



Employees Win Latest California Bag Check Case – But Court Leaves One Final Cliffhanger On The Compensability Of Closing Tasks

Insights

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The long-fought bag-check battle against Apple is coming to an end, and the employee class just won a major victory in California when a federal court of appeals ruled that the company must pay its workers for the time spent during mandatory anti-theft searches at the end of their shifts. Following the California Supreme Court's decision in February that concluded, among other things, that an element of employee choice whether to engage in an activity does not by itself make the time non-compensable, the 9th Circuit Court of Appeals reversed the lower court's 2014 rulings in favor of Apple and directed the trial court to enter judgment in favor of the employee class. After the September 2 decision, the only question that remains open for most California employers is whether there might exist some type of *de minimis* doctrine under California law that would permit employers to avoid paying workers for short and occasional tasks, albeit one that is more limited than the federal canon.

How We Got Here

In the last two years, there have been a three major decisions cases clarifying what counts as compensable time under most California Wage Orders. The cases all involve relatively brief tasks, regularly recurring, that typically occur at the end of a shift — security shifts and store-closing tasks. And the message from the courts is clear: the time is likely compensable, arguably even under the federal doctrine.

- July 2018: In *Troester v. Starbucks*, the California Supreme Court held that the *de minimis* doctrine does not apply in California when the regularly occurring tasks in question last several minutes per day.
- July 2019: In the companion cases *Rodriguez v. Nike Retail Stores* and *Chavez v. Converse*, the 9th Circuit Court of Appeals followed *Troester* and reversed a ruling in favor of the employers because the trial court had relied on the federal *de minimis* doctrine rejected by the California Supreme Court.
- February 2020: In an earlier ruling in this same case against Apple, the California Supreme Court, answering a question from the 9th Circuit, clarified that the time employees spend undergoing security checks at the end of their shifts is compensable time, even though they are not subject to the policy if they choose to not bring in a bag (such as a backpack or handbag).

What About The *De Minimis* Doctrine?

Each of these opinions, however, leaves open the possibility that there could be very brief and irregular tasks that are not compensable under California, or arguably, under federal law or what could be viewed as California's narrower version of the federal *de minimis* doctrine. Yesterday's decision is no exception — the employer did not raise a *de minimis* argument at the trial court level, so the appeals court declined to address it.

In fact, it may well be that the so-called rejection of the federal *de minimis* doctrine by the California Supreme Court is overstated. Even the federal doctrine applied by the U.S. Department of Labor informs workers that “your employer must count as hours worked any part, however small, of your fixed or regular working time or identifiable periods of time you are regularly required to spend on duties assigned to you.” And further, “an employer may not arbitrarily fail to count any part, however small, of working time that can be practically ascertained.” In any event, California's test for “hours worked” remains more rigorous, including all time spent by employees while under the control of the employer, whether or not they are actually working, an element lacking under the federal test.

What Should Employers Do?

As we discussed in February, employers tracking the working hours of their employees should work with legal counsel to make sure that all time, however minimal in duration or scope, is recorded and paid as compensable “hours worked” as required by these recent California state and federal decisions.

Stay updated on the latest news at our California Employers Blog and through our legal alert system. If you have any questions about this decision, or how it may affect your business, contact your Fisher Phillips attorney or one of our attorneys in our California offices.

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