California Employers Win Latest Round In Bag Check Battle

Insights
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A federal judge in California handed employers a recent victory earlier this week, dismissing a class action lawsuit brought by Apple retail store employees who wanted to be paid for the time they spend waiting for their personal bags to be checked at the end of their work shifts (Frlekin v. Apple, Inc.). Although employers won a similar victory at the U.S. Supreme Court this past summer (see our Alert here), this decision was based on California law and was not a foregone conclusion.

California employers and any other company that conducts bag checks will want to pay close attention to this decision, as valuable lessons can be learned to keep you out of legal hot water.

What Are Bag Checks?
Apple retail store employees are permitted to bring personal bags (i.e., handbags and backpacks) to work. However, if they do so, the employees are required to have their bags searched by a manager or security officer before leaving the store as a loss prevention measure. Generally, employees are required to clock out prior to undergoing the search, so the time they spend waiting is not compensable.

A group of current and former hourly-paid and non-exempt employees brought a class action lawsuit against Apple, Inc. in the Northern District of California federal court, seeking to be paid for that bag search time under California law.

When Do Employers Have To Pay?
The federal judge granted summary judgment in favor of Apple on November 7, 2015, holding that the time spent by waiting for their personal bags to be checked was not compensable time under California law. In reaching this conclusion, the court examined the definition of "hours worked" under California Industrial Welfare Commission Wage Orders 4 and 7.

These wage laws state that if employees can prove that time spent is "subject to the control of the employer," or that they were "suffered or permitted to work" by the employer, they should be compensated for that time by the employer. The *Frlekin v. Apple, Inc.* decision focused on these two factors.

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prong of California's definition of compensable time. In order to prove this element, an employee must show that the employer restrained the worker's actions, and that the employee has no plausible way to avoid the activity.

In the Apple case, the first portion was undisputed – the employer clearly restrains its employees' actions when it conducts bag checks. Analyzing California case law, though, the court found that the second element was not met.

Finding that "employee choice is dispositive," the court sided with Apple. The judge cited to two other cases to reach this decision. In the 2006 case of *Overton v. Walt Disney Co.*, the California Court of Appeal found the time spent by employees on company shuttles to and from the employee parking lot was not compensable time because the employees were not required to take the shuttle. The employees had a choice to bypass the lots altogether or use some other mode of transportation.

Similarly, in the very recent 2015 case of *Watterson v. Garfield Beach CVS LLC*, the U.S. District Court for the Northern District of California held that the time spent at an annual employee health screening was not compensable time. In that case, although the employer required the health screening, it was only mandatory if the employee voluntarily enrolled in the employer's group medical insurance program.

Similarly, while Apple required employees to have their bags checked, the requirement was triggered only when the employees exercised the option to bring their personal bags to work. Because the employees' freedom to bring their personal bags to work was an optional benefit provided by Apple, the benefit was therefore subject to the conditional bag check and not compensable time.

(Note: this decision does not contemplate special-need scenarios, when workers might be required to carry bags or other personal items because of a mental or physical disability. Although the judge invited employees with special needs who might be required to bring a bag to work to intervene in the class action lawsuit, no one did. Accordingly, the opinion applies only to bags that are voluntarily brought in by employees.)

"Suffered Or Permitted To Work"

Even if employees are not subject to the control of their employer, they still must be compensated under California law if the employer "suffered or permitted them to work." In the Apple case, the plaintiffs attempted to convince the court that any activity that benefits the employer – such as ensuring that theft was not taking place – should be considered as falling under this second prong. However, the court was unpersuaded.

Simply put, the court found that waiting for a security check and allowing a manager or security guard to look in their bags was passive activity by the employees and therefore not considered work.

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Further, though the court declined to hold that the "suffered or permitted" prong mirrors the scope of "compensable activities" under the federal Fair Labor Standards Act, it did find the U.S. Supreme Court's analysis under *Integrity Staffing Solutions, Inc. v. Busk* to be persuasive. In awaiting and being subject to bag checks, the employees were not doing anything that resembled their job duties or responsibilities. Accordingly, the court was not persuaded that they were "suffered or permitted to work."

What's Next

This decision was a step in the right direction for retail employers, but it likely is not the end of this discussion. Although this decision is a win for Apple, it is limited to future cases filed in federal district court, and state court judges might issue contrary rulings.

Further, it is specific to Apple's policies and procedures, and a court may find your own particular situation to be different enough to warrant a different outcome. Finally, it is unclear if the plaintiffs in the Apple case will appeal the court's ruling, so we could see this decision overturned in the next year or two.

If you want to lower the chances of such a claim being filed against your company, there are a few relatively easy changes you can make to your policies to minimize your legal risk:

- The best solution is to conduct security checks before employees clock out at the end of their work day, where possible.
- You can also diminish possible wait times by staggering 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.
- Finally, try to coordinate your bag checks so that they are 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.

We recommend that you consult with your employment attorney to identify the best policies and procedures for your business. If you have any questions about this decision, or how it may affect your business, please contact your Fisher Phillips attorney or one of our attorneys in our California offices.

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