may "assert that[ ] the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). Although a court assessing the sufficiency of a complaint must accept factual allegations as true, this rule is "inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. "[A] complaint that offers 'labels and conclusions, . . . a formulaic recitation of the elements of a cause of action[,]' or 'naked assertion[s]' devoid of 'further factual enhancement' will not suffice." *Landers v. Quality Commc'ns, Inc.*, 771 F.3d 638, 641 (9th Cir. 2014) (quoting *Twombly*, 550 U.S. at 555, 557). Moreover, the factual allegations "must be enough to raise a right to relief above the speculative level," and they must do more than "create[] a suspicion of a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (internal quotation marks and citation omitted). Rather, a plaintiff must allege the "kind of factual allegations that 'nudg[e] their claims across the line from conceivable to plausible.'" *Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014) (quoting *Twombly*, 550 U.S. at 570). In conducting its analysis, a court must "draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. It acts as a gatekeeper to ensure that, based on the plaintiff's claims, "it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

These standards exist to ensure that a plaintiff "with a largely groundless claim" cannot simply "take up the time of a number of other people," by pursuing a suit without even the "reasonably founded hope that the [discovery] process will reveal relevant evidence." *Starr*, 652 F.3d at 1213 (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)). Concerns related to unnecessary expense and the waste of time and judicial resources are particularly relevant where, as here, Plaintiffs

purport to represent a large class alleging violations that span over a period of years. *See Twombly*, 550 U.S. at 559. It is only by "taking care to require allegations" to meet a plausibility standard that courts can adequately guard against these significant risks. *Id.*

## IV. ARGUMENT

### A. Time Spent in and Waiting for COVID Screenings Is Not Compensable (Claims 1, 2, & 6)

Plaintiffs allege that Amazon owes them pay under the FLSA and the California Labor Code for time spent in COVID-19 screenings before they clock in for work, as well as any time associates spend waiting in line for such screenings. Plaintiffs have failed to state a claim under Rule 12(b)(6) because they have not plausibly alleged that Amazon's COVID-19 screenings are compensable time under either federal or state law.

#### 1. Time Spent in and Waiting for COVID-19 Screenings Is Not Compensable Under the FLSA

The Ninth Circuit applies "a three-step approach to determine when an activity was compensable within the definitions of the FLSA and the Portal[-]to-Portal Act." *Ceja-Corona v. CVS Pharmacy, Inc.*, 2013 WL 796649, at *4 (E.D. Cal. Mar. 4, 2013) (citing *Bamonte v. City of Mesa*, 598 F.3d 1217, 1224 (9th Cir. 2010)). "The three steps are (1) whether the activity constituted 'work,' (2) whether the activity was an 'integral and indispensable' duty, and (3) whether the activity was *de minimis*." *Id.*

Plaintiffs' claim that time spent waiting for and undergoing COVID-19 screening is compensable under the FLSA fails at each step. *First*, because Amazon associates do not undergo COVID-19 screening for the primary purpose of benefiting Amazon, the screenings are not "work" for which compensation may be owed under the FLSA. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003). *Second*, even if COVID-19 screening is "work," it is "preliminary" to "the principal activity or activities which such employee is employed to perform," and thus non-compensable under the Portal-to-Portal Act. 29 U.S.C. § 254(a); *see Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 35 (2014). *Third*, any time spent waiting for COVID-19 screening is not compensable under the FLSA, *see* 29 C.F.R. § 790.7(g), and the FAC fails to allege that the time it takes Amazon associates to complete the actual COVID-19 screenings is anything more than *de minimis*, *see Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

**a. COVID-19 Screenings Are Not "Work" Under the FLSA**

The test for whether an activity constitutes "work," and therefore must be compensated, under the FLSA "contains two conjunctive components—activity that is *controlled or required by the employer*, *and* that is pursued necessarily and *primarily for the benefit of the employer*." *Bamonte v. City of Mesa*, 598 F.3d 1217, 1224–25 (9th Cir. 2010) (citations omitted). Both prongs must be met for an activity to be compensable work. *Id*. COVID-19 screenings do not satisfy this test because they are not conducted primarily for Amazon's benefit. The FAC's conclusory allegation to the contrary is not supported by facts that make the assertion plausible. *See* FAC ¶¶ 40–41. Rather, COVID-19 screenings are part of a nationwide public health initiative that transcends any particular interest Amazon may have; while they incidentally benefit Amazon, they also benefit its associates and, indeed, the community as a whole. The screenings are thus not compensable under the FLSA.

An activity is not primarily for the benefit of the employer under the FLSA where any benefit the employer receives is only incidental, or where the employer and its employees benefit more or less equally from the activity, including when the activity is related to employee health and safety. *See, e.g.*, *Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1163 (D.C. Cir. 1975) (employees' accompaniment of OSHA inspectors around employer's facility was not primarily for the employer's benefit despite "furthering industrial safety benefits"); *Wheat v. J.B. Hunt Transp., Inc.*, 2016 WL 1397673, at *4 (C.D. Cal. Apr. 5, 2016) (truck drivers' sleep apnea testing pursuant to federal requirements and employer's internal policies was not primarily for the benefit of the employer); *Gibbs v. City of N.Y.*, 87 F. Supp. 3d 482, 493–95 (S.D.N.Y. 2015) (counseling sessions that police officers with alcohol problems were required to complete were not compensable); *Makinen v. City of N.Y.*, 53 F. Supp. 3d 676, 698–99 (S.D.N.Y. 2014) (employer-mandated alcohol rehabilitation treatments were not primarily for the police department's benefit); *Loc. 1605 Amalgamated Transit Union, AFL-CIO v. Cent. Contra Costa Cty. Transit Auth.*, 73 F. Supp. 2d 1117, 1124 (N.D. Cal. 1999) (that the employer "received incidental benefits" from workers' collective bargaining activities and paid them for time spent in negotiations before a strike began does not mean that negotiating activities "after the strike were pursued primarily for [the employer's] benefit").

COVID-19 screenings first and foremost benefit Amazon associates by detecting whether they are ill and in need of medical attention, as well as by preventing associates from putting their colleagues at risk. While Plaintiffs are correct that a COVID-19 outbreak at an Amazon fulfillment center would be disruptive to business operations, *see* FAC ¶ 41–43, Amazon would by no means be the only, or even the primary, entity to suffer from such an incident; employees, and the general public, would as well. Steps to stop the spread of COVID-19—like the screenings Plaintiffs have based their claims on here—are designed to detect and prevent the society-wide spread of a contagious disease. While Amazon benefits from measures to reduce the spread of COVID-19, it does so in the same way all members of the public benefit from responsible precautions to slow the spread of the virus. *See* RJN, Ex. 6, *OSHA Guidance on Preparing Workplaces for COVID-19* ("To reduce the impact of COVID-19 outbreak conditions on businesses, workers, customers, and the public, it is important for all employers to plan now for COVID-19."). That is why federal, state, and local authorities directed *all* members of the public for over a year to do their part to mitigate the risk posed by the virus, whether that be by requiring individuals to wear masks when they are in public, requiring businesses to screen employees before they start work each day, or even requiring non-essential workers to stay at home. Because the pandemic threatens all members of the community, it has necessitated preventive action by everyone for everyone's benefit.

The fact that Amazon's COVID-19 screenings are conducted in accordance with regulations and guidelines issued by California state agencies and the CDC underscores that these screenings benefit Amazon associates and the public at large, and are not undertaken primarily for Amazon's benefit. As outlined above, the CDC issued guidance as early as May 2020, and California public health authorities issued guidance as early as July 2020, urging employers to screen their employees at work; California regulation now requires such screenings. *See supra* 4–5. Courts have held, in analogous circumstances, that government-mandated workplace screenings are not conducted primarily for the employer's benefit. In *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007), for example, the court determined that mandatory security screenings of construction workers at the Miami International Airport were not compensable time. The screenings at issue were required by the Federal Aviation Administration; the employer could not choose whether its employees were screened.

For that reason, the court concluded that the employer "did not primarily—or even particularly—benefit from the security regime." *Id*. at 1344. In other words, though the screenings were "necessary" for workers to access their jobsite, they were required by the government to achieve purposes that did not primarily benefit the employer. *Id.*

Similar reasoning applies here. Amazon is compelled—and previously was at the very least strongly encouraged—by state authorities to engage in COVID-19 screening of its associates to address broader public health concerns that transcend Amazon's business interests and advance the interests of workers and the public-at-large. As the CDPH and Cal/OSHA explained in guidance for logistics and warehousing facilities, the recommended measures were designed "to support a safe, clean environment for workers." RJN, Ex. 7, *CDPH & Cal/OSHA, COVID-19 Industry Guidance: Logistics & Warehousing Facilities*. Time spent waiting for and undergoing COVID-19 screening thus is not "work" under the FLSA.

**b. COVID-19 Screening Is "Preliminary to" Associates' Principal Activities**

COVID-19 screening also is not compensable for a separate reason: under the Portal-to-Portal Act, screening is "preliminary to" "the principal activity or activities" Amazon associates are "employed to perform." 29 U.S.C. § 254(a). The Supreme Court made clear in *Integrity Staffing Solutions, Inc. v. Busk* that, even if an activity is work-related, it is not compensable unless it is either a principal activity the employee is employed to perform or "integral and indispensable to" principal activities, meaning it is "an intrinsic element of those [principal] activities and one with which the employee cannot dispense if he is to perform those activities." 574 U.S. at 35. According to Plaintiffs' allegations, their principal work-related activities consisted of "gathering packages from the Amazon warehouse, scanning them, placing them in boxes, and labelling the items"; "gathering items from the shelves in the warehouses and putting the items in carts"; and "gathering items and placing them in the right location in the warehouse." FAC ¶¶ 24–25. Undergoing COVID-19 screening is not a principal activity for which they were employed. Plaintiffs' half-hearted, conclusory assertion that "the [COVID-19] screening was necessary to ensure that the Plaintiffs and Class Members" could safely "serve the customers of Amazon" (*id.* ¶ 41) does not demonstrate otherwise.

Amazon's COVID-19 screening is "preliminary" because it is not intrinsically tied to the primary activity for which the worker is employed and associates' jobs could be performed without the screening. *Busk*, 574 U.S. at 36 ("The integral and indispensable test is tied to the productive work that the employee is employed to perform."); *see also Steiner v. Mitchell*, 350 U.S. 247, 255 (1956). COVID-19 screening is not a function of, or dictated by the specific nature of, the job the worker is performing. In *Busk*, for example, the Court held that security screenings of workers who "retrieve products from warehouse shelves and package those products for shipment to Amazon customers" were preliminary because "[t]he screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment" and the company "could have eliminated the screenings altogether without impairing the employees' ability to complete their work." 574 U.S. at 35. The same is true of COVID-19 screenings.

The lack of a close nexus to "the productive work that the employee is *employed to perform*," *Busk*, 574 U.S. at 36, is further demonstrated by that fact that COVID-19 screenings are a general precaution required by the State of California for nearly all employers, and long recommended by the CDC for all employers, *see supra* at 4–5. As noted above, California guidelines on screening apply across nearly all industries and recommend that visitors to worksites be screened, too. Such generalized screening procedures are not tied to or dictated by the principal activities fulfillment center associates are employed perform. *See, e.g.*, *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593–94 (2d Cir. 2007) (time spent undergoing entry security screenings at a nuclear power plant was not compensable "because the security measures at entry are required (to one degree or another) for everyone entering the plant—regardless of what an employee does . . . —and including visitors"). The COVID-19 screenings alleged by Plaintiffs are plainly non-compensable "preliminary" activities.

Recent governmental guidance does not dictate otherwise. In FAQs published online, the Department of Labor's Wage and Hour Division ("WHD") stated that, for some employees, "undergoing a temperature check before they begin work must be paid because it is necessary for their jobs." RJN, Ex. 8, *COVID-19 and the Fair Labor Standards Act Questions and Answers*. WHD gave as an example a "nurse who performs direct patient care services at a hospital," explaining that such a worker may

have to be compensated because the screening is needed for her "to safely and effectively perform her job during the pandemic," and is therefore "integral and indispensable" to her work. *Id.*

This informal guidance is entirely consistent with the conclusion that time spent by Amazon associates undergoing COVID-19 screenings is not compensable. The work of a nurse caring for patients is health-oriented and involves the provision of care to patients, including patients suffering from COVID-19. In such circumstances, then, it may well be the case that COVID-19 screenings are integral and indispensable to nurses' principal work activities. Unlike with nurses, however, COVID-19 screenings for Amazon associates are in no way a function of or directly related to the particular job duties they perform. They are therefore not integral or indispensable to associates' principal activities. This distinction is consistent with recent caselaw, too. In *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270 (10th Cir. 2020), for example, the Tenth Circuit concluded that security screenings underwent by detention guards employed at a prison were compensable, distinguishing *Busk*'s holding that security screenings are not compensable for warehouse workers. The Court reasoned that while "an employer's general desire to keep its employees safe has no clear or obvious connection to the particular activities those employees are employed to perform," the work of detention guards is security-oriented, the security screenings are thus directly "tied to" the work they perform, and time spent in those screening was therefore compensable. *Id.* at 1278.

