

# DON'T FORGET STATE LAW: WHY BUSK DOES NOT SAVE ALL RETAILERS

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Expansion is the lifeblood of a growing business. But with expansion comes a diverse landscape of state laws governing all aspects of the employment relationship. It is vital when entering new jurisdictions to understand the specific laws that will govern your business and may require change to operational practices. Many states have robust and unique employee protections above and beyond federal law, and recent litigation over a common retailer practice drives the state-law versus federal-law dichotomy home.

## **The Practice In Question**

As part of their loss prevention programs, many retailers conduct routine bag checks of employees' handbags, backpacks, and shopping bags before the employees leave the store on breaks and at the end of shifts. Such checks are performed to deter and prevent employee theft.

The bag-check process often takes very little time, but some workers complain that the process can take over 10 minutes if they have to wait—either in line behind coworkers, or for a manager to finish helping with a customer. Employees who are required to clock out prior to getting their bag checked have argued that they are being deprived of wages and, in applicable

## **Service Focus**

Wage and Hour

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## **Industry Focus**

Retail

cases, overtime premium pay, for the additional waiting time.

### **Bag Checks Under Federal Law**

In December, national retailers collectively exhaled with relief when the Supreme Court decided *Integrity Staffing Solutions, Inc. v. Busk*, ruling that post-shift security “bag checks” are not compensable time under the federal Fair Labor Standards Act (FLSA). (See [Alert](#) here.)

The Supreme Court ruled that security screenings of Amazon.com warehouse workers are neither “integral” nor “indispensable,” meaning that they are not considered compensable under the FLSA’s Portal-to-Portal Act. A unanimous Court held that activities that are not necessary to fulfill an employee’s job duties may be disregarded for compensation purposes.

In the *Busk* case, the workers were employed to retrieve merchandise and prepare it for shipment. Submitting to security screenings was not part of their jobs; even if screenings were eliminated, their job duties would not be affected. The Supreme Court said that the fact that the employer required the security checks is immaterial to the determination, as is the efficiency (or lack thereof) of screening.

### **Don’t Celebrate Just Yet**

Nevertheless, a California federal district court recently granted class certification for a class of over 12,400 former and current retail store employees in an action against Apple, Inc. In a July ruling, the court agreed with the argument that bag-check time might be compensable under state law.

Although the complaint initially alleged claims that spanned several other jurisdictions (including New York, Massachusetts, and Ohio), only the California claims survived because California and federal law use different tests to determine if time is compensable.

### **How State Law Differs**

While federal law looks at whether an activity is

“integral” and “indispensable” to determine if the time spent on the activity is compensable, California law is concerned with whether the employee was subject to the “control” of his or her employer. Because of this difference, the federal Portal-to-Portal Act is not applicable under state law, and the *Busk* decision will not control the situation.

In California and other states with similar wage and hour laws, if employees are kept on the employer’s premises waiting for and undergoing mandatory security checks at the employer’s direction, that time may well be considered compensable.

### **Potential Liability For Employers**

If security checks are considered compensable time, you may face liability for unpaid wages, overtime, and meal period violations, each of which may carry statutory penalties and be the basis for costly class action suits. In states where employees can earn overtime wages if they work over a certain number of hours in a day (such as California, Colorado, and Nevada), an employee who waits an additional 10 minutes after a daily shift for mandatory security screening could be entitled to overtime premium pay for that additional time.

Additionally, if your business conducts mandatory security screenings prior to meal breaks, an employee may be considered to have been deprived of the complete meal period. A few minutes here or there can quickly escalate to significant liability if ignored.

### **Potential Solutions**

Retailers who wish to continue conducting post-shift bag checks may be able to avoid liability with a few relatively easy changes:

- If possible, the best solution is to conduct security checks before employees clock out at the end of their work day.
- Another method to diminish possible wait times is to stagger the end-times for shifts so that employees

are not required to wait in line. You may consider also setting the end-time for closing shifts later if they are currently unable to finish all security checks in the allotted time.

- Where possible, bag checks should be conducted by an employee who is not subject to the interruptions inherent in managing a retail establishment. This will help avoid employees waiting for several minutes while the manager is engaged in more urgent activities.
- Finally, you could make clear to workers that they can opt out of security screenings by not bringing any bags to work. Because employees are only subject to security checks if they bring a bag or some other container to work, you could argue that the resulting security checks are, in essence, optional. However, this argument is risky and could run counter to state or federal law, as the security checks could still be considered mandatory and are certainly in place for the employer's benefit.

### **Final Remarks**

Many states have wage and hour laws that are more onerous than federal standards. For example, 29 states and the District of Columbia have minimum wage laws calling for a higher rate than under the FLSA, and there are an assortment of distinct state laws governing overtime, meals, and rest breaks. When expanding into new states, retailers should look closely at this patchwork of laws before they leap.

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