

# McManis Faulkner

BLOG

## Hazard Pay During COVID-19 – Who May Be Entitled And What To Do Next

April 10, 2020 | Andrew Parkhurst

The current COVID-19 crisis has many employees asking (if not demanding) that they receive additional compensation for work that may put them at an increased risk of exposure to the coronavirus.<sup>[i]</sup> Although their requests may seem reasonable to many, especially for those deemed “essential” in this crisis, an employee’s “entitlement” to additional compensation is not so clear.

### What is Hazard Pay?

Additional pay for dangerous or physically taxing work is commonly referred to as “hazard pay.” A more apt name for this type of additional compensation however may be “incentive pay.” The purpose of this increased compensation is to incentivize employees to take on “hazardous duty or work involving physical hardship.”<sup>[ii]</sup> The U.S. Department of Labor defines hazardous work as “[w]ork duty that causes extreme physical discomfort and distress which is not adequately alleviated by protective devices [and] is deemed to impose a physical hardship.”<sup>[iii]</sup> Hazard pay is also forward looking pay that provides additional compensation in advance to mitigate the impacts of potential future harm. Worker’s compensation insurance and social security disability are post-harm mitigation measures intended to compensate after a worker is injured.

The U.S. Department of Labor does not currently regulate hazard pay and does not require that employers provide hazard pay.<sup>[iv]</sup> An employee is only entitled to hazard pay either through an employment agreement, or in specific instances, where provided by statute.

### Who Typically Receives Hazard Pay?

Federal statutes establish hazard pay for government employees whose duty involves “unusual physical hardship or hazard, and for any hardship or hazard related to asbestos” in an amount not to exceed 25 percent of the employee’s basic pay.<sup>[v]</sup>

However, in order to be entitled to the hazard pay incentive, the employee’s work must not be “in a position the classification of which takes into account the degree of physical hardship or hazard involved in the performance of the duties.”<sup>[vi]</sup> Workers whose positions are already known to be hazardous would not receive additional hazard pay. The hazard entitling a federal worker to additional compensation must therefore be outside the hazards normally encompassed by the worker’s job description. With respect to COVID-19, federal employees whose job it is to work with deadly infectious diseases on a regular basis would likely not receive hazard pay under the statute.

The Office of Personnel Management (“OPM”) sets out the pay increases applicable to certain types of hazardous work for federal workers.<sup>[vii]</sup> OPM has published guidelines for federal employees during the current health crisis, reminding employees that a 25 percent hazard pay differential is authorized for employee exposure to “virulent biologicals,” defined as “work with or in close proximity to . . . [m]aterials of micro-organic nature which when introduced into the body are likely to cause serious disease or fatality and for which protective devices do not afford complete protection.”<sup>[viii]</sup> Federal statutes also provide hazard pay for specific types of work performed by federal employees and contractors. Persons who have served in the United States Armed Forces are likely aware of the numerous incentive pays available to them while on active duty.<sup>[ix]</sup>

Federal workers have brought class actions seeking hazard back pay. In one such case, employees unsuccessfully sought hazard back pay for exposure to second hand smoke in their office space.<sup>[x]</sup> Persons who contract to provide services to government agencies may receive hazard pay incentives as part of their agreements. Private contractors have brought claims for failure to pay hazard pay included in their contracts for working at U.S. Embassys in dangerous parts of the world and in combat zones.<sup>[xi]</sup> States and local municipalities often provide hazard pay incentives by statute or collective bargaining agreements.<sup>[xii]</sup> Private collective bargaining agreements with labor unions whose workers are involved in potentially hazardous work also may provide for hazard pay.<sup>[xiii]</sup>

### **What about Hazard Pay Options for Workers During COVID-19?**

Employees who have not bargained for hazard pay as part of their employment agreements or do not qualify for hazard pay under a federal or state statute are likely not entitled to hazard pay from risks imposed by COVID-19. Employees who are concerned about COVID-19 exposure, and who are demanding they receive hazard

pay, may look for other employment opportunities if their employers are unwilling to provide some form of hazard pay or other incentives for working during the health emergency. Going forward, as this pandemic continues to grow and hampers life around the globe, employers may find that hazard pay and sick leave are discussed in greater depth during the hiring process. It is foreseeable that hazard pay and sick leave become an increasingly important component to employee compensation packages.

Employers, especially those with employees deemed essential or working in fields with exposure to the public, should anticipate that employees will seek additional compensation, if they have not already. While the law may be fairly clear as to an employee's entitlement to hazard pay today, we are experiencing an evolving and unpredictable world event, and federal, state, and local laws may begin to change rapidly as the crisis drags on. Employers should consult their employment law attorneys upon receiving hazard pay requests and look for ways to be proactive with their employees. While employers may not be required to give additional pay, it may be beneficial in the long run for public relations and employee retention purposes.