In any event, the WHD FAQ is informal and does "not warrant *Chevron*-style deference." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000). Rather, the FAQ is "'entitled to respect' . . . , but only to the extent that [its] interpretation[] ha[s] the 'power to persuade.'" *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). That persuasive power may be demonstrated by "the thoroughness evident in [the document's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Skidmore*, 323 U.S. at 140. The FAQ's reasoning is "cursory" and "offer[s] no explanation for its conclusion" beyond providing the one example concerning nurses. *Xiao Lu Ma v. Sessions*, 907 F.3d 1191, 1196 (9th Cir. 2018).

Moreover, the standard WHD appears to rely upon is at least questionable. The FAQ suggests that an activity is "integral and indispensable" and thus compensable under the Portal-to-Portal Act if it is "necessary" for a worker to "safely and effectively perform her job." But that standard is drawn

from the *concurrence* in *Busk*. *See* 574 U.S. at 37–38; *Dinkel v. MedStar Health Inc.*, 99 F. Supp. 3d 37, 41–42 (D.D.C. 2015) (explaining that the "safely and effectively" "test is nowhere to be found in the Court's opinion itself"). And it is too open-ended. The Supreme Court has held that "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity.'" *IBP, Inc. v. Alvarez*, 546 U.S. 21, 40 (2005). This is true even where the activity necessitated by the employee's job is safety related. *See Chagoya v. City of Chicago*, 992 F.3d 607, 623 (7th Cir. 2021) (holding that employer's "directive that its officers take the precautions necessary to ensure the safe and secure storage of the weapons and equipment" they use in their work was not "integral and indispensable" to their principal activities because it was "very far removed, both logically and practically, from the [employees'] principal activity"). In other words, contrary to what the FAQs may suggest, the fact that a given activity may be necessary to promote on-the-job safety is not dispositive regarding compensability. *See Dinkel*, 99 F. Supp. 3d at 41–43 (holding that healthcare workers' uniform maintenance activities undertaken to control the spread of infection were not compensable because it "would [not] be so unsafe as to be effectively impossible to carry out their jobs without their uniform maintenance activities," and because the activities did not have the "sort of intimate relationship with [the workers'] principal activities" needed to make an activity integral and indispensable). For all of these reasons, the FAQ holds limited persuasive value. *See, e.g.*, *Nature v. United States*, 250 F. Supp. 3d 634, 639 n.3 (E.D. Cal. 2017) (Drozd, J.) (declining to defer to National Park Service FAQs).

**c. Time Spent in COVID-19 Screenings Is *De Minimis*.**

Finally, even if COVID-19 screenings were integral and indispensable to Plaintiffs' principal work activities (which they are not), Plaintiffs have failed to allege that *the screenings themselves*—when considered apart from *the time spent waiting* to undergo screening—are more than "*de minimis*," meaning the "employee is required to give up a substantial measure of his time and effort" on the activity. *Anderson*, 328 U.S. at 692 (1946). By ignoring the distinction between waiting time and time spent undergoing screening, and offering no allegations regarding the amount of time spent actually undergoing screenings, the FAC provides no plausible basis to infer that Plaintiffs have a viable claim.

First, time spent waiting to be screened is decidedly not compensable under the FLSA. U.S. Department of Labor regulations make clear that time spent waiting in line to begin principal work activities is not compensable. *See* 29 C.F.R. § 790.7(g) (time spent "checking in and out and waiting in line to do so" are "preliminary" and "postliminary" activities). The Supreme Court also has recognized that time employees spend waiting to perform a task that itself may be intrinsic and indispensable to their principal work activities is not compensable because the waiting period is "two steps removed" from the principal activities. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 42 (2005). The Court reasoned that if such waiting time were compensable there would be "no limiting principle" to distinguish activities that are plainly non-compensable under the Portal-to-Portal Act, such as walking from a time clock to the worksite. *Id*. at 41. In consequence, even if COVID-19 screenings themselves were compensable, any time Amazon associates spend waiting to be screened would not be.

In order to state a claim, therefore, the FAC needed to allege facts sufficient to plausibly support the conclusion that time spent in COVID-19 screenings is more than *de minimis*. *See Ceja-Corona*, 2013 WL 796649, at *7 (granting motion to dismiss on *de minimis* grounds where "complaint is devoid of the necessary details"). "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours," it is not compensable under the FLSA. *Alvarez*, 339 F.3d at 903 (quoting *Anderson*, 328 U.S. at 692). In determining whether otherwise compensable time is *de minimis*, the Ninth Circuit considers three factors: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984). Although "[n]o rigid rule can be applied with mathematical certainty," "[m]ost courts have found daily periods of approximately 10 minutes de minimis even though otherwise compensable." *Id*. at 1062; *see Young v. Beard*, 2015 WL 1021278, at *11 (E.D. Cal. Mar. 9, 2015) ("Ten minutes often serves as a rule of thumb.").

The FAC gives no indication that COVID-19 screenings themselves take any appreciable amount of time. Indeed, the factual allegations indicate that the time spent in screenings was negligible. Plaintiffs allege that it takes "10 to 15 minutes on average"—inclusive of time spent waiting—to complete a COVID-19 screening, and that the time varies depending on how long the wait is. FAC ¶ 32. The screenings themselves are alleged to involve answering a small handful of simple questions and

having one's temperature taken. *Id.* ¶¶ 28–30. It is implausible that those activities took 10 to 15 minutes on average. And even assuming that the majority of this time was not spent waiting, which is implausible, it is clear "as a matter of logic" that the few minutes Plaintiffs spent in COVID-19 screenings is below the 10-minute threshold courts typically rely on to differentiate compensable time from *de minimis* time. *Alvarez*, 339 F.3d at 904. Further, the COVID-19 screenings are a short-term, emergency measure, meaning Plaintiffs' aggregate claims are not substantial enough to render the time spent in the screenings anything other than *de minimis*. *See Lindow*, 738 F.2d at 1063. The indeterminacy of exactly how long Plaintiffs spent in the COVID-19 screenings on any given day also points to the conclusion that the time should be treated as *de minimis*, as does the lack of any allegation suggesting it was practicable to record the time spent in just COVID-19 screening. *See Id.*

In sum, Plaintiffs' allegations conflate time spent in COVID-19 screening with time spent *waiting* to be screened. FAC ¶ 32. But waiting time is unquestionably not compensable even if COVID-19 screening time is. The FAC is therefore devoid of any allegations about the actual amount of work Plaintiffs engaged in without being compensated. What scant allegations Plaintiffs do make indicate that, whatever amount of time they spent in COVID-19 screenings, it was *de minimis*, and therefore not compensable.

* * *

For all of these reasons, time spent waiting for or undergoing COVID-19 screening is not compensable under the FLSA.

**2. Time Spent in and Waiting for COVID-19 Screenings Is Not Compensable "Hours Worked" Under California Law**

Time spent undergoing and waiting for COVID-19 screenings also is not compensable under California law. The California Supreme Court has held that only certain time spent on activities where the employee is under the *control* of the employer is compensable.[2] *See Frlekin v. Apple Inc.*, 48 Cal.

[2] Unlike the FLSA, which provides no definition of "work," California law defines what constitutes "hours worked" for purposes of its minimum wage and overtime requirements. As applicable here, California regulations define "hours worked" to mean "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." Cal. Code Regs. tit. 8, § 11070. Although in some ways related, the tests for what constitutes "work" under Federal and California law are different

*(Cont'd on next page)*

5th 1038, 1046 (2020). "The level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative." *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 587 (2000). "[A]t least with regard to cases involving *onsite* employer-controlled activities, the mandatory nature of an activity is not the only factor to consider . . . . [C]ourts may and should consider additional relevant factors—including, but not limited to, the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures—when evaluating such employer-controlled conduct." *Frlekin*, 48 Cal. 5th at 1056. Here, applying these factors to the alleged facts shows that time Amazon associates spent in COVID-19 screenings is decidedly not compensable. COVID-19 screening is not primarily for Amazon's benefit, it is required by California regulations (and was strongly encouraged by both the state and federal governments before regulations were adopted), and it takes place before employees fully enter onto the work premises.

As explained above, COVID-19 screenings are not primarily for Amazon's benefit. *See supra* at 7–9. To reiterate, Amazon does not implement COVID-19 precautions to advance a particular business purpose or serve some other objective of unique interest to Amazon. Rather, like all businesses and individuals during the pandemic, Amazon has done its part to advance a nationwide public health initiative directed by government authorities and designed to produce benefits common to everyone. In fact, the company has adopted industry-leading COVID-19 safety measures well beyond the screening of associates. Simply put, the screening is not "imposed primarily for the benefit of the employer." *Madera Police Officers Ass'n v. City of Madera*, 36 Cal. 3d 403, 410 (1984).

That COVID-19 screening is required by California and before that was strongly encouraged by state authorities confirms that the screening is not primarily for the benefit of Amazon and that Amazon's control is minimal. *See supra* at 8–9. Amazon's COVID-19 screening is analogous to the facts of *Griffin v. Sachs Electric Co.*, 390 F. Supp. 3d 1070, 1089–90 (N.D. Cal. 2019). In *Griffin*,

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in significant respects. *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 590 (2000) ("While one of our lower courts has recognized the 'parallel' nature of the federal and state definitions of 'hours worked,' the [California Department of Labor Standards Enforcement] has underscored the substantial differences between the federal and state definitions in numerous advice letters."). Whether or not an activity is "controlled" by an employer for purposes of California law therefore says little about whether or not the activity counts as "work" under the FLSA.

employees had to travel along an access road after passing through a security gate to get to their worksite. While on the access road, employees were required to follow rules "fundamentally no different than limitations imposed on travel through other types of premises," many of which "originated" with "the State of California," not the employer. *Id.* at 1089. The court concluded that travel time on the access road was therefore not compensable under California law, because the requirements were "not atypical on an employer's premises" and were "safety-oriented in nature." *Id.* at 1089–90. That description fits COVID-19 screening to a tee. COVID-19 screening at Amazon facilities is safety-oriented and intended to comply with generally applicable government policy and is not "primarily directed" to benefiting the employer. *Madera*, 36 Cal. 3d at 409. As noted above, these screening procedures are required of many different types of businesses and public places. In fact, this Court has issued orders to prevent individuals with COVID symptoms from entering courthouses in the Eastern District of California. *See* RJN Ex. 9, *General Order No. 610, Restrictions on Visitors to Eastern District of California Courthouses.*

Amazon's minimal control over associates is confirmed by the fact that the alleged screenings occur before associates' shifts and before they fully enter the worksite. In *Morillion*, the court explained that time spent by employees commuting to the worksite is non-compensable where the employer does not restrict what employees can do in the moments leading up to their arrival and entry at the worksite. *See* 22 Cal. 4th at 586. Time spent being screened in a non-invasive fashion before actually entering the employer's premises is analogous. *See Griffin*, 390 F. Supp. 3d at 1089–90; *Cervantez v. Celestica Corp.*, 253 F.R.D. 562, 571 (C.D. Cal. 2008) ("[A] pre-shift security line requirement . . . may be more akin to time spent in an ordinary commute, where employees may choose to start earlier or later depending on their own judgment."). Amazon's control over associates is minimal as they pass through and wait for COVID-19 screening.

Plaintiffs' analogy to the California Supreme Court's decision in *Frlekin* is misplaced. *See* FAC ¶ 38. In *Frlekin*, the plaintiffs alleged that mandatory security screenings conducted by the employer as employees left for the day consisted of, among other things, intrusive bag checks under the close supervision of managers in order to detect theft. 8 Cal. 5th at 1056. Given those allegations, the court emphasized that "the employer-controlled activity primarily serve[d] the employer's interests"—

i.e., the "searches promote[d] [the employer's] interest in loss prevention." *Id.* at 1052–53. Amazon's COVID-19 screenings—designed to advance, and dictated by, public health objectives—are thus a far cry from exit screenings "to detect and deter theft." *Id*. at 1052.

Moreover, Amazon's COVID-19 screenings occur at the *beginning* of the workday before Amazon associates are permitted to enter the worksite, whereas in *Frlekin* workers were not permitted to *leave* the worksite until they had completed screening, which allegedly required employees to wait as long as 45 minutes before a screening occurred. 8 Cal. 5th at 1044. Because Amazon associates are not "confined to the premises until" the COVID-19 screening, they are subject to a lesser degree of control than the workers in *Frlekin*. *Id.* at 1051. As the court in *Frlekin* emphasized, the employees there were allegedly required to perform very specific tasks, "including opening their bags, unzipping internal compartments, removing their personal Apple technology devices and technology cards, and proving ownership of such items." *Id*. Nothing similar is alleged here. Rather, Plaintiffs allege that Amazon associates were required to answer a handful of short questions and have their temperature taken. FAC ¶¶ 28–31. These actions are entirely passive and exhibit much less control by the employer than the security screening in *Frlekin*.

Under California law, time spent on a work activity can also be compensable, even if the employer does not exercise control over the employee, if the employer has "suffered or permitted" the person to work. *See Morillion*, 22 Cal. 4th at 584. Under this standard, the relevant question is whether the employer was aware that the employee was engaged in work activities and failed to stop her from doing so. *Martinez v. Combs*, 49 Cal. 4th 35, 70 (2010). "The test lacks relevance where the primary issue is whether the plaintiff's activities constituted work in the first place." *Saini v. Motion Recruitment Partners, LLC*, 2017 WL 1536276, at *11 (C.D. Cal. Mar. 6, 2017). Since the central question raised by Plaintiffs' FAC is whether COVID-19 screening constitutes work at all, not whether Amazon was aware of the screenings, the "suffered or permitted" to work test does not apply.

