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Busk Leaves Open Many Compensability Questions

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On Dec. 9, the U.S. Supreme Court ruled in Integrity Staffing Solutions v. Busk that the time spent waiting to undergo and undergoing security screenings is not compensable under the Fair Labor Standards Act.

The case involved hourly temporary staffing agency warehouse workers who retrieved products from warehouse shelves and packaged the products for delivery to Amazon.com customers. Before leaving the warehouse each day, workers were required to undergo a security screening, which involved removing wallets, keys and belts and passing through metal detectors.

Two hourly warehouse employees in Nevada filed a putative class action alleging that they were entitled to compensation under the FLSA and Nevada labor laws for the time spent waiting to undergo and undergoing the security screenings, which they claimed took roughly 25 minutes each day. The workers also alleged that because they were conducted to prevent theft, the security screenings were solely for the benefit of the employer and Amazon's customers. Lastly, the workers alleged that Integrity Staffing could have reduced the waiting and screening time to a de minimis amount by adding more screeners or by staggering the termination of shifts.

The district court dismissed the complaint for failure to state a claim, holding that the time spent waiting for and undergoing the security screenings was not compensable under the FLSA. The U.S. Court of Appeals for the Ninth Circuit reversed in relevant part. Reversing the Ninth Circuit, the Supreme Court unanimously held that waiting to undergo and undergoing the security screenings were not integral and indispensable to the principal activities that the workers were employed to perform, meaning such time is not compensable because it is excluded from compensation by the 1947 Portal-to-Portal Act amendment to the FLSA.

Congress enacted the Portal-to-Portal Act to exempt employers from liability for "activities which are preliminary to or postliminary to said principal activity or activities," among other things.

The court reasoned that the employees were not hired to wait in security lines, and the postshift activities at issue were not intrinsic to the job the employees were hired to do, i.e., retrieve products from shelves. In other words, Integrity Staffing could have eliminated the screenings altogether without impairing the employees' ability to complete their work.

The court rejected the argument that Integrity Staffing could have decreased the time for waiting and screening, noting that it was more properly presented at the bargaining table, not to a court.

While the court's decision settles the compensability of security screenings, it leaves many open questions about the compensability of pre- and postshift activities generally, including how the lower courts should apply the Supreme Court's decision in other contexts.

Test Ejected

Before the court's ruling, most lower courts had adopted a three-part test for determining the compensability of pre- and postshift activities, which looked at whether the activity is required by the employer, necessary to the employee's principal activities and for the primary benefit of the employer.

The Supreme Court seems to have implicitly rejected this three-part test, however, since it criticized the Ninth Circuit for focusing on whether Integrity Staffing required the security screening or benefited from them. Instead, the Supreme Court held that the relevant inquiry is whether the activity is "intrinsic" to the job being performed, but provided little direction to the lower courts on what that means.

Justice Sonia Sotomayor's concurring opinion provides more clarity as to when such activities are compensable, setting out the test as whether the pre- and postshift activities allow the employee to perform his tasks safely or more effectively, and noting that mere ingress and egress activities are precisely what Congress meant to carve out by the Portal Act. But while Sotomayor notes that her concurrence is intended to elucidate her understanding of the test set out by the court, it nevertheless was joined only by Justice Elena Kagan.

Notwithstanding these open questions, Busk is a win for employers. Just as the 2014 decision in Sandifer v. U.S. Steel and the 2012 decision in Christopher v. SmithKline Beecham, which respectively addressed issues related to donning/doffing in unionized facilities and the outside sales exception for pharmaceutical companies, Busk furthers the Supreme Court's recent trend of taking cases to refine specific contours of the FLSA in a manner favorable to employers. How far the lower courts will push the boundaries set forth in Busk, however, remains to be seen.