---

[i] See, e.g., "Is Your Grocery Delivery Worth a Worker's Life?", Steven Greenhouse, *The New York Times*, <https://www.nytimes.com/2020/03/30/opinion/coronavirus-worker-strike.html>; "Senators Are Calling For Better Protections For Delivery Workers During The Coronavirus Pandemic," Caroline O'Donovan *BuzzFeed News*, <https://www.buzzfeednews.com/article/carolineodonovan/senators-call-for-better-protections-for-delivery-workers>; "Schumer Calls For Hazard Pay For Frontline Workers In Coronavirus Fight," Sam Gringlas, <https://www.npr.org/sections/coronavirus-live-updates/2020/04/01/825577637/schumer-calls-for-hazard-pay-for-frontline-workers-in-coronavirus-fight>; Online proposal by Uber and Lyft drivers requesting that the companies (1) pay all their drivers in hard economically hit cities hazard pay for hours driven during this national pandemic, (2) stop taking fees on rides the drivers complete during the pandemic, or (3) change the requirements for sick leave pay for drivers who desire to "self-quarantine," <https://www.change.org/p/uber-hazard-pay-for-rideshare-drivers>.

[ii] Defining Hazard pay, United States Department of Labor, <https://www.dol.gov/general/topic/wages/hazardpay>

[iii] *Id.*

[iv] *Id.*

[v] 5 U.S.C. § 5545.

[vi] *Id.*

[vii] *See id.*; 5 C.F.R. § Pt. 550, Subpt. I, App. A (establishing hazard pay incentives for: exposure to hazardous weather or terrain, exposure to physiological hazards (including “virulent biologicals”), work in fuel storage tanks, fight fighting, underwater and underground work, sea duty aboard deep water research vessels, work collecting aircraft approach and landing environmental data, work done at a height over 50 feet, work involving flying and experimental parachute jumps, work required beneath a hovering helicopter, and “work outdoors in undeveloped jungle regions.”).

[viii] U.S. Office of Personnel Management Questions and Answers on Human Resources Flexibilities and Authorities for Coronavirus Disease 2019 (COVID-19), published by the Office of Personnel Management, March 7, 2020.

[ix] Those serving in proximity to warzones receive combat pay, aircrews are entitled to hazardous duty incentive pay, submariners earn “sub-pay,” and others receive special incentive pays for serving in austere and remote locations often called “hardship duty pay. *See, e.g.*, 37 U.S.C. § 301 *et seq.*, Defense Finance and Accounting Service, Pay/Special Pay/Allowance Tables, <https://www.dfas.mil/militarymembers/payentitlements/Pay-Tables/CZ1.html>. For an example from case law, commissioned and non-commissioned medical workers employed by the U.S. Health Service were likely entitled to hazard pay winning reversal on appeal of a dismissal of their case seeking hazard back pay for work they had done with leprosy patients. *Levy v. Urbach*, 651 F.2d 1278 (9th Cir. 1981).

[x] *Adair v. U.S.*, 497 F.3d 1244 (Fed. Cir. 2007).

[xi] *See, e.g. Redwine v. PAE Government Services, Inc.*, 2007 WL 9724940 (D. Ariz., July 11, 2007, No. CV-07-0671-PHX-SRB) (Contractor working at U.S. embassy in Afghanistan as an electrician under a one-year agreement that called for a monthly salary of \$6,000 plus 25% of his monthly salary in hazard pay); *Dalkilic v. Titan Corp.*, 516 F. Supp. 2d 1177 (S.D. Cal. 2007) (Turkish citizens contracted to work with the U.S. military to provide linguistic and interpretive services in Turkey, and later during the Iraq War in 2003, sued employer seeking enforcement of promises to provide hazard pay).

[xii] *Officers for Justice v. Civil Service Com'n of City and County of San Francisco*, 688 F.2d 615 (9th Cir. 1982) (motorcycle police officers received hazard pay above base salary for time served on duty without a partner in a solo capacity); *Morgan v. Bd. of Pension Comrs.*, 85 Cal. App. 4th 836 (2000) (hazard pay for police officers “assigned to a division or other organizational component which works in the field in uniform,” referred to as Uniform Field Assignment Incentive pay).

[xiii] *Garage Maint., Mach. Warehousemen, Repairmen, Inside Men & Helpers & Plastic Employees, Local No. 974 v. Greater Metro. Auto. Dealers Ass'n of*, 747 F.3d 527, 530 (8th Cir. 2014) (union technicians

working on Toyota Prius hybrid cars received incentive pay as part of their collective bargaining agreement because such was considered “especially difficult and dangerous”).

---



### **ABOUT THE AUTHOR**

**Andrew Parkhurst**

Andrew represents clients in general civil litigation. As a former officer in the United States Navy and a civil engineer, his background gives him a special perspective on legal and business matters.

---

©2020 McManis Faulkner