Amazon is aware that an informal FAQ posted online in late July 2020 by the California Department of Industrial Relations ("DIR") asserts that "[e]mployers that require their workers to complete a medical check in order to begin a shift, even if it is recommended under public health orders, must compensate workers for that time worked." RJN, Ex. 10, *Safe Reopening FAQs for Workers and*

*Employers*. This guidance, however, is not legally binding. *See Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1029 n.11 (2012). At best, it is entitled to something approximating *Skidmore* deference. *See Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 14–15 (1998). Under that rubric, the DIR FAQ is entitled to little, if any, weight. Moreover, the DIR's analysis of this novel legal question is both cursory and erroneous; in fact, it is contrary to California Supreme Court precedent. Specifically, the FAQ reasons that because COVID-19 screening is required, employees are under the control of the employer. But the California Supreme Court has repeatedly held that the "fact that the employer requires the employees' activity" is not "determinative," *Morillion*, 22 Cal. 4th at 587, but merely "probative," *Frlekin*, 8 Cal. 5th at 1056. The Court should follow the decisions of the California Supreme Court, not the DIR's informal FAQ that misinterprets those decisions, and hold that COVID-19 screenings are not compensable time under California law.

**B. Plaintiffs Have Failed to State a Claim for Unpaid Overtime (Claim 2)**

Even leaving aside the fact that Plaintiffs' time spent in and waiting for COVID-19 screenings is not compensable under either the FLSA or California law, Plaintiffs fail to state a claim for unpaid overtime. Under *Landers*, "a plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours *in a given workweek* without being compensated for the overtime hours worked during *that workweek*." 771 F.3d at 644–45 (emphases added). A complaint that lacks "sufficient detail about the length and frequency of [Plaintiffs'] unpaid work to support a reasonable inference that [they] worked more than forty hours in a given week" must be dismissed for failure to state a claim. *Id*. at 646 (quoting *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 201 (2d Cir. 2013)). This pleading standard applies to both Plaintiffs' FLSA and California claims. *See Tan v. GrubHub, Inc.*, 171 F. Supp. 3d 998, 1007 n.3 (N.D. Cal. 2016) ("[A]lthough *Landers* discussed overtime claims asserted under the FLSA, its reasoning applies to overtime claims asserted under the California Labor Code, as well.").

Plaintiffs have not met this standard. Even after amending their complaint, Plaintiffs still fail to allege the hours they worked and the overtime they claim they are owed with the level of specificity required by *Landers*. The FAC alleges that Plaintiff Boone normally worked ten-hour shifts four days a week, and that Plaintiff Rivera worked from "approximately 6 pm to 5 am" on "a rotation that was

four days straight followed by three days off." FAC ¶¶ 24–25. But Plaintiff Rivera does not allege a *single* "given workweek" when she believes she should have been paid overtime. And while Plaintiff Boone generally claims that she worked overtime "during the first and second weeks of May 2020" (*id.* ¶ 24), neither she nor Plaintiff Rivera alleges "the amount of overtime they believe they are owed." *Nicolas v. Uber*, 2021 WL 2016161, at *9 (N.D. Cal. May 20, 2021). Absent such allegations, Plaintiffs do not (and cannot) state any claim for overtime pay.

**C. Plaintiffs' Wage Statement Claim is Derivative, They Lack Standing to Bring the Claim, and the FAC Fails to State the Essential Elements of the Claim (Claim 3)**

Plaintiffs allege that Amazon "knowingly and intentionally failed to furnish and continues to fail to furnish Plaintiffs and each California Class Member with timely, itemized wage statements that accurately reflect—among other things—the total number of hours worked, hourly rates, and wages earned, as mandated by the California Labor Code § 226(a)." FAC ¶ 98. This claim should be dismissed for four independent reasons: (1) this claim is derivative of claims 1 and 2, neither of which are cognizable, rendering the wage statement claim also not cognizable; (2) Plaintiffs have failed to allege an injury-in-fact and thus lack Article III standing; (3) Plaintiffs have failed to state a valid claim entitling them to relief because all inaccuracies they allege in the wage statements Amazon issued to them are based on disputed payments, and they make no allegation of actual injuries they sustained; and (4) the FAC lacks any factual assertions to support Plaintiffs' claims that Amazon knowingly and intentionally failed to provide accurate wage statements, an essential element of a claim under section 226.

*First*, Plaintiffs' section 226 claim should be dismissed because it is derivative of claims 1 and 2, both of which have failed to state a claim. *See Tavares v. Cargill Inc.*, 2019 WL 2918061, at *7 (E.D. Cal. July 8, 2019) (Drozd, J.) (dismissing derivative wage statement claims where underlying claims failed); *see also Harris v. Best Buy Stores, L.P.*, 2018 WL 984220, at *9 (N.D. Cal. Feb. 20, 2018) (same).

*Second*, the FAC lacks sufficient allegations to show that Plaintiffs have Article III standing to bring a claim based on the supposed inaccuracies of their wage statements. The claim thus should be dismissed under Rule 12(b)(1). *See Kirchner v. First Advantage Background Servs. Corp.*, 2016 WL

6766944, at *1–*2 (E.D. Cal. Nov. 14, 2016). Alleging a violation of section 226, without more, does not demonstrate that Plaintiffs suffered a "concrete" and "real" injury-in-fact for purposes of Article III standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548–49 (2016). Rather, "in order to satisfy Article III's standing requirement, a plaintiff seeking damages for the violation of a statutory right must not only plausibly allege the violation but must also plausibly allege a 'concrete' injury causally connected to the violation." *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1172 (9th Cir. 2018). Here, Plaintiffs have not alleged a cognizable injury resulting from the purportedly inaccurate wage statements. *See* FAC ¶¶ 98–100. That warrants dismissal of the section 226 claim. *See Mays v. Wal-Mart Stores, Inc.*, 804 F. App'x 641, 643 (9th Cir. 2020) (dismissing claim for relief under section 226 because the complaint failed to "allege any real-world consequences flowing, or even potentially flowing, from the violation").

*Third*, a failure to display disputed wages on a wage statement does not entitle an employee to a presumption of injury under section 226. *See* Cal. Lab. Code § 226(e)(2). If the alleged inaccuracy underlying a claim under section 226 is based on disputed wages, an "individualized showing[] of actual harm" is needed for a claim to succeed. *Kazi v. PNC Bank, N.A.*, 2021 WL 965372, at *21 (N.D. Cal. Mar. 15, 2021); *see also Maldonado v. Epsilon Plastics, Inc.*, 22 Cal. App. 5th 1308, 1337 (2018) ("The purpose of section 226 is to *document* the *paid* wages to ensure the employee is fully informed regarding the calculation of those wages." (quotation marks omitted)). There is nothing in the FAC to suggest that the alleged section 226 violations are based on anything other than a failure to include the disputed payments in the wage statements. And the FAC makes no reference to any actual injury the supposed inaccuracies in the wage statement caused. Because Plaintiffs cannot rely on section 226's presumption of injury, they have thus failed to state all the essential elements of their claim.

*Fourth*, relief under section 226 is available only where the injury suffered is the "result of a knowing and intentional failure by an employer to comply" with the statute. Cal. Lab. Code § 226(e)(1). The FAC "offers nothing more than a single conclusory statement that Defendant ['knowingly and intentionally'] failed to provide accurate wage statements, without any facts to support the inference that Defendant was aware of the information required on a wage statement as it pertained to

Plaintiff[s] and the putative class, but intentionally chose to omit it." *Dawson v. Hitco Carbon Composites, Inc*, 2017 WL 7806358, at *6 (C.D. Cal. May 5, 2017); *see* FAC ¶ 98.

**D. Plaintiffs' Claim for Waiting Time Penalties Is Foreclosed Because Plaintiffs Do Not and Cannot Allege Willfulness (Count 4)**

Plaintiffs seek waiting time penalties under California Labor Code section 203, alleging that Amazon failed to pay them all wages they were owed at the time they were discharged in violation of sections 201 and 202. FAC ¶ 104. This claim fails for multiple reasons.

To begin, Plaintiffs' section 203 claim is derivative of their claims that they were owed gap and overtime pay. The gap and overtime pay claims fail; therefore, the derivative section 203 claim also fails. *See Krauss v. Wal-Mart, Inc.*, 2019 WL 6170770, at *3 (E.D. Cal. Nov. 20, 2019) ("Because Plaintiff's underlying causes of actions fail, this derivative claim [for waiting time penalties] fails as well.").

Moreover, Plaintiffs offer merely conclusory allegations that Amazon knowingly and willfully violated sections 201 and 202, *see, e.g.*, FAC ¶ 104, even though that is an essential element of a claim for waiting time penalties under section 203. Such allegations are insufficient to allege a viable section 203 claim. *See, e.g., Johnson v. Winco Foods, LLC*, 2018 WL 6017012, at *16 (C.D. Cal. Apr. 2, 2018) ("Such a conclusory allegation merely parrots the statutory language without providing any details to suggest that Defendants intentionally failed to pay upon termination the wages allegedly owed to Plaintiff and other class members.").

At the very least, the claims brought in the FAC are plainly subject to good faith disagreement. Cal. Code Regs. tit. 8, § 13520 ("[A] good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203."); *see also Diaz v. Grill Concepts Servs., Inc.*, 23 Cal. App. 5th 859, 868 (2018) ("an employer's failure to pay is not willful if that failure is due to . . . uncertainty in the law"); *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 8 (1981). Amazon is aware of no court decision anywhere in the country holding that time spent waiting for and undergoing COVID-19 screening is compensable under either the FLSA or California law. And, as explained above, the DIR's statement in an online FAQ that COVID-19 screening time is compensable is informal, non-binding, and legally erroneous. Nor is the legal question posed by application of wage and

hour laws to such screenings closely analogous to existing precedents. That is reason enough to conclude that any failure to pay wages owed for time spent in COVID-19 screenings was not willful, even assuming the Court ultimately rejects Amazon's argument that such screenings are not compensable. *See Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1202 (2008) (declining to find violation of section 203 willful where the disputed wage payments presented "complicated issues of first-impression").

**E. Plaintiffs' Claim Under the UCL Should Be Dismissed as Derivative of Plaintiffs' Other Failed Claims and Because Plaintiffs Have Not Alleged that the Available Legal Remedies Are Inadequate (Claim 5)**

Plaintiffs' UCL claim is entirely derivative of their other claims for relief. Because each of their other claims is defective and must be dismissed, their UCL claim also necessarily fails. *See, e.g.*, *Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136, 1147 (2011) ("Because the underlying causes of action fail, the derivative UCL . . . claim[ ] also fails.").

Plaintiffs also cannot pursue relief pursuant to the UCL because they expressly claim entitlement to numerous remedies at law and make no allegations that those remedies are inadequate. "[I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992). The Ninth Circuit recently explained that this principle requires district courts to dismiss claims for equitable relief under the UCL absent a showing by the plaintiff that she "lacks an adequate remedy at law." *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020); *see also Nationwide Biweekly Admin., Inc. v. Superior Court*, 9 Cal. 5th 279, 292 (2020) (holding that UCL claims "are equitable in nature"). Plaintiffs have not and cannot make that showing; thus, their UCL claim should be dismissed.

Further, while Plaintiffs also purport to seek "injunctive and preventive relief" as part of their UCL claim, *see* FAC ¶ 110, they allege that they are *former* employees, meaning they lack standing to obtain such prospective remedies, s*ee Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 988 (9th Cir. 2011) ("[O]nly current employees have standing to seek injunctive relief.").[3]

[3] Plaintiffs' FAC deleted the original Complaint's request for injunctive relief from the prayer, but the FAC's fifth claim continues to refer to "all other injunctive and preventive relief authorized by Business and Professions Code §§ 17202 and 17203."

## V. CONCLUSION

Amazon respectfully requests that the Court dismiss the entirety of Plaintiffs' FAC.

Dated: June 3, 2021

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U.S. DEPARTMENT OF LABOR

**Wage and Hour Division**

# COVID-19 and the Fair Labor Standards Act Questions and Answers

The FLSA provides many beneficial labor standards, including minimum wage and overtime compensation. These critical protections continue to apply during the pandemic. The questions below address some common questions about applying the FLSA's requirements during the pandemic.

Please note that federal and state laws may differ and operate independently; therefore, you might want to contact your state labor office to determine whether there are any state laws that address your workplace rights during the pandemic.

Please see Families First Coronavirus Response Act: Questions and Answers for questions specific to the application of the Families First Coronavirus Response Act and paid leave.

## Business Closure

**Key reminder:** If you have been laid off and have not received your last paycheck on time, please contact the Department of Labor's (DOL) Wage and Hour Division or your state labor office. For information about assistance to continue your employment-based health plan coverage under the American Rescue Plan Act of 2021, please visit DOL's Employee Benefits Security Administration's FAQs.

1. My hours have been cut due to COVID-19. Does my employer have to pay me for the hours I would have worked if it weren't for COVID-19?
2. My employer has closed its office and requires employees to work from home, but I am unable to perform my job from home. Is my employer still required to pay me? (revised 04/26/2021)
3. I am a salaried exempt employee; can my employer require me to use my accrued leave (paid time off [PTO] or vacation) during office closures due to COVID-19 or any other public health emergency?

