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# Sometimes, it takes work to leave work

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An Amazon employee at their Fernley, Nev., warehouse, Dec., 1, 2008.

Must employers pay for time employees spend leaving work if they cannot depart until they pass a security screening to prevent and detect theft? The U.S. Supreme Court is currently mulling this issue after hearing oral argument in early October in *Integrity Staffing Solutions Inc. v. Busk*. The case has implications in many employment settings where security screenings abound, including retail stores, airports, prisons, shipping ports and warehouses. But given the significant difference between California's definition of compensable work time and that of the federal Fair Labor Standards Act, it is unclear what implications, if any, the Supreme Court's ultimate decision will have in California workplaces.

The complaint in *Busk* was brought on behalf of nonexempt workers employed by Integrity Staffing and assigned to work filling customer orders in Amazon warehouses in Nevada. It alleged that after clocking out, workers were required to pass through security screening that involved waits of up to 25 minutes and entailed the removal of wallets, keys and belts, and then passing through metal detectors. The plaintiffs claimed that under the FLSA, they had a right to compensation for this time, because it was employer-required and benefitted the employer.

Under the FLSA, specifically the 1947 Portal-to-Portal Act amendments, time spent in so-called preliminary or postliminary activities is generally noncompensable, as is any time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity [the] employee is employed to perform." 29 U.S.C. Section 254(a). But if the preliminary or postliminary activities are "integral and indispensable" to an employee's principal activity, they are part of the principal activity and compensable. *Steiner v. Mitchell*, 350 U.S. 247, 332 (1956). For example, in *IBP v. Alvarez*, 546 U.S. 21 (2005), the Supreme Court determined that donning and doffing protective equipment in a meat packing plant is a principal activity, but time spent in line waiting to don and walking out of the plant after doffing is not.

Concluding that the security screenings in Busk were "postliminary activities" unrelated to the employees' principal work activity, the district court dismissed the complaint. The plaintiffs fared better on appeal. The 9th U.S. Circuit Court of Appeal reversed and held the time compensable, reasoning that the security clearances "are necessary to employees' primary work as warehouse employees and done for [the employer's] benefit." *Busk v. Integrity Staffing Solutions Inc.*, 713 F.3d 525 (9th Cir. 2013).

Hence, to the Supreme Court. Its grant of certiorari has resulted in strange bedfellows, with the U.S. solicitor general appearing as amicus on behalf of the employer, Amazon. The basic thrust of Amazon's argument, echoed by the solicitor general, is that time spent in screenings is simply time spent leaving work, and thus not compensable under the Portal-to-Portal Act. The workers, on the other hand, assert that because the screenings are required by the employer and benefit the employer, they constitute a compensable principal work activity. While this approach to FLSA compensability found a warm reception in the 9th Circuit, the Supreme Court was decidedly cool at oral argument. Indeed, a benefit-to-the-employer inquiry has not figured previously in the Supreme Court's analysis under the Portal-to-Portal Act. Judging from the comments of the justices at oral argument, they are unlikely to expand the test of compensability to include it.

Why should California employers care? California's definition of compensable work time is materially different and more expansive than the FLSA's, encompassing all time during which an employee is subject to the control of the employer. E.g., Wage Order 1-2000 Section 2(H). The FLSA, on the other hand, ignores the concept of employer control, looking only to whether the employee is suffered or permitted to work and clarifying what is *not* work under the Portal-to-Portal Act. Under California's employer-control test, an activity required by the employer is automatically compensable. As such, the security screening time at issue in *Busk* would likely be compensable had the Amazon warehouse been located in California: The employer requires the screening and employees cannot leave without undergoing it. For this reason, it is doubtful that the Supreme Court's ultimate disposition of the case will provide helpful guidance to California employers.

Instead, the question under California law may well be what entity is requiring the security screening and/or whether all individuals are required to undergo it or only employees. At airports, for example, security screening of all entrants is mandated by federal law, not the employer operating a coffee concession in the terminal. At prisons, security screening of all entrants is likewise mandated by state regulation, not the contractor providing educational services to inmates. On the other hand, security screenings at stores and warehouses are clearly employer mandates applicable only to employees, and may well result in the time being spent in the process being compensable under California law. What can be said definitely, however, is that as security procedures proliferate, we can expect to see more wage and hour class actions in this area, regardless of the outcome in *Busk*.

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