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U.S. Supreme Court: Antitheft Security Screening Not Part of the Job for FLSA Compensation Purposes

By Neil Alexander, Rick Roskelley, and Cory Walker

Employers across the country are breathing a sigh of relief following the December 9, 2014 unanimous ruling of the U.S. Supreme Court that time spent by warehouse workers waiting for and undergoing antitheft security screening is not compensable time under the Fair Labor Standards Act (FLSA). *Integrity Staffing Solutions, Inc. v. Busk et al.*, No. 13-433. The opinion is of significant import for many of the nation's largest employers, as security screening and bag checks have become an increasingly ubiquitous part of an employee's ingress and egress to and from work. Indeed, the significance of this ruling is underscored by the spate of class-action suits that were filed after the U.S. Court of Appeal for the Ninth Circuit's determination in *Busk et al. v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525 (2013), which held that such time could be compensable under the FLSA. Like the *Busk* litigation, the suits that followed the Ninth Circuit's ruling have been brought by employees seeking back-pay for time spent in security screening, and represented massive potential liability. Justice Thomas authored the majority opinion that reversed the Ninth Circuit's holding in *Busk* with a concurring opinion authored by Justice Sotomayor and joined by Justice Kagan.

The case that spawned the Supreme Court's decision, *Busk v. Integrity Staffing Solutions*, No. 2:10-cv-1854 (D. Nev. Dec. 15, 2010), was brought against defendant Integrity Staffing Solutions, Inc. by the plaintiffs, warehouse workers employed by Integrity Staffing to work in Amazon.com fulfillment centers locating and preparing merchandise for shipment to Amazon.com customers. After clocking out at the conclusion of their shifts, the plaintiffs would exit the warehouse, passing through a security check that required them to remove items such as wallets, keys, and belts and pass through a metal detector. The plaintiffs claim that they, and workers like them across the country, should be paid for the security screening time. The Supreme Court, however, disagreed.

The Court's ruling clarifies its precedent regarding tasks that are excluded from compensable work time by virtue of their being preliminary or postliminary to an employee's principal activity under the Portal-to-Portal Act. Specifically, the Court explained that it had consistently held that the term "principal activity" is expansive enough to encompass not only those tasks an employee is employed to perform, those that are obviously principle activities, but also tasks that are an "integral and indispensable" part of the principal activities. The Court went on to explain that because the words "integral" and "indispensable" are to be given their plain and ordinary meanings, an activity is integral and indispensable to the principal activities only "if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

The Court reasoned that warehouse workers are not hired to undergo security screening and that such screening is not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment. That is, the Court explained, warehouse workers are just as able to perform the activities for which they are employed without the screenings as they are with them. The Court concluded, therefore, that security screenings performed after the conclusion of the plaintiffs' shifts were not integral and indispensable to their principal activities as warehouse workers and the time spent undergoing the screenings is not compensable under the FLSA.

The Court took specific issue with the Ninth Circuit's interpretation of the "integral and indispensable" test, saying that it erred by focusing on whether the particular activity at issue was required by the employer. Indeed, as the Court pointed out, if it were enough to merely show that a particular task was required by the employer to satisfy this test, it would nullify the Portal-to-Portal Act, "sweeping into 'principal activities' the very activities [that Act] was designed to address."

What This Means for Employers

The Supreme Court's decision helps to clarify the principles used to determine what constitutes a compensable activity, adding much needed focus to the legal discourse that had gone far afield with the Ninth Circuits decision in *Busk*. However, litigation will certainly continue in this area due to the need for clarity with regard to which elements of productive work are actually indispensable or an intrinsic element, leaving the legal profession to argue over the difference between the time it takes a butcher to sharpen her knives or the time it takes a battery plant worker to don protective gear (two tasks that have been deemed compensable, and the time a poultry-plant employee spends waiting to don his protective gear (a task deemed noncompensable, being two steps removed from the productive work). Indeed, Justice Sotomayor's concurring opinion seems primarily directed at offering some further guidance as to what constitutes indispensability, explaining that in her view, the term must signify a task that is required not just for the productive work to actually be performed, but to be performed "safely and effectively."

While the Supreme Court's decision finds the time spent in security screenings is not compensable under the FLSA, the result may be different under state wage and hour laws. Prudent employers should check with their counsel before relying on the decision in states that have their own wage hour laws.

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