## Temperature Checks/Health Screenings

4. My employer requires all employees to take their temperature to try to screen for people who might have COVID-19 before entering the job site. Do I need to be paid for the time spent taking my temperature?
5. My employer requires me to have a temperature check onsite to screen for people who might have COVID-19 after I have started work for the day. Do I need to be paid for the time spent waiting for or undergoing the check?
6. If I am required to complete a COVID-19 health screening for myself during the workday, is such time compensable?

## COVID-19 Testing

7. If my employer requires COVID-19 testing during the workday, do I need to be paid for the time spent undergoing the testing?

EXHIBIT "2"

8. My employer is requiring me to undergo COVID-19 testing on my day off before I can return to the jobsite. Do I need to be paid for the time spent undergoing the testing?

# Quarantine

9. What are an employer's obligations to an employee who is under quarantine due to exposure to COVID-19?
10. Because of the pandemic, I am required to telework and perform my normal work duties. Does my employer have to compensate me when I telework?

# Volunteers

**Key reminder:** If your business has a shortage of workers and is looking for "volunteers" to help, please know that the FLSA has stringent requirements with respect to using volunteers. In general, covered, nonexempt workers working for private, for-profit employers have to be paid at least the federal minimum wage and cannot volunteer their services. Check with DOL for the rules governing the circumstances where volunteering in the public, and private non-profit, sectors may be allowed.

11. If people volunteer to a public agency, are they entitled to compensation?
12. If people volunteer to a private, not-for-profit organization, are they entitled to compensation?

# Telework

13. May an employer encourage or require employees to telework (i.e., work from an alternative location such as home) as an infection control strategy?
14. Is my employer required to cover any additional expenses that I might incur if I work from home (for example, internet access, computer, additional phone line, increased use of electricity, etc.)? (revised 04/26/2021)
15. Do OSHA's regulations and standards apply to the home office? Are there any other federal laws that protect the health and safety of employees who work from home? (revised 04/26/2021)

# Hours Worked and Job Duties

16. How many hours per day or per week can my employer require me to work?
17. Can I be required to perform work outside of my job description?
18. I am an employee in a hospital with direct patient care responsibilities, and I am required to put on ("don") and take off ("doff") COVID-19 protective and safety gear, such as an N95 respirator, eye protection, and a face shield, before my shift starts and after my shift ends. Is my employer required to pay me for the time spent donning and doffing?

# Telework (Hours Worked)

19. How are hours worked calculated for employees who work from home or no longer work at an employer's worksite? (revised 04/26/2021)
20. I am working from home. Is my employer required to pay me the same hourly rate or salary while I work from home? (revised 04/26/2021)
21. I am teleworking during the COVID-19 pandemic. My employer allows employees flexible hours during the normal workday to take care of personal and family obligations, such as caring for my children while school is closed. If I begin work, take several hours in the middle of the workday to care for my children, and then return to work, what is the proper way to count my compensable hours? (revised 04/26/2021)

# Salaried Exempt Employees

22. I am a salaried employee exempt from the minimum wage and overtime requirements under Section 13(a)(1) of the Fair Labor Standards Act (FLSA) as a bona fide executive, administrative, or professional employee. Can my employer reduce my salary during the COVID-19 pandemic or an economic slowdown? Am I entitled to minimum wage and overtime protections if my employer reduces my salary? (revised 04/26/2021)

# Hazard Pay and Incentive Payments (Regular Rate)

23. I am an essential employee of an employer that will provide me an incentive payment to receive the COVID-19 vaccine. Does this incentive payment have to be included in the regular rate that is used to compute my overtime pay?
24. Is hazard pay required under the FLSA for employees working during the COVID-19 pandemic?
25. I am an employee of a private employer that began paying me incentive payments, such as hazard pay, for working during the COVID-19 pandemic. Do those incentive payments have to be included in the regular rate that is used to compute my overtime pay? (added 08/27/2020)
26. I am an employee of a state or local government that began paying me incentive payments, such as hazard pay, for working during the COVID-19 pandemic. Does my government employer have to include such incentive payments in the regular rate that is used to compute my overtime pay? (added 08/27/2020)

# Child Labor

27. I am 15 years old. When and how much can I work during the school year?
28. I am 15 years old. My school has physically closed due to COVID-19, but it would normally be in session. Am I permitted to work if I cannot physically go to classes?
29. I am 15 years old. My school has physically closed due to COVID-19 and is not in session. Am I permitted to work in agriculture?
30. I work in an office. My child's school has physically closed due to COVID-19. Am I permitted to bring my child to work with me?
31. I am a farmworker. I have a ten year-old and a 14 year-old. Both of my children's schools are physically closed due to COVID-19 and they are learning remotely. Therefore, due to a lack of day care I bring my children to work with me. Am I permitted to bring my children to work with me, and if so, can they assist me in doing agricultural work?

# Business Closure

**Key reminder:** If you have been laid off and have not received your last paycheck on time, please contact the Department of Labor's (DOL) Wage and Hour Division or your state labor office. For information about assistance to continue your employment-based health plan coverage under the American Rescue Plan Act of 2021, please visit DOL's Employee Benefits Security Administration's FAQs.

### 1. My hours have been cut due to COVID-19. Does my employer have to pay me for the hours I would have worked if it weren't for COVID-19?

No, under the FLSA, your employer is only required to pay you for the hours you actually worked. The FLSA does not require employers to pay employees who are entitled to the minimum wage and overtime protections of the FLSA for hours they were scheduled to work but do not in fact work because of a change in schedule.

In some states, a reduction in hours may qualify you for partial Unemployment Insurance benefits. Please contact your state workforce agency for more information.

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### 2. My employer has closed its office and requires employees to work from home, but I am unable to perform my job from home. Is my employer still required to pay me? (revised 04/26/2021)

Under the FLSA, employers generally have to pay employees only for the hours they actually work, whether at home or at the employer's office. In general, employers must pay at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried executive, administrative, or professional employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. Contact the U.S. Department of Labor Wage and Hour Division for additional information or call 1-866-487-9243 if you have questions.

When not all employees can work from home, we encourage employers to consider additional options to promote physical distancing, such as staggered work shifts.

If your workplace has closed and you can't work from home, you may qualify for Unemployment Insurance benefits. Please contact your state workforce agency for more information.

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### 3. I am a salaried exempt employee; can my employer require me to use my accrued leave (paid time off [PTO] or vacation) during office closures due to COVID-19 or any other public health emergency?

In general, salaried ("exempt") executive, administrative, or professional employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. An employee will not be considered to be paid "on a salary basis" if deductions from the predetermined salary are made for absences caused by an office closure during a week in which the employee performs any work. Exempt salaried employees are not required to be paid their salary, however, in weeks in which they do not work.

The FLSA does not require your employer to provide you PTO or paid vacation time. If your employer provides such benefits, it may require you to use accrued PTO or vacation time to cover an office closure during a week in which you perform some work. If your employer requires you to use PTO or paid vacation time during office closures, the use of such benefits will not affect your salary basis of payment, so long as you still receive in payment an amount equal to your predetermined compensation (or guaranteed salary). Therefore, in the case of a partial week office closure, an employer may direct salaried executive, administrative, or professional employees to take vacation time or debit their PTO leave bank, whether for full or partial days, provided the employees receive in payment an amount equal to their guaranteed salary. A salaried exempt employee who has no accrued leave in the leave bank account—or has limited accrued leave and the reduction would result in a negative balance in the leave bank account—still must receive their guaranteed salary for any absence(s) occasioned by the office closure in order to remain exempt. For more information, see WHD Opinion Letter FLSA2005-41.

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## Temperature Checks/Health Screenings

### 4. My employer requires all employees to take their temperature to try to screen for people who might have COVID-19 before entering the job site. Do I need to be paid for the time spent taking my temperature?

It depends, under the FLSA, your employer is required to pay you for all hours that you work, including for time before you begin your normal working hours if the task that you are required to perform is necessary for the work you do. For many employees, undergoing a temperature check before they begin work must be paid because it is necessary for their jobs. For example, if a nurse who performs direct patient care services at a hospital is required to check her temperature upon arrival at the hospital before her shift, the time that she spends checking her temperature upon entry to the worksite is likely compensable because such a task is necessary for her to safely and effectively perform her job during the pandemic. In other words, the temperature check is integral and indispensable to the nurse's job. Other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.

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### 5. My employer requires me to have a temperature check onsite to screen for people who might have COVID-19 after I have started work for the day. Do I need to be paid for the time spent waiting for or undergoing the check?

Yes, time spent waiting for and undergoing a temperature check related to COVID-19 during the workday must be paid. All time between the start and finish of an employee's workday must be paid unless it falls within one of the exceptions stated in 29 C.F.R. Part 785, such as bona fide meal breaks and off-duty time. Specifically, WHD's regulations require that employees be paid for time spent in waiting for and receiving medical attention required by their employer during the workday. The same logic applies to a temperature check required by your employer during your workday. Other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.

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### 6. If I am required to complete a COVID-19 health screening for myself during the workday, is such time compensable?

Yes, if you are required to complete a health screening during your workday, your employer must pay you for that time. All time between the start and finish of an employee's workday must be paid unless it falls within one of the exceptions stated in 29 C.F.R. Part 785, such as bona fide meal breaks and off-duty time. Specifically, WHD's regulations require that employees be paid for time spent in waiting for and receiving medical attention required by their employer during the workday. The same logic applies to a COVID-19 health screening required by your employer during your workday. Other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.

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## COVID-19 Testing

### 7. If my employer requires COVID-19 testing during the workday, do I need to be paid for the time spent undergoing the testing?

Yes, under the FLSA, your employer is required to pay you for time spent waiting for and receiving medical attention at their direction or on their premises during normal working hours. Other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.

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### 8. My employer is requiring me to undergo COVID-19 testing on my day off before I can return to the jobsite. Do I need to be paid for the time spent undergoing the testing?

It depends, under the FLSA, your employer is required to pay you for all hours that you work, including for time on your vacation day if the task you are required to perform is necessary for the work you are paid to do. For many employees, undergoing COVID-19 testing may be compensable because the testing is necessary for them to perform their jobs safely and effectively during the pandemic. For example, if a grocery store cashier who has significant interaction with the general public is required by her employer to undergo a COVID-19 test on her day off, such time is likely compensable because it is integral and indispensable to her work during the pandemic. Other laws may offer greater protections for workers, and employers must comply with all applicable federal, state, and local laws.

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# Quarantine

### 9. What are an employer's obligations to an employee who is under quarantine due to exposure to COVID-19?

WHD encourages employers to be accommodating and flexible with workers impacted by quarantines after exposure to COVID-19. Employers may offer alternative work arrangements, such as teleworking, and additional paid time off to such employees during a quarantine period if they are unable to telework.

While the requirement that employers provide paid sick leave to employees who are unable to work due to a quarantine related to COVID-19 under the Families First Coronavirus Response Act (FFCRA) expired on December 31, 2020, tax credits remain available to employers who voluntarily continue to provide paid sick leave for COVID-19 related reasons. Employers who choose to provide such leave between January 1, 2021, and September 30, 2021, may be eligible for employer tax credits. Information about claiming the tax credits for paid sick leave or paid family leave wages can be found on the IRS website at: (https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-paid-leave-provided-by-small-and-midsize-businesses-faqs).

In addition, other laws may have different requirements, which employers must also consider when determining their obligation to provide paid sick leave.

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### 10. Because of the pandemic, I am required to telework and perform my normal work duties. Does my employer have to compensate me when I telework?

Yes, under the FLSA, your employer is required to pay you for all hours that you work, regardless of whether the work is performed at home, at a location other than your normal workplace, or at your office. If your employer knows or has reason to believe that work is being performed, the time must be counted as hours worked. This is true even for hours of telework that your employer did not specifically authorize. For more information, see Field Assistance Bulletin No. 2020-5.

The FLSA requires employers to pay non-exempt employees at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. In general, salaried executive, administrative, or professional employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. Such requirements apply regardless of where your work is being performed.

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# Volunteers

**Key reminder:** If your business has a shortage of workers and is looking for "volunteers" to help, please know that the FLSA has stringent requirements with respect to using volunteers. In general, covered, nonexempt workers working for private, for-profit employers have to be paid at least the federal minimum wage and cannot volunteer their services. Check with DOL for the rules governing the circumstances where volunteering in the public, and private non-profit, sectors may be allowed.

### 11. If people volunteer to a public agency, are they entitled to compensation?

People who volunteer their services to a public agency (such as a state, parish, city, or county government) in an emergency capacity are not considered employees due compensation under the FLSA if they:

- Perform such services for civic, charitable, or humanitarian reasons without promise, expectation, or receipt of compensation. The volunteer performing such service may, however, be paid expenses, reasonable benefits, or a nominal fee to perform such services; and,
- Offer their services freely and without coercion, direct or implied; and,

- Are not otherwise employed by the same public agency to perform the same services as those for which they propose to volunteer.

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### 12. If people volunteer to a private, not-for-profit organization, are they entitled to compensation?

People who volunteer their services in an emergency relief capacity to private not-for-profit organizations for civic, religious, or humanitarian objectives, without contemplation or receipt of compensation, are not considered employees due compensation under the FLSA. However, employees of such organizations may not volunteer to perform on an uncompensated basis the same services they are employed to perform.

