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PERSPECTIVE

# What security screenings ruling means for California

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Does the Federal Labor Standard Act (FLSA) require employers to compensate employees for the time spent on all actions required by employers? Based on recent lower court decisions, many employers may understand the answer to be "yes." Not so, ruled a unanimous U.S. Supreme Court in *Integrity Staffing Solutions Inc. v. Busk*, 2014 DJDAR 16194 (Dec. 9, 2014). The court concluded that Integrity Staffing Solutions Inc. is not required by the FLSA to pay its employees for time spent going through mandatory security screenings when exiting warehouses after their shifts.

Jesse Busk and Laurie Castro, employees of Integrity Staffing, a temp agency that helps staff Amazon.com Inc. warehouses in Nevada, claimed that Integrity had to pay its employees for the time spent at the end of each workday waiting for and undergoing security screenings after their shifts. It was alleged that the workers were paid hourly wages to fill customer orders and package them to ship, but after clocking out at the shift change, the workers had to wait in line for an average of 25 minutes, as some 1,000 workers were processed through two security screening machines to detect and deter theft.

Before the Supreme Court, however, was not the time spent, but the function being performed, and the interpretation of the 1947 amendment to the FLSA, the Portal-to-Portal Act, which says that companies need not pay for "preliminary" or "postliminary" activities, meaning activities that take place before and after the workday. The Supreme Court interpreted the law in 1956 in *Steiner v. Mitchell*, 350 U.S. 247, 248 (1956), to require pay only for tasks that are an "integral and indispensable part of the principal activities for which covered workmen are employed." So the issue before the court in *Busk* was whether the employee's time spent waiting to undergo and undergoing post-shift security screenings to detect thefts was an integral or indispensable part of the work being performed.

At trial court level, U.S. District Judge Roger L. Hunt of the District of Nevada had granted Integrity's motion to dismiss, finding the time was not compensable as a matter of law. The 9th U.S. Circuit Court of Appeals reversed and, in interpreting the Portal-to-Portal Act, allowed the Nevada case to proceed, finding that screenings were for the company's benefit and were a necessary part of the employees' jobs. That was enough, the 9th Circuit reasoned, to make the screenings "integral and indispensable."

The Supreme Court disagreed and reiterated that an activity required by an employer to be performed is only compensable if the activity is the sort of work: (1) that an employee is employed to perform; and (2) that an employee cannot avoid doing while still doing the job. Given the jobs being performed by the Integrity workers, i.e., retrieving products from warehouse shelves and packaging them for shipment, the court determined that the time spent going through security screenings was neither the sort of work these employees were employed to perform nor work these employee could not avoid doing while still doing their job.

Writing for the court, Justice Clarence Thomas was mindful not to disturb precedent where time spent before or after work was compensable. The opinion noted that some employees must perform activities before and after their shifts to perform their actual work safely and effectively, such as battery plant workers who don and doff protective gear before and after a shift to shield themselves from toxic chemicals. While such employees could ostensibly perform their job duties without such gear, they could not do so safely and effectively. Similarly, meatpacker employees' time spent sharpening their knives is compensable because of safety and efficiency concerns. By contrast, the opinion noted poultry-plant employees' time spent waiting to don and doff protective gear — as opposed to compensable time spent actually donning and doffing — was noncompensable because it was "two steps removed from the productive activity on the assembly line." Security screenings are similarly noncompensable, Thomas wrote, because "Integrity Staffing could have eliminated the screenings altogether without impairing the employees' ability to complete their work."

Notably, the Supreme Court disagreed with the 9th Circuit's emphasis that the work should be compensated because "an employer required a particular activity." The district court had relied on 2nd and 11th Circuit opinions holding that security screenings at a nuclear power plant and on an airport construction project were noncompensable. The 9th Circuit distinguished the out-of-circuit precedent because in those cases the screening was required for all who entered the workplace and, in the latter case, was dictated by a government regulation that the employer followed. In reversing the 9th Circuit, the Supreme Court reasoned that if the "test" could be satisfied by an employer requiring an activity, "it would sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address."

Justice Sonia Sotomayor joined the unanimous opinion, but added a concurrence to stress the case's limited breadth. Activities related to worker efficiency and safety were compensable, she wrote, but in the warehouse case before the court, "employees could skip the screenings altogether without the safety or effectiveness of their principal activities being substantially impaired." Sotomayor also wrote that the Portal-to-Portal Act was "primarily concerned with defining the beginning and end of the workday," whereas the "searches were part of the process by which the employees egressed their place of work, akin to checking in and out and waiting in line to do so." Such activities were noncompensable under the FLSA. Justice Elena Kagan joined Sotomayor's concurrence.

**Impacts post-*Busk*?**

Although Congress might try to amend the law so such post-work activities are compensable, it is unlikely. The Obama administration sided with the temp agency. Curtis E. Gannon, a lawyer for the federal government, told the justices that exit screenings were not covered by the 1947 law.

While this is good news for Integrity, employers would be wise to think carefully about whether their employees' pre- and post-shift activities are compensable under *Busk*. Whether time spent pre- and post-shift is compensable under the FSLA hinges on whether the activity is sufficiently connected to the work the employee is employed to perform, and this analysis is reviewed on a case-by-case basis. California private employers would also be smart to note that *Busk* only interpreted the FLSA, rather than the much more employee-friendly California wage and hour laws. How *Busk* will reverberate in courts applying California law is yet to be seen, and *Frlekin et al v. Apple Inc.*, a bag check case pending in the U.S. District Court for the Northern District of California, contains FLSA, New York Labor Law and California Labor Code causes of action. That case had been stayed pending the *Busk* decision, and it will now be watched closely by many as it may be the first of many cases to grapple with *Busk* expressly finding that compensable work is not merely defined by an employer requiring the activity.

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