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***INTEGRITY STAFFING SOLUTIONS, INC. V. BUSK* - EMPLOYERS NEED NOT PAY FOR END-OF-SHIFT SECURITY CHECKS UNDER THE FAIR LABOR STANDARDS ACT**

By Tom Geidt

The U.S. Supreme Court ruled on December 9, 2014, that an employer was not required to pay its employees under the Fair Labor Standards Act ("FLSA") for the 25 minutes or so they spent passing through a security screening at the end of their shift. The Court's decision in *Integrity Staffing Solutions v. Busk* was unanimous, reversing a decision issued by the Ninth Circuit in early 2013. The Supreme Court's decision is a major victory for employers.

The Court's Holding:

The two named plaintiffs in *Busk* were employed at warehouses in Nevada, retrieving products from warehouse shelves and packaging them for delivery to Amazon.com customers. Plaintiffs were employed by an Amazon security vendor, Integrity Staffing Solutions. At the end of each shift, Integrity Staffing required its employees to pass through a metal detector to check for theft. Plaintiffs alleged that the total process, including the time they spent waiting in line, took roughly 25 minutes each day. Plaintiffs filed a class and collective action under the FLSA and Nevada state law, alleging that Integrity Staffing should have paid them for this time.

The Supreme Court addressed only Plaintiffs' federal claim under the FLSA, not their claim under Nevada law. Specifically, the Court decided the case under the Portal-to-Portal Act, which was passed in 1947 as an amendment to the FLSA. Prior to 1947, courts had found employers liable for travel time and other activities that were essentially part of the ingress and egress process. Congress passed the Portal-to-Portal Act in response to these decisions, making it clear that most pre-shift ("preliminary") and post-shift ("postliminary") activities are *not* compensable under federal law, unless they are "integral and indispensable" to the "principal activity" that the employees were hired to perform. This "integral and indispensable" test has been the source of much confusion over the years.

The Court's decision in *Busk*, authored by Justice Clarence Thomas, clarified that an activity is "integral and indispensable" to the principal activities that an employee is employed to perform "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." Applying this new test, the Court held that the security screening time and related waiting time were not compensable.

The Court reasoned, first, that going through a security check was not the "principal activity" the warehouse workers were hired to perform. Rather, they were hired to retrieve inventory and package it for shipment. The Court further held that the security screenings were not "integral and indispensable" to the employees' duties as warehouse workers. According to the Court, the security screens were not "an intrinsic element" of retrieving products from warehouse shelves or packaging them for shipment. Moreover, they were not "indispensable" to the principal activity, because Integrity Staffing could have "eliminated the screening altogether without impairing the employees' ability to complete their work." The Court's holding applied both to the time employees spent passing through the metal detector as well as any related time waiting in line.

Plaintiffs argued nonetheless that this time should be compensated because (1) the security screenings were mandatory; (2) the screenings were primarily for the benefit of the employer, not for the benefit of the workers; and (3) the total time at issue was significant in duration – roughly 25 minutes each day. Plaintiffs further alleged that the employer could have shortened this to some *de minimis* amount of time by hiring more security personnel or staggering the end times of the shifts.

The Supreme Court rejected all of these arguments. According to the Court, it is immaterial that the employer *required* the activity; such a test would sweep into "principal activities" the very activities that the Portal-to-Portal Act was intended to address, such as walking "from a timeclock near the factory gate to a workstation." A test that turns on whether the activity is for the "benefit of the employer," the Court said, is similarly overbroad. Finally, the Court was unpersuaded that the length of time spent in the activity – 25 minutes – made it compensable, or the fact that that the employer could conceivably have reduced the time by making operational changes. As the Court found, such factors do not change "the nature of the activity or its relationship to the principal activities that an employee is employed to perform."

What This Means for Employers in California and Elsewhere:

This is a welcome decision for employers. Currently, the courts are flooded with "off-the-clock" claims – many involving security checks and others involving other pre-shift and post-shift activities of one kind or another. The *Busk* decision likely will result in the dismissal of the security screening cases to the extent they have been brought under federal law – or state laws around the country that follow the FLSA – unless a case contains distinguishing facts that would somehow compel a different result.

The California Wage Orders provide that employers in some industries, such as the healthcare industry, are governed by the FLSA definition of hours worked. *Busk* will be extremely helpful to employers in these industries.

Most employers in California, however, are governed by a broader definition of compensable "hours worked." Under the prevailing definition, "hours worked" means "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." *See, for example*, section 2(K) of Wage Order No. 4. California does not have its own Portal-to-Portal Act, expressly excluding many pre-shift and post-shift activities from an entitlement to pay.

For most employers, therefore, *Busk* will not be dispositive on whether time spent undergoing a security check, or related time waiting in line, is compensable time under California law. Plaintiffs' lawyers in California, citing the control test, undoubtedly will continue to argue, despite *Busk*, that time spent in security screenings and other pre- and post-shift activities, should be compensated. Nonetheless, there is reason to hope that *Busk* will provide positive momentum for employers that are defending these cases under California law, and that the courts will reach the same result under the California standard.

Employers who have questions about the *Busk* decision, and its effect on their operations in California and elsewhere, should feel free to contact us.