Where employers are requested to furnish their services, including their employees, in emergency circumstances under federal, state, or local general police powers, the employer's employees will be considered employees of the government while rendering such services. No hours spent on the disaster relief services are counted as hours worked for the employer under the FLSA.

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## Telework

### 13. May an employer encourage or require employees to telework (i.e., work from an alternative location such as home) as an infection control strategy?

Yes, an employer may encourage or require employees to telework as a part of implementing their infection-control or prevention strategy. Telework also may be a reasonable accommodation for a qualified person with a disability.

Of course, employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by any of the Equal Employment Opportunity laws. (See the U.S. Equal Employment Opportunity Commission's publication, Work at Home/Telework as a Reasonable Accommodation, for more information.)

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### 14. Is my employer required to cover any additional expenses that I might incur if I work from home (for example, internet access, computer, additional phone line, increased use of electricity, etc.)? (revised 04/26/2021)

Under the FLSA, an employer may not require you to pay for items that are your employer's business expenses if doing so reduces your earnings below the required federal minimum wage or overtime compensation due in any workweek. If the employer provides a computer to you or pays for an additional phone line for your home, for example, the employer may not require you to reimburse it for those costs if doing so reduces your earnings below the required federal minimum wage or overtime compensation due in any workweek. (Contact the U.S. Department of Labor Wage and Hour Division for additional information or call 1-866-487-9243 if you have questions.) Please contact your state labor office to find out whether state laws may apply in situations where employees incur additional expenses as part of working from home.

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### 15. Do OSHA's regulations and standards apply to the home office? Are there any other federal laws that protect the health and safety of employees who work from home? (revised 04/26/2021)

The Department of Labor's Occupational Safety and Health Administration (OSHA) does not have any regulations regarding telework in home offices. The agency issued a directive in February 2000 stating that the agency will not inspect employees' home offices, will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their employees. If OSHA receives a complaint about a home office, the complainant will be advised of OSHA's policy. If an employee makes a specific request, OSHA may informally let employers know of complaints about home office conditions but will not follow-up with the employer or employee.

Employers who are required to keep records of work-related injuries and illnesses will continue to be responsible for keeping such records for injuries and illnesses occurring in a home office.

The FLSA and its implementing regulations do not prevent employers from implementing telework or other flexible work arrangements allowing or requiring employees to work from home. Employers are required to maintain an accurate record of hours worked for all employees—including those participating in telework or other flexible work arrangements—and to pay no less than the minimum wage for all hours worked and to pay at least one and one-half times the employee's regular rate of pay for all hours worked more than 40 in a workweek to non-exempt employees.

Employers are encouraged to work with their employees to establish hours of work for employees who telework and a way for recording each teleworking employee's hours of work. See Field Assistance Bulletin No. 2020-5. Non-exempt employees must receive the required minimum wage and overtime pay free and clear. This means that when a covered employee is required to provide the tools and equipment (e.g., computer, internet connection, facsimile machine) needed for telework, the cost of providing the tools and equipment may not reduce the employee's pay below that required by the FLSA. (See the U.S. Department of Labor Wage and Hour Division for additional information or call 1-866-487-9243 if you have questions.)

Under the Americans with Disabilities Act, telework could be a reasonable accommodation the employer would need to provide to a qualified person with a disability, barring any undue hardship. However, an employer may instead offer alternative accommodations if they would be effective. (See the U.S. Equal Employment Opportunity Commission's publication, Work at Home/Telework as a Reasonable Accommodation, for additional information.)

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# Hours Worked and Job Duties

### 16. How many hours per day or per week can my employer require me to work?

The FLSA does not limit the number of hours per day or per week that employees aged 16 years and older can be required to work.

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### 17. Can I be required to perform work outside of my job description?

Yes, the FLSA does not limit the types of work employees aged 18 and older may be required to perform. However, there are restrictions on what work employees under the age of 18 can do. This is true whether or not the work asked of the employee is listed in the employee's job description.

As part of pre-influenza, pandemic, or other public health emergency planning, employers might want to consult their human resource specialists if they expect to assign employees work outside of their job description during a pandemic or other public health emergency. Employers might also wish to consult bargaining unit representatives if they have a union contract.

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### 18. I am an employee in a hospital with direct patient care responsibilities, and I am required to put on ("don") and take off ("doff") COVID-19 protective and safety gear, such as an N95 respirator, eye protection, and a face shield, before my shift starts and after my shift ends. Is my employer required to pay me for the time spent donning and doffing?

Yes, under the FLSA, your employer is required to pay you for putting on and taking off protective and safety gear because these tasks are necessary for you to perform your direct patient care work safely and effectively during the pandemic. In addition, any time you spend walking and waiting that occurs after you begin your workday (e.g., when you put on your protective and safety gear) and before you end your workday (e.g., when you take off your gear) must also paid by your employer.

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# Telework (Hours Worked)

### 19. How are hours worked calculated for employees who work from hŏme or no longer work at an employer's worksite? (revised 04/26/2021)

Under the FLSA, your employer is required to pay you for all work performed whether at the employer's worksite or at your home. Therefore, you must be paid for all hours of telework actually performed, including overtime work, in accordance with the FLSA. Your employer must pay you for all reported and unreported hours of telework that they know or have reason to believe had been performed. This is true even for the hours of telework that your employer did not authorize. It is an employer's obligation to exercise control to prevent unwanted work from being performed. In most cases, your employer may satisfy their obligation to pay their teleworking employees by providing reasonable time-reporting procedures and paying employees for all reported hours. For more information, see Field Assistance Bulletin No. 2020-5.

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### 20. I am working from home. Is my employer required to pay me the same hourly rate or salary while I work from home? (revised 04/26/2021)

It depends, under the FLSA, your employer is required to pay you for all the hours you actually worked, whether at home or at the employer's worksite. The FLSA requires employers to pay non-exempt workers at least the federal minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked more than 40 in a workweek. In general, salaried exempt employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.

In cases where telework is provided as a reasonable accommodation for a qualified person with a disability, or if required by a union or employment contract, then your employer must pay you the same hourly rate or salary.

If the Service Contract Act (SCA) or state or local laws regulating the payment of wages also apply, nothing in the FLSA or its regulations or interpretations overrides or nullifies any higher standards provided by such other laws or authority. (See the U.S. Department of Labor, Wage and Hour Division for additional information on the SCA or call 1-866-487-9243.).

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### 21. I am teleworking during the COVID-19 pandemic. My employer allows employees flexible hours during the normal workday to take care of personal and family obligations, such as caring for my children while school is closed. If I begin work, take several hours in the middle of the workday to care for my children, and then return to work, what is the proper way to count my compensable hours? (revised 04/26/2021)

Under the FLSA, employers generally must pay employees only for the hours they actually work, whether at home or at the employer's office. Periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for her own purposes are considered "off duty" time and are not hours worked. This principle applies whether you and your employer agree in advance on the schedule or if your employer allows you flexibility to choose the hours that you will take off to care for your children. Your employer therefore does not need to count the hours in the middle of the workday that you use to care for your children as hours worked.

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## Salaried Exempt Employees

### 22. I am a salaried employee exempt from the minimum wage and overtime requirements under Section 13(a)(1) of the Fair Labor Standards Act (FLSA) as a bona fide executive, administrative, or professional employee. Can my employer reduce my salary during the COVID-19 pandemic or an economic slowdown? Am I entitled to minimum wage and overtime protections if my employer reduces my salary? (revised 04/26/2021)

In general, an employer may prospectively reduce the amount regularly paid to a salaried exempt employee for economic reasons related to COVID-19 or a related economic slowdown. However, any such reduction must be predetermined rather than an after-the-fact deduction from your salary based on your employer's day-to-day or week-to-week needs. In addition, any such salary change must also be bona fide, meaning the change is not an attempt to evade the salary basis requirements and is actually

because of COVID-19 or an economic slowdown as opposed to the quantity or quality of work you performed. If your employer properly reduces your salary under these conditions and requirements, it can treat you as exempt from minimum wage and overtime pay if your reduced salary is at least $684 per week and you are paid on a salary basis.

However, you would be entitled to minimum wage and overtime protections if your employer reduces your salary to less than $684 per week or changes your pay from salary to hourly basis. Please see Fact Sheet #70: Frequently Asked Questions Regarding Furloughs and Other Reductions in Pay and Hours Worked Issues at https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs for additional information.

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# Hazard Pay and Incentive Payments (Regular Rate)

### 23. I am an essential employee of an employer that will provide me an incentive payment to receive the COVID-19 vaccine. Does this incentive payment have to be included in the regular rate that is used to compute my overtime pay?

No, your employer can make payments that are gifts or in the nature of gifts for special occasions (e.g., vaccination for COVID-19) that may be excluded from your regular rate of pay that is used to compute your overtime pay.

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### 24. Is hazard pay required under the FLSA for employees working during the COVID-19 pandemic?

No, the FLSA does not require hazard pay; FLSA generally requires only payment of at least the federal minimum wage (currently $7.25 per hour) for each hour worked and overtime compensation for each hour more than 40 worked in a workweek in the amount of at least one and a half times the employee's regular rate of pay. In some cases, hazard pay may be determined privately between employers and employees or their authorized representatives. State or local laws may also impose other obligations; you may wish to contact your state labor office to determine whether there are any state laws that address hazard pay. You may locate that office by visiting: https://www.dol.gov/agencies/whd/state/contacts.

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### 25. I am an employee of a private employer that began paying me incentive payments, such as hazard pay, for working during the COVID-19 pandemic. Do those incentive payments have to be included in the regular rate that is used to compute my overtime pay? (added 08/27/2020)

Yes, payments your employer provides you to perform work constitute compensation for employment that must be included in the regular rate, subject to eight exclusions described in section 7(e) of the FLSA. None of those exclusions apply to the incentive payments described above.

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### 26. I am an employee of a state or local government that began paying me incentive payments, such as hazard pay, for working during the COVID-19 pandemic. Does my government employer have to include such incentive payments in the regular rate that is used to compute my overtime pay? (added 08/27/2020)

Yes, the incentive payments are paid for by your government employer as compensation for working during the COVID-19 pandemic. As such, the payments are compensation from your government employer that must be included in the regular rate.

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# Child Labor

## 27. I am 15 years old. When and how much can I work during the schoŏl year?

With limited exceptions, during any week that school is in session, children that are aged 14 and 15 years are permitted to work in nonagricultural employment only:

- Outside of school hours.
- Up to 3 hours in any school day, including Fridays,
- Not more than 8 hours in any non-school day, and
- Not work more than 18 hours total in the week.

"School hours" means the hours the local public school district is in session. This definition of "school hours" applies to all children, regardless whether they attend public or private school.

During any week that school is not in session, children that are aged 14 and 15 may not work in nonagricultural employment more than 8 hours in any day and not more than 40 hours total in any week.

Information regarding the type of work 14- and 15-year-olds may or may not perform is available here: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/childlabor101.pdf.

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## 28. I am 15 years old. My school has physically closed due to COVID-19, but it would normally be in session. Am I permitted to work if I cannot physically go to classes?

In general, for purposes of nonagricultural employment, school is considered to be in session during any week the public school district, where the child lives, requires its students to attend school, either physically or through virtual or distance learning. See Field Assistance Bulletin No. 2020-3: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_3.pdf.

If a public school district physically closes schools in response to COVID-19, but requires all students to continue instruction through virtual or distance learning for at least one day or during any part of one day, then school is in session in the school district during that day and that week. If a school is physically closed, and the school district does not require virtual or distance learning, the school will not be considered to be in session.

During any week that school is not in session, minors that are aged 14 and 15 may not work in nonagricultural employment more than 8 hours in any day, not more than 40 hours total in any week, and only between 7 a.m. and 7 p.m. in any 1 day, except during the summer (June 1 through Labor Day) when the evening hour is extended to 9 p.m.

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## 29. I am 15 years old. My school has physically closed due to COVID-19 and is not in session. Am I permitted to work in agriculture?

If the schools in your public school district are physically closed, and there is no virtual learning requirement, then under the FLSA your school would not be in session. The Department's child labor regulations set standards for youth employed in agriculture. These standards differ for those in nonfarm jobs. In agricultural employment, a child below the age of 16 is permitted to work "outside of school hours" of the public school district where such child is living while so employed. Youth aged 14 and 15 may work outside school hours in jobs not declared hazardous by the Secretary of Labor, while minors 12 and 13 years of age may work outside of school hours in non-hazardous jobs on farms that also employ their parent(s) or with written parental consent. See 29 U.S.C. § 213(c)(1)(C); 29 C.F.R § 570.123(b) (defining "outside school hours" to mean "periods before or after school hours, holidays, summer vacation, Sundays, or any other days on which the school for the district in which the minor lives does not assemble"), Fact Sheet #12: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs12.pdf and Fact Sheet #40: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs40.pdf.

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## 30. I work in an office. My child's school has physically closed due to COVID-19. Am I permitted to bring my child to work with me?

The FLSA does not have any restrictions on your employer permitting you to bring your child with you to work. As long as your child is not performing any work for your employer, they are not employees and therefore, are not subject to the FLSA, including its minimum wage, overtime, and child labor requirements. In terms of your work, your employer is required to pay you for all hours that you work.

If your child is assisting you with performing your work for your employer, they are likely an employee and the FLSA applies, including the child labor provisions. If your employer knows or has reason to believe that work is being performed, the time must be counted as hours worked, and paid at the federal minimum wage of $7.25 per hour unless certain exemptions apply. See Fact Sheet #14: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs14.pdf and Fact Sheet #43: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs43.pdf.

