

# FYI<sup>®</sup>

## For Your Information<sup>®</sup>

### **It's in the bag! California employers on the hook for security checks**

On February 13, the California Supreme Court held that the time nonexempt employees spend waiting for, and undergoing, mandatory security screenings is compensable as “hours worked” under state law. Employers that conduct on-site bag checks or other security screenings should immediately re-examine their current policies and pay practices to ensure compliance.

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#### **Background**

The federal Fair Labor Standards Act (FLSA) generally requires covered employers to pay nonexempt employees a minimum wage for the hours they work and at least time-and-a-half for hours worked in excess of 40 in a workweek. It does not require employers to pay for time spent on activities before or after the employee’s regular working hours unless they are an integral part of the employee’s principal job activities. In *Busk v. Integrity Staffing Solutions, Inc.*, the Supreme Court unanimously held that post-shift security screenings are not part of the workday and are not compensable time under federal law. (See our [December 11, 2014 FYI](#).)

California’s Industrial Welfare Commission (IWC) establishes minimum state requirements with respect to wages, hours, and working conditions through industry- and occupation-wide wage orders that often exceed the FLSA’s. IWC Wage Order 7 requires employers to pay California employees a minimum wage for all “hours worked” — but defines hours worked as “the time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.”

#### **Exit searches**

Apple retail store employees are required to undergo package and bag searches after clocking out but before leaving the store premises for any reason (such as breaks, lunch, and end of shift). Employees have to find a manager or security officer to screen them, open all bags, remove personal

electronic devices (such as iPhones) and other items for inspection, and remain on the premises during the search. Employees estimated they generally spend five to 20 minutes waiting or undergoing an exit search, with occasional wait times of up to 45 minutes. Employees are not paid for this time.

### Legal challenge

Nonexempt Apple employees brought a federal class action challenging the policy, claiming that time spent waiting for and undergoing post-clock-out exit searches is work time and must be compensated under California law. A class that consisted only of employees who brought a bag to work “merely for personal convenience” was certified. The trial court sided with Apple, finding that the exit searches were not compensable since employees could avoid them simply by choosing not to bring bags or personal devices to work. On appeal, the U.S. Court of Appeals for the 9<sup>th</sup> Circuit asked the Supreme Court of California to decide the following question of California law:

“Is time spent on the employer’s premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees compensable as “hours worked” within the meaning of Wage Order 7?”

### California Supreme Court weighs in

On February 13, the California high court unanimously held in *Frlekin, v. Apple Inc.* that the time nonexempt employees spend waiting for and undergoing required bag searches or other security checks at work is compensable. According to the court, Wage Order 7 requires those employees to be paid for “hours worked” — the time during which they are either:

- Subject to their employer’s control regardless of whether they have to work during that time
- Suffered or permitted to work whether or not under the employer’s control, provided the employer knows or should know of the employees’ work

In analyzing the compensability of time spent waiting for and undergoing Apple’s exit searches, the court focused solely on the wage order’s employer control prong. While acknowledging that an employee’s choice to bring bags to work purely for personal convenience is a consideration in assessing whether mandatory or routine security screenings are on the clock, the court made clear that it is not the only one. It identified a number of factors that may and should be considered in determining whether activities are compensable — including the mandatory or optional nature of the activity, its location, the degree of employer control, whom the activity primarily benefits, and whether the activity is enforced through disciplinary measures.

In applying these factors, the court found that Apple’s on-site exit searches are required as a practical matter, imposed mainly for the company’s benefit as an integral part of its loss prevention plan, prevent employees from leaving its premises with their personal belongings until they undergo a bag check, and are enforceable by disciplinary action. Concluding that employees are clearly under

Apple’s control while waiting for and undergoing exit searches, the court held that the time spent in those security checks qualifies as compensable “hours worked” in California.

Having decided that plaintiffs are entitled to compensation under Wage Order 7’s control clause, the court did not decide whether the searches would be compensable under the “suffered or permitted to work” clause. Importantly, the court held that its ruling applies retroactively.

## In closing

In view of the widespread use of mandatory bag or other security screenings in today’s workplaces, the California Supreme Court’s decision can be expected to have far-reaching implications, particularly for employers in the retail and certain other industries. Because the ruling applies retroactively, employers that conduct on-site bag checks or other security screenings should immediately review their current policies and pay practices to ensure employees are properly compensated under California law.

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