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### 31. I am a farmworker. I have a ten year-old and a 14 year-old. Both of my children's schools are physically closed due to COVID-19 and they are learning remotely. Therefore, due to a lack of day care I bring my children to work with me. Am I permitted to bring my children to work with me, and if so, can they assist me in doing agricultural work?

The FLSA does not have any restrictions on your employer permitting you to bring your child with you to work. However, there are separate conditions for the employment of minors under the age of 16 in agriculture.

Federal child labor regulations set standards for youth employed in agriculture. Youth, aged 16 and above, may work in any farm job at any time. Minors aged 14 and 15 may work outside school hours for the public school district in which they reside while working, and in jobs not declared hazardous by the Secretary of Labor, while minors 12 and 13 years of age may work outside of school hours in non-hazardous jobs on farms that also employ their parent(s) or with written parental consent. Youth of any age may work at any time in any job on a farm owned or operated by their parents. See Fact Sheet #12: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs12.pdf and Fact Sheet #40: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs40.pdf.

If either you or your children are performing work in agriculture, such as picking vegetables or hauling water in a field, you and your children are likely employees and the FLSA requires your employer to pay you and your children for the hours worked. If your employer knows or has reason to believe that work is being performed, the time must be counted as hours worked, and paid at the federal minimum wage of $7.25 per hour unless certain exemptions apply.

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## Contact Us

For additional information or to find out how to file a complaint, visit our Wage and Hour Division Website: https://www.dol.gov/agencies/whd and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487- 9243).

For further information about COVID-19, please visit the HHS's Centers for Disease Control and Prevention.

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**Wage and Hour Division**

An agency within the U.S.
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The situations which arise by reason of the foregoing are completely different from a situation where a law enforcement official seeks admission for purposes of search without a warrant.

**CONCLUSION**

It is therefore the opinion of this office that authorized University of Nevada personnel may enter student housing units provided by the University, for the purpose of inspection, repairs, or official business, without violating any of the constitutional or legal rights of said students.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

**OPINION NO. 69-566 EMPLOYERS; PAYMENT OF WAGES BY—**An employer, under NRS 608.250 and NRS 609.030, is obligated to pay not less than the minimum statutory wages for all hours that he knowingly suffers or permits an employee to work.

Carson City, March 3, 1969

Mr. Stanley P. Jones, Labor Commissioner, Carson City, Nevada 89701

Dear Mr. Jones:

You have advised this office that certain employers in Nevada are requiring new employees to break in on the job by working for a certain indefinite period without pay.

Your question is whether such procedure contravenes the provisions of NRS 608.250 and 609.030.

**ANALYSIS**

NRS 608.250 reads as follows:

> 1. Except as otherwise provided in subsection 2, the minimum wages which may be paid to male persons in private employment within the state are as follows:
> (a) For minors under 18 years of age, $1 per hour, or $8 for l day of 8 hours, or $48 for 1 week of 6 days of 8 hours each.
> (b) For persons 18 years of age or older, $1.25 per hour or $10 for 1 day of 8 hours, or $60 for 1 week of 6 days of 8 hours each.
> 2. The provisions of subsection 1 do not apply to male persons:
> (a) In domestic service or in an agricultural pursuit.
> (b) Governed by the provisions of the Fair Labor Standards Act of 1938, as amended, being 29 U.S.C. § § 201 to 219, inclusive.

NRS 609.030(3) reads as follows:

> 3. The policy of this state is hereby declared to be:
> (a) That 8 hours in any one 13-hour period, and not more than 48 hours in any 1 calendar week, and not more than 6 days in any calendar week, are the maximum number of hours and days female workers shall be employed in private employment, with certain exceptions; and



EXHIBIT "3"

(b) That not less than the rate of $1.10 for 1 hour or $8.80 for 1 day of 8 hours, or $52.80 for 1 week of 6 days of 8 hours each, shall be paid such female workers under the age of 18 years in this state; and

(c) That not less than $1.25 for 1 hour or $10 for 1 day of 8 hours, or $60 for 1 week of 6 days of 8 hours each, shall be paid such female worker 18 years of age or over in this state.

These sections cover minimum wages to both sexes. An employer is obligated to pay not less than the minimum statutory wages for all hours that he knowingly suffers or permits an employee to work. The agreement of the employee, as a condition of securing the job, that he will work without compensation for a break in period is not voluntary, but coercive, and thus runs afoul of Nevada statutes.

The insecurity of such an arrangement is emphasized by the fact that an employer does not guarantee the employee a gainful employment after the break in period. The employer may, and often does, release the employee at the end of the break in period, thus opening the door to securing another employee on the same terms. It may readily be seen that such procedure could lead to free service by employees ad infinitum.

## CONCLUSION

It is the opinion of this office that an employer, under NRS 608.250 and 609.030, is obligated to pay not less than the minimum statutory wages for all hours that he knowingly suffers or permits an employee to work.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

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**OPINION NO. 69-567 COUNTY ASSESSOR AND COUNTY BOARD OF EQUALIZATION; REAL PROPERTY—**Factors which can and do affect the value of property other than those enumerated in NRS 361.227, subsection 1, may be considered in determining full cash value for the purpose of assessment.

Carson City, March 20, 1969

Mr. Roy E. Nickson, Secretary, Nevada Tax Commission, Carson City, Nevada 89701

Dear Mr. Nickson:

You have requested an opinion from this office regarding factors which may be considered in the valuation of property for assessment purposes. You have advised that taxpayers have questioned valuation of property based on the following facts:

## FACTS

The taxpayer's property is located in a remote area and its sole access is by either of two unimproved roads. One road is a fire trail maintained by the Forest Service. It is often impassable in the winter months and is established by an easement for the purposes of fire protection. The second road in part traverses the private property of another person. Since 1963, the third party has never attempted to deny or restrict access to the taxpayer's property although he has reserved the right ultimately to use his property for purposes other than a road.

At the time of initial purchases of the properties, building permits were readily issued by the county and residences were constructed. Subsequently, the county has taken the position that no further building permits will be issued until some permanent arrangement is made whereby access to the property in question can be assured. The Forest Service fire trail is not regarded as adequate for this purpose.

The county assessor has verified that the values established were determined in accordance with the provisions of NRS 361.227 1(a), (b) and (c). It is the contention of the taxpayers that the value of their property is diminished by reason of the tenuous status of accessibility and the inability to obtain further issuance of building permits to improve the property in that area. They concede that, were access assured, the valuation is reasonable. However, they contend that questionable right of access is a factor which was not considered by the county assessor in applying the factors above recited.

## QUESTION

Based on the foregoing facts, you have posed the following question:

In determining full cash value of real property, are county assessors and county boards of equalization authorized to consider factors other than those enumerated in subsection 1 of NRS 361.227?

## ANALYSIS

It will be noted that NRS 361.227 was added by the Legislature in 1965 to the previously existing statutory plan for the valuation and assessment of property taxes. In so doing, we do not believe that the Legislature intended to restrict county assessors or county boards of equalization in their overall function of fairly and truly determining full cash value. This conclusion is fortified by the fact that NRS 361.227 was added and NRS 361.025 amended in the same act. See Statute of Nevada 1965, Chapter 518, page 1444. We regard this to be an expression by the Legislature that the definition of full cash value is to be read in connection with the factors which determine it, and that such factors are to aid in arriving at it, but not to be restrictive of it. The pertinent provision are the following:

NRS 361.025:

> Except as provided in NRS 361.227, "full cash value" means the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor.

NRS 361.225:

> All property subject to taxation shall be assessed at 35 percent of its full cash value.

NRS 361.227:

> 1. In determining the full cash value of real property, the county assessor and county board of equalization *shall give weight to each of the following factors for which information is available*:
>
> (a) The price at which the property was sold to the present owner, plus any improvements made by him and minus any depreciation applicable to buildings and other improvements.
>
> (b) The market value of the property, as evidenced by comparable sales in the vicinity.

(c) In addition to the value of the land, the replacement cost of any buildings or other improvements less a reasonable allowance for depreciation computed according to the estimated life of such buildings and improvements.

(d) The value of the property derived from the capitalization, at a rate of return not less that 5.5 percent nor more than 8 percent, of the net income which could reasonably be expected from the rental of the property, taking due account of its location.

(e) The value of the property for the use to which it is actually put during the fiscal year of assessment.

2. Any taxpayer may furnish to the county assessor information concerning any one or more of the factors enumerated in subsection 1, and if he does so, shall furnish such additional information as the county assessor may reasonably require. If the taxpayer does not so furnish information, the determination of value by the county assessor shall be rebuttably presumed to be correct. (Italics added.)

It will be observed that weight is to be given to each of those factors for which information is available or supplied by the taxpayer. If the taxpayer does not supply information, the determination is presumptively correct. It would follow that if no information is available for any of the factors, they need not be given any weight at all. In such instances, county assessors and county boards of equalization would, nevertheless, be required by law to determine full cash value as otherwise defined by law and Nevada decisions. Stated differently, we do not believe that county assessors and boards of equalization are required to look only to those five elements to the exclusion of other factors cognizable within the legislative framework, which obviously can and do affect valuation of property.

It is apparent that a factor such as access which is questionable at the time of purchase could thereafter be denied or lost to an owner. Such a factor truly affects value and would not be reflected by the purchase price. If the land were vacant there would be no basis to consider replacement costs or depreciation of improvements. Similarly, there would be no basis to capitalize its value. Finally, if no other comparable sales in the vicinity exist, there is no way to determine market value on the basis of such comparable sales.

Unless valuation can be determined without regard to these factors, valuation becomes impossible.

"Full cash value" means that amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor. This is the statutory definition. It is fair to presume that such property so taken would be valued at what is reasonably worth. *State v. Virginia & Truckee RR.*, 23 Nev. 283. The Nevada Supreme Court, in construing this statutory language, quoted from a California decision based on the same language in that state's statute. It said that this statutory language, in effect, means that price which the property would bring if its owner offered it for sale on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other. It is a measure of desirability translated into money amounts or its value for use in its present condition. *Nellis Housing v. State of Nevada*, 75 Nev. 267 at 275. Within this concept there must be included those factors which affect value in a real sense, which are not within the definitions of NRS 361.227. We therefore conclude that, in an appropriate case, your inquiry must be answered in the affirmative.

## CONCLUSION

It is the opinion of this office that factors which can and do affect the value of the property other than those enumerated in NRS 361.227, subsection 1, may be considered in determining full cash value for purposes of assessment. Therefore, the county assessors and county boards of equalization are not necessarily restricted to such enumerated factors in all cases.

Respectfully submitted,

HARVEY DICKERSON
Attorney General

By: Robert A. Groves
Deputy Attorney General

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**OPINION NO. 69-568 UNIVERSITY OF NEVADA; LIABILITY FOR ACTS AND CONDUCT OF STUDENTS—**University officials have an affirmative obligation to prevent dangerous acts or conduct of students which might reasonably be foreseen to result in injuries to other students.

Carson City, March 24, 1969

Mr. N. Edd Miller, President, University of Nevada, Reno, Reno, Nevada 89507

## STATEMENT OF FACTS

Dear Mr. Miller:

Last fall, three students living in Nye Hall on the University of Nevada, Reno, campus sought approval of University officials to promote charter flights to various University activities and athletic contests outside the State of Nevada. The plane to be used was a DC-3 and was to be leased by minor students for purposes of these flights. The pilot of this twin engine airliner was to be a 20-year-old student who had a commercial pilot's license. The co-pilot was to be a 19-year-old student who was qualified to fly only single engine aircraft.

The students requested that they be allowed to use University facilities to set up a table in the Student Union Building to promote the plan and sell tickets to other students for the flights. The request was denied, and after the students indicated they were going ahead with the plan in spite of administration objections, the advice of this office was sought concerning the right and responsibility of the University to exercise supervisory authority to prohibit such a plan. We advised that the University had the right and the duty to prohibit student activities and the use of University facilities that may reasonably be classified as dangerous to the health and welfare of the students. We also advised that the University and its responsible officers may be personally liable for damages for injuries to students resulting from failure to supervise and regulate student activities that were dangerous and which might reasonably result in injuries to students.

At that time it was requested that a broader question of liability be presented for review and more substantial research by this office. Our present analysis is based primarily on the following question:

## QUESTION

What are the University's legal responsibilities and obligations concerning student activities which may involve exposure of students to dangerous conditions and possible injury?

## ANALYSIS

The general rule is recited in an annotation in 86 A.L.R.2d at 565, as follows:

> Liability may arise for personal injuries to a pupil or student due to the misconduct of a fellow pupil, student, or other person where a school official or teacher was negligent with respect thereto, such as in failing to exercise proper

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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

DWIGHT MALLOY, on behalf of himself and all others similarly situated;

Plaintiffs,

vs.

AMAZON.COM SERVICES, LLC,

Defendant.

Case No. 2:22-cv-00286-ART-VCF

**DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT**

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

As set forth in Defendant Amazon.com Services LLC's ("Amazon") Motion to Dismiss (the "Motion"), Plaintiff's First Amended Class Action Complaint ("FAC") should be dismissed because the time that Plaintiff claims he and others spent undergoing Covid screenings is not compensable; i.e. it does not constitute "hours worked" under Nevada law. Even if this time could be considered hours worked, the screening is not integral and indispensable to the employees' primary duties and, thus, is not compensable time. As this time is not compensable, each of Plaintiff's claims should be dismissed.

Plaintiff's Response to Defendant's Motion to Dismiss (the "Response") fails to set forth any arguments that would provide a basis for finding that this time was "hours worked" as it relies on the misreading of and misapplication of case law on that issue. Likewise, the Response relies on an incorrect standard for what assessing whether the Covid screenings were integral and indispensable to the employees' principal activities. As to each individual claim, the Response fails to rescue any of

them. Plaintiff's claim that Amazon violated NRS 608.016 fails because that law is inapplicable to his situation. Plaintiff's claim for minimum wage fails because he was paid more than minimum wage and his overtime claim fails because he did not plead a given week in which he was not paid it properly. Plaintiff's derivative waiting time penalties fail with each of his other claims as well as because the pay upon which they are allegedly based is, and remains, unascertainable and, thus, is not yet due; i.e. not yet late.

## II. LEGAL ARGUMENT

### A. The Time Spent Undergoing Covid Screenings is Not Compensable

#### 1. Plaintiff and the Employees Are Clearly the Primary Beneficiary of the Covid Screenings.

As Plaintiff rightly concedes, the Nevada legislature has not defined the term 'work' and, thus, "it is appropriate to look to the Fair Labor Standards Act ("FLSA") for guidance." (Dkt. 23 at 3). Under the FLSA, work is defined as any activity "controlled or required by the employer and pursued *necessarily and primarily for the benefit of the employer* and his business." *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27, 31 (2014) (quoting *Tennessee Coal, Iron & R. Co. v. Muscoda Local No., 123*, 321 U.S. 590, 598 (1944)) (emphasis added).

Plaintiff's assertion that *Steiner v. Mitchell*, 350 U.S. 347 (1956) is the "seminal case addressing the concept of 'work'", however, is incorrect (that case is the 1944 *Tennessee Coal* case) and his reliance on *Steiner* to assist with the question of hours worked is misplaced. Plaintiff relies on *Steiner* to 'prove' that the Covid screenings here were "hours worked" because, he asserts, the activities in *Steiner* "primarily benefitted" the employer (Dkt 23 at 4). The *Steiner* court, however, never so much as mentions the concept of primary beneficiary. *Steiner* did not "ma[k]e clear that ensuring the health and safety of employees primarily benefits the employer" (*Id.*) as it did not address that question. *Steiner* was focused on the concept of integral and indispensable activities under the Portal-to-Portal Act. 350 U.S. at 256.

*Steiner* sheds no light on whether the activities in *this* case constitute an integral and indispensable part of Plaintiff's principal activities. Critically, the employer in *Steiner* "d[id] *not challenge the concurrent findings of the courts below* that the clothes-changing and showering

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activities of the employees are indispensable to the performance of their productive work and integrally related thereto." *Steiner*, 350 U.S. at 251 (emphasis added). The issue in *Steiner* was not, as Plaintiff misleadingly indicates, whether the activities there *were* integral and indispensable (*see* Dkt 23 at 4). The issue was whether, given the defendants' concession that the activities were integral and indispensable, their being so was sufficient to render them compensable under the FLSA when they took place "off the production line and before or after regular shift hours." *Steiner*, 350 U.S. at 251-52. The Court's holding is that "activities performed either before or after the regular work shift, on or off the production line, are compensable … if those activities are an integral and indispensable part of the principal activities." *Id.* at 256. The Court's comment about these activities being "clearly" indispensable and integral, block quoted and given extra emphasis by Plaintiff, is dicta as the defendants had conceded the point.

Plaintiff's assertion that the facts of *Steiner* are "very similar" to those in this case does not pass the red-faced test. Per the Court:

> All of the production employees … customarily work with or near the various chemicals used in the plant. These include lead metal, lead oxide, lead sulphate, lead peroxide, and sulphuric acid. Some of these are in liquid form; some are in powder form, and some are solid. In the manufacturing process, some of the materials go through various changes and give off dangerous fumes. Some are spilled or dropped, and thus become a part of the dust in the air. *In general, the chemicals permeate the entire plant and everything and everyone in it.* Lead and its compounds are toxic to human beings. … *In battery plants, such as this one, it is 'almost impossible,' it was testified, to keep lead concentration in the air 'within absolutely safe limits,'* and in petitioners' plant 'lead oxide was on the floor and in the air and on the plates which employees handled.' *Abnormal concentrations of lead were discovered in the bodies of some of petitioners' employees, and petitioners' insurance doctor recommended that such employees be segregated from their customary duties.* The primary ways in which lead poisoning is contracted are by inhalation and ingestion ... *The risk is 'very great'* and even exists outside the plant … Even the families of battery workers may be placed in some danger if lead particles are brought home in the workers' clothing or shoes. Sulphuric acid in the plant is also a hazard. … When the acid contacts clothing, it causes disintegration or rapid deterioration. Moreover, the effects of sulphuric acid make the employee more susceptible than he would otherwise be to contamination by particles of lead and lead compounds.

*Id.* at 249-50 (emphasis added). The Court further noted the workplace was so hazardous that the employer gave the employees clothes to wear, at no charge, because "the acid causes such rapid



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deterioration that the clothes sometimes last only a few days." *Id.* at 251. No amount of calculated wordsmithing[1] can bring the facts of this case under the aegis of *Steiner* as the workplace there was, in fact, unalterably hazardous which is simply not the case here. Using *Steiner* as Plaintiff seeks would reflect the old saw that 'bad facts make bad law'.

As to *Alvarez v. IBP, Inc*., 339 F.3d 894 (9th Cir. 2003), Plaintiff overstates its holding. While that Court does indicate donning and doffing would be hours worked, it does so without significant discussion - it is not clear that the defendant even argued the point – and the Court most certainly did *not* "specifically reject" Amazon's argument that the fact that the Covid screenings were in alignment with governmental mandates shows that the activity was not primarily for Amazon's benefit. The Court simply noted that complying with the law benefitted the employer, not that it *primarily* benefitted the employer or that compliance alone is sufficient to make the employer the primary beneficiary of the activity. *Id.* at 903. Moreover, the legal requirements in the *Alvarez* case and those here are miles apart as the law there which mandated protective equipment for the employees, did not protect anyone other than the employees themselves, unlike here where the mandate protected the employees, their families, friends, and the public at large.[2] The breadth of the non-employer beneficiaries of the Covid screenings here dwarfs those in *Alvarez*.

While Plaintiff notes that "[t]wo prior courts have addressed whether the time spend in Covid-19 screenings is compensable and have rejected Amazon's arguments" (Dkt 23 at 7), those courts simply accepted, at face value, counsel's carefully crafted allegations without analyzing whether they were actually plausible. (Dkt 22 at n.3). Neither court looked beyond the allegations to see if it is truly

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[1] Notably, after discussing *Steiner* and making the incorrect assertion that it "made clear that ensuring the health and safety of employees primarily benefits the employer", the Response proudly notes "Plaintiff pled precisely these facts in his First Amended Complaint." (Dkt. 23 at 4). Two of the three paragraphs to which Plaintiff cites (#s 31 and 32) were added after Plaintiff had read the Motion to Dismiss that Amazon had filed regarding the original complaint and in which Amazon argued the Covid screenings did not constitute hours worked.

[2] The Court should summarily reject Plaintiff's strawman argument that Amazon asserted it did not benefit from the Covid screenings. (Dkt. 23 at 7). Amazon made no such claim; rather, it demonstrated that the employees, their families and friends, and the public are the *primary* beneficiaries of the Covid screenings. What's more, the law does not require that an employer take no benefit from an activity; if it did, it would frame the question as centering on who the activity exclusively or solely benefits, not frame the question (as it does) being who the activity primarily benefits.



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plausible that the time spent to prevent a Covid outbreak primarily benefits Amazon as neither weighed the full scope of the harms from which Amazon was protecting its employees, their family members and friends, or the general public, much less weighed them relative to the harm to Amazon from an outbreak. It is not plausible that the party that would be primarily harmed from shutting down Plaintiff's facility is Amazon – which Plaintiff alleges makes "billions in profits" and could easily weather that outcome – as opposed to the hourly employees that work at that facility and would suddenly be without income for an unknown period. The *financial* harm to the employees of losing their income is clearly greater than would be the harm to Amazon of shutting down one facility; i.e. the financial harm of such a shutdown falls primarily on the employees and any assertion to the contrary is not plausible. Obviously, the benefit of not catching a life-threatening disease that can have and does have long-standing and significant health effects flows primarily to the employees, their friends, and their families, and not to Amazon. Plaintiff's assertions to the contrary are not plausible and, thus, Plaintiff does not plausibly allege that Amazon is the primary beneficiary of the Covid screenings.[3]

**2. Nevada Law Incorporates the Portal-to-Portal Act.**

The Nevada Supreme Court has stated that when interpreting a statute, "it is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." *City of Boulder v. General Sales Drivers*, 101 Nev. 117, 118–19 (1985) (citing three United States Supreme Court cases addressing federal law and noting the "well-known history of arbitration and a traditional use of the terms 'arbitrator' and 'final and binding' in the context of labor relations."). Here, the FLSA was amended by the Portal-to-Portal Act in 1947. 29 U.S.C. § 251 *et seq*. Nevada passed its overtime statute NRS 608.018 in 1975 and passed NRS 608.016, addressing pay for hours worked during a trial or break-in period, in 1985. At the time those laws were passed, the Portal-to-Portal Act had been in place for 28 and 38 years respectively, with the concept of compensable work the subject of a large body of caselaw. Consequently, the Nevada legislature did not need to expressly

[3] Plaintiff asserts, without citation, that in *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 the Court "recognized that undergoing security screening was work." (Dkt. 23 at 11). The Court did not address that question at all; it did not need to as the security screenings at Amazon warehouses were not compensable under the Portal-to-Portal Act.



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define work.

Trying get around this timing and the *City of Boulder* holding, Plaintiff asserts that Nevada's wage and hour legal scheme predates the FLSA and cites an unrelated statute passed in 1911 - NRS 608.130. (Dkt. 23 at 10). NRS 608.130 requires that employees be paid via a negotiable instrument. Its passage in 1911 is irrelevant to Nevada law with respect to what constitutes "hours worked", minimum wage, or overtime; i.e. irrelevant to the pertinent portions of Nevada wage and hour law. It does not show Nevada's wage and hour statutory scheme predates the FLSA.

As to Nevada's incorporation of the Portal-to-Portal Act, Plaintiff's opposition fails to address that the job of the federal court when applying state law, as expressed by Judge Batchelder in *In Re:Amazon.Com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation*, 905 F.3d 387, 408 (6th Cir. 2018), is to "anticipate how the … state's highest court would rule in the case and ... [i]f [that] court has not yet addressed the issue, ... render a prediction by looking to all the available data." Notably, in addressing whether Nevada law incorporates the Portal-to-Portal Act, Plaintiff does not address the Nevada Supreme Court cases relied upon by Judge Batchelder in her concurrence and dissent (i.e. *Csomos v. Venetian Casino Resort, LLC*, 128 Nev. 891, 381 P.3d 605, *3 (2012) and *Rite of Passage v. Nevada Department of Business and Industry*, No. 66388, 2015 WL 9484735, at *1 (Nev. Dec. 23, 2015)) which led her to conclude that Nevada's Supreme Court *would* find Nevada law incorporates that Act.

Plaintiff makes much of the fact that the legislature did not *expressly* incorporate the Portal-to-Portal Act, citing the non-employment matter of *State Dep't of Taxation v. DaimlerChrysler*, 121 Nev. 541, 119 P.3d 135, 139 (2005) for the proposition that "omissions of subject matters from statutory provisions are presumed to have been intentional." (Dkt. 23 at 12). That holding is inapposite as the legislature here did not omit the pertinent 'subject matters' from the law; indeed, Plaintiff's claims are predicated on Nevada statutes addressing hours worked, minimum wage, and overtime. Moreover, at least in the context of wage and hour law, the rule is actually the opposite. *See Terry v. Sapphire Gentlemen's Club*, 130 Nev. 879 (2014). In *Terry*, the court held: "*Given that* the Legislature has long used federal minimum wage laws as a platform for this state's minimum wage scheme, that *the statutes in question do not signal any intent to deviate from that course*, and that for practical

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reasons the two schemes should be harmonious in terms of which workers are entitled to protection, we herein adopt the Fair Labor Standards Act's "economic realities" test for employment in the minimum wage context." 130 Nev. at 881 (emphasis added). The law is not, as Plaintiff would have it, that the legislature must affirmatively incorporate a federal statute or regulation before the Court may rely on it to interpret Nevada law but, instead, that the Court may rely on federal law *unless* the legislature signals an intent to deviate from it. There has been no such signal here.[4]

### 3. The Covid Screenings Were Not Compensable as They Are Not Integral and Indispensable to the Employees' Principal Activities.

Under the Portal-to-Portal Act, activities that are integral and indispensable to the principal activities of the employee hired are compensable, unless the time taken to perform them is *de minimis*. *See, e.g., Pipich v. O'Reilly Auto Enterprises, LLC*, Case No.: 21cv1120-L-LL, 2022 WL 788671 *3 (March 15, 2022 S.D. Cal.).[5] The Supreme Court has held time spent in security screenings by workers in Amazon's warehouses is not compensable as those screenings are "not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment." *Busk*, 574 U.S. at 35. The test is not "whether an employer *required* a particular activity. *Id.* at 36 (emphasis in original). Rather, "[t]he integral and indispensable test is tied to the productive work that the employee is *employed to perform*." *Id.* (emphasis in original). There is "no distinction between the searches conducted for the safety of the employees and those conducted for the purpose of preventing theft." *Id.* That the Covid screening protects Amazon's employees, among numerous others, does not make it compensable.

Seeking to get around *Busk*, Plaintiff asserts that "to be 'integral and indispensable,' an activity must be necessary to the principal work performed for the employer." (Dkt. 23 at 15). While that may

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[4] Plaintiff's citation to *Dancer I–VII v. Golden Coin, Ltd.*, 176 P.3d 271 (2008) in which the Nevada Supreme Court did not follow federal law is inapposite because there, unlike here, "the language of the relevant statutes was entirely conflicting." *Terry*, 130 Nev. at 956. As Plaintiff concedes, Nevada law does not define "work" (Dkt. 23 at 3) and, thus, there is no conflict between state and federal law.

[5] Contrary to Plaintiff's assertion, Amazon has not conceded and does not concede that the time spent undergoing Covid screenings is not *de minimis*. Amazon did not move on that basis as it recognized that Plaintiff's allegation that the covid screenings took an "average" of 10-15 minutes and "could be longer" was sufficient at the pleading stage, even though ultimately untrue.



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be true, the Supreme Court has held that the converse is not: "the fact that certain preshift activities are necessary for employees to engage in their principal activities *does not mean* that those preshift activities are 'integral and indispensable' to a 'principal activity.'" *IBP, Inc. v. Alvarez*, 546 U.S. 21, 40 (2005) (emphasis added). Plaintiff's argument that the "facts demonstrate that the COVID-19 screenings were necessary for the Plaintiff to perform his work and thus, 'integral and indispensable' to the Plaintiff's principal activities" (Dkt. 23 at 16) fails under *IBP*.

Tellingly, Plaintiff tries to distinguish *Pipich* by asserting that the plaintiff there "failed to plead sufficient facts" (Dkt. 23 at 16). Once again, Plaintiff treats the plausibility standard as being nothing more than a question of wordsmithing, with cleverly-crafted allegations being a siren call that a Court must follow. As the *Pipich* court noted, however,

> When determining if an activity is integral and indispensable to the principal activities for which an employee was hired, *it is the nature of the work to be performed that drives the analysis. A court must look to the specific tasks and surrounding circumstances in conducting the inquiry.* For instance, the time spent by meatpackers sharpening their knives was held to be compensable because that activity was necessary to avoid dull blades that would "slow down production," "affect the appearance of the meat," and "lead to accidents." *In contrast, poultry-plant workers were not to be compensated for time spent waiting to put on protective gear because the waiting was "two steps removed from the productive activity on the assembly line."*

*Id.* at *4 (emphasis added) (citations omitted). As in *Pipich* and *IBP*, Amazon's Covid screenings are multiple steps removed the employees' productive work and, thus, are not integral and indispensable to their primary activity. Here "O'Reilly [and Amazon] did not hire the employees to undergo health screenings." *Id.*; *see also Busk*, 574 U.S. at 35 (Defendant "did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment to Amazon customers."); *Perez v. Walmart, Inc.*, No. 4:21-cv-00120-HFS, 2021 WL 5741484, at *4 (W.D. Mo. Oct. 25, 2021) (finding that the covid screenings "were not integral and indispensable" as "there are no allegations that Walmart hired plaintiff to submit to medical screenings, instead … she was hired to, among other things, stock and unload merchandise.").[6]

[6] Plaintiff's argument that Perez "provides no guidance" in this case as it was an unjust enrichment case, Dkt. 23 at 9, is not well-taken. Whether and the degree to which Covid screenings benefit the employees, their families, their friends, and the public has nothing to do with the cause of action at



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Likewise, the *Pipich* court dismissed the Department of Labor ("DOL") guidance, relied upon by Plaintiff here (Dkt. 23 at 17), which notes that Covid screenings for nurses would be compensable. 2022 WL 788671 at *4. In doing so, the Court noted nurses' "principal job duty is to keep patients healthy and [they have] direct patient contact" which is unlike Pipich, who was a manual laborer and delivery person, and unlike the employees here who are warehouse workers. *Id.*[7]

**B. NRS 608.016 Only Applies to Trial / Break-In Periods.[8]**

Plaintiff's opposition to Amazon's motion with respect to NRS 608.016 is predicated on the false assertion that the statute is unambiguous and, thus, needs no interpretation. (Dkt. 23 at 18). Regardless of Plaintiff's counsel's advocacy-based certitude, NRS 608.016 does not define "pay to the employee wages for each hour the employee works"; i.e. does not define what it means to pay the employee for each hour they worked. Critically, NAC 608.115 expressly allows employees to be paid on piece-rate which is, by definition, *not* paying them by the hour and an inefficient piece-rate worker could very well not complete a "piece" in an hour. Under Plaintiff's reading of 608.016, that employee has not been paid "for each hour worked" even though Nevada law plainly authorizes paying them by the piece. NRS 608.016 cannot unambiguously mean what counsel asserts without running afoul of piece-rate law and the remainder of Nevada's statutory scheme. The statute is ambiguous.

In interpreting the law, the Court has "a duty to consider the statute[s] within the broader statutory scheme harmoniously with one another in accordance with the general purpose of those statutes." *Neville v. Eighth Jud. Dist. Ct. in & for Cty. of Clark*, 133 Nev. 777, 783 (2017). "[W]hen possible, any conflict is [to be] harmonized." *Doe Dancer I v. La Fuente, Inc.*, 481 P.3d 860, 871 (Nev. 2021) (citation omitted). NRS 608.016 must be read in light of its purpose, which was to address the situation where companies made agreements with workers to have an unpaid trial period and would

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issue in that case. Moreover, as respects the Portal-to-Portal Act, the *Perez* court specifically discussed *Steiner, Busk*, and the FLSA in making its finding that the covid screenings were not integral and indispensable to the plaintiff's job duties. *Id.* at *3-4.

[7] Note, the DOL guidance is just that, guidance, and not a regulation. Its assertion that employees must be paid for screenings if they are "necessary" is contrary to *IBP* and is entitled to no deference.

[8] The issue regarding NRS 608.016 only applying to trial and break-in periods is briefed and currently pending decision from the Nevada Supreme Court in *Martel v. HG Staffing, LLC*, Nevada Supreme Court Case No. 82161.



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terminate their services without ever paying them. (Dkt. 22 at 14). Such a situation would evade a breach of contract claim and minimum wage/overtime laws as the person was not an employee. NRS 608.016 ensures that person will be paid. Once past that stage, Nevada law passes questions about pay over to minimum wage and overtime law as those laws ensure that employees are paid sufficiently for the hours they work.[9] On the face of the FAC, Plaintiff was paid well more than minimum wage even adding in the time spent in Covid screenings and assuming it was compensable. That is, he was paid for each hour worked.

**C. On the Face of the Complaint, Plaintiff Was Paid Minimum Wage.**

Plaintiff argues that the Minimum Wage Amendment ("MWA") to Nevada's Constitution does not allow for the "workweek method," citing to *Porteous v. Capital One Servs. II, LLC*, 809 F. App'x. 354 (9th Cir. 2020) and two non-precedential decisions. (Dkt. 23 at 21). While *Porteous* is a Ninth Circuit decision, albeit unpublished, it is wrongly decided (and distinguishable) as the Court there did not consider the absurd results that not applying the workweek method leads to; i.e. did not follow Nevada law's instruction that Courts "have a duty to consider the statute[s] within the broader statutory scheme harmoniously with one another in accordance with the general purpose of those statutes." *Neville*, 133 Nev. at 783. Disallowing the workweek method results in the absurd outcome that two non-exempt employees can work the exact same number of hours and receive the exact same pay, yet one was paid minimum wage and one was not, with the sole difference between them being how they were paid. (*See* Dkt. 22 at 15-18). Likewise, disallowance of it leads to two non-exempt employees, working the same hours for the same pay, with one having a claim for unpaid overtime and the other not, again based solely on how they were paid. (*Id.*) Plaintiff offers no argument to the contrary. More importantly, he fails to articulate how such an outcome could be proper under Nevada law.

**D. Plaintiff Has Not Sufficiently Pled a Claim for Overtime.**

"[I]n order to survive a motion to dismiss, a plaintiff asserting a claim to overtime payments must allege that she worked more than forty hours *in a given workweek* without being compensated for the overtime hours worked during that workweek." *Landers v. Quality Communications, Inc.*, 771

[9] Plaintiff's notation that the legislative history raises minimum wage (Dkt. 23 at 19) shows only that the law was intended to ensure workers were paid at least minimum wage during the break-in period.



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F.3d 638, 644-45 (9th Cir. 2014) (emphasis added). "Although plaintiffs in these types of cases cannot be expected to allege 'with mathematical precision,' the amount of . . . compensation owed by the employer, *they should be able to allege facts demonstrating there was at least one workweek in which they [were not fully compensated]." Id*. at 646 (citation omitted) (emphasis added).

Despite filing a Complaint, an Amended Complaint, and an opposition to the Motion, Plaintiff still has not identified a "given workweek" in which he was denied overtime, continuing instead to rely on generalized allegations as to what he "normally" did. Plaintiff's allegations are conclusory; counsel's denial of that fact changes nothing. The Response does not point to a single *Nevada* case holding that an overtime claim pled as he has here, passes muster. Plaintiff has failed to meet the plausibility standard set forth in *Landers.*

**E. Plaintiff's Claim for Final Paycheck Penalties Fails.[10]**

Plaintiff offers no response to Amazon's demonstration – *see* Dkt. 22 at 19-24 - that Plaintiff's claim for "late" final pay fails because the amount allegedly due to Plaintiff is unascertainable and, thus, cannot be due to him; i.e. Amazon cannot have failed to pay wages or compensation that had not "become[] due." Likewise, Plaintiff does not address how Amazon, or any employer, can take advantage of the right the law explicitly gives to an employer to cut off or cure any penalties where the amount due is unascertainable.

Instead, Plaintiff takes two approaches. First, apparently recognizing the problem posed where an employer is unable to ascertain the amount due and, thus, cannot exercise its right to cut off damages, Plaintiff asserts *without citation* that the law imposes strict liability. (Dkt. 23 at 25). In effect, Plaintiff asserts that any time a former employee makes an off-the-clock claim, or otherwise makes a claim for pay based on facts that the employer was unaware of, they are entitled to 30 days pay provided, that is, they are smart enough to wait 30 days before demanding payment. Plaintiff's assertion also amounts to a *de facto* penalty to any employer that is lucky enough to get a demand from an employee for off-the-clock work inside of 30 days, but that has the temerity to defend itself

[10] Plaintiff does not address, and thus concedes, that the Final Paycheck claim is derivative and if his first three claims are dismissed, his Final Paycheck claim must be dismissed as well. (Dkt. 22 at 19). Plaintiff, further, does not contest that he failed to plead a plausible claim for violation of Nevada law with respect to his final pay (Dkt. 22 at 24) and the Court should dismiss this claim on that basis alone.



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against that claim. Defending against that claim will necessarily stretch beyond 30 days.

Second, Plaintiff asserts that the Court in *D'Amore v. Caesars Enter. Servs.*, No. 2:18-CV-1990 JCM (VCF), 2019 WL 8128166 (D. Nev. Dec. 16, 2019) "addressed a virtually identical argument as that made by Amazon and rejected it outright." (Dkt. 23 at 25). The defendant in that matter, however, did not argue, as Amazon has, that before pay can become due it must be ascertainable; rather, the *D'Amore* defendant argued that the amount must be undisputed before it can come due. 2019 WL 8128166 at *6-7. The Court's holding is inapposite.[11]

### F. The Court Should Deny Plaintiff's "Motion for Leave to Amend."

Plaintiff filed his initial Complaint and Defendant responded by filing a Motion to Dismiss. Rather than respond to that motion, Plaintiff filed the FAC, addressing several of the arguments Defendant had raised in its motion. In effect, Plaintiff has *already* had his opportunity to address the deficiencies in his complaint. He should not be given another, especially given his apparent belief that bringing a suit is not about bringing plausible claims but, rather, about how creatively one can craft the allegations. However, should the Court provide Plaintiff with an opportunity to amend his complaint, Defendant expressly reserves the right to file what would be its third Motion to Dismiss.

## III. CONCLUSION

Amazon respectfully requests that this Court dismiss Plaintiff's Amended Complaint.

Dated: May 31, 2022

Respectfully submitted,

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[11] It is unclear why Plaintiff also cited *Fetrow-Fix v. Harrah's Entm't, Inc.*, No. 2:10–cv–00560–RLH–PAL, 2010 WL 4774255 (D. Nev. Nov. 16, 2010). The Defendant does not appear to have made any argument with respect to ascertainability.



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*Respectfully submitted,*

*/s/ Montgomery Y. Paek*

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## CERTIFICATE OF SERVICE

This is to certify that on December 23, 2024, a true and correct copy of the foregoing **JOINT APPENDIX VOL. 1** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

*/s/ Erin J. Melwak*
Erin J. Melwak
An employee at Littler Mendelson, P.C.