9th Circuit Kicks California Security Check Case Back To Lower Court

Insights
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In a unanimous decision late last week, the 9th Circuit Court of Appeals resuscitated class claims against retail giants Nike and Converse that allege employees are owed compensation for time spent undergoing security checks when exiting the retail stores (*Rodriguez v. Nike Retail Stores, Inc.*; *Chavez v. Converse, Inc.*). On Friday June 28, the federal appellate court held that the lower district court – which had ruled in favor of the employers by applying the federal *de minimis* doctrine – needs to conduct a do-over to comply with a recent California Supreme Court decision that all but eliminates the *de minimis* doctrine based on the facts before the high court. The bar set by the courts is high; California employers may now need to pole vault in order to scale it.

The Baggage That Comes With Conducting Business In California

As a loss prevention measure, many retailers require their store employees to undergo a "bag check" or security check whenever they leave the store to confirm that are not taking any merchandise. But some employees have complained that they should be paid for the time they are required to spend during these checks, and these disputes have often ended up in court. California retail employers have seen the bag check battle waged several times over the past few years.

First, in September 2015, the U.S. Supreme Court held in *Busk v. Integrity Staffing* that post-shift security bag checks are not compensable time under the federal Fair Labor Standards Act (FLSA). This was only half of the equation for California employers, though, because the California Labor Code is stricter than the FLSA in many ways.

However, in November 2015, a federal court dismissed claims brought by a class of Apple retail store employees under California law. In *Frlekin v. Apple, Inc.*, the court applied California precedent to examine the element of control. The court found that, because Apple only required employees to undergo bag checks when they made the *choice* to bring a personal bag into the store, Apple did not exercise control over the employees during their bag checks and that the time therefore was not compensable. The question on whether that was a correct interpretation is currently pending before the California Supreme Court.

Nike And Converse Have To Sidestep Previous Successful Arguments

The arguments that succeeded for employers in *Busk* and *Frlekin* were not available to the retail employers involved in this specific dispute. That's because the class overtime claims arose under

California law, not the FLSA; and the stores had a security policy that applied to *all* employees, not a bag check policy for only those who chose to bring bags to work. So instead, they turned to a concept from federal law that had been applied favorably in California cases in the past – the *de minimis* doctrine, which is based on the common-sense principle that an employer cannot be expected to capture *all* working time ("the law does not concern itself with trifles").

After all, according to the employers' expert, the average exit inspection at Nike took between 16.9 and 20.2 seconds. 81.4 percent of inspections took less than 30 seconds, and 97.5 percent took less than two minutes. Some inspections, however, lasted up to several minutes. Nevertheless, under the *de minimis* doctrine, the lower district court found that even those scenarios were trivial and ruled in favor of the employers in September 2017.

But the California Supreme Court torpedoed employers' hopes that the *de minimis* doctrine would save them from capturing time spent on employee security checks. In July 2018, the state's highest court held in *Troester v. Starbucks Corp.* (1) that California's wage and hour statutes or regulations had not adopted the federal *de minimis* doctrine as applied to the FLSA and (2) that the general concept of a *de minimis* doctrine did not apply to required store closing procedures that regularly took between six and 10 minutes. However, it left open whether a California *de minimis* principle may *ever* apply. Specifically, the high court stated, "we do not decide whether there are circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded."

The California Supreme Court Chucks The Lower Court's *De Minimis*-Based Decision

On appeal, the employers argued that the trial court was right to dismiss the employees' claims even under the standard later established in *Troester*, since the amounts of time at issue were so insignificant – a matter of seconds – that a California version of the *de minimis* doctrine should apply. Given the facts presented by the employers in support of summary judgment, the 9th Circuit disagreed.

The court was not convinced by the employers' argument that the *de minimis* threshold should simply be one minute instead of 10. The 9th Circuit found that such an interpretation would "read far too much into *Troester's* passing mention of 'minutes'" and was inconsistent with *Troester*'s reasoning. Further, the 9th Circuit expressed doubt that the *Troester* ruling would have come out differently had the tasks the Starbucks workers were required to perform "taken only 59 seconds per day."

The 9th Circuit also reiterated employer's obligation under *Troester* to show administrative difficulty under alternative systems. The three-judge panel rejected the lower court's reasoning that the employers needed only show that it would be administratively difficult to record time using its *existing* time-keeping system. In doing so, it posited that the employees' proposed alternatives of adding fixed amounts of time to employees' paychecks, or having employees undergo inspections at the back of the store before clocking out, were viable solutions.

Accordingly, the 9th Circuit concluded that it could not affirm the lower court's grant of summary judgment for the employers, sending the issue back to the lower district court to revisit its decisions under the standard in *Troester* instead of the federal *de minimis* doctrine.

Should California Retail Employers Just Pay It?

The 9th Circuit's decision makes clear that you must clear a very high hurdle if you hope to avoid measuring and paying employees for time spent during mandatory security checks. Accordingly, if you wish to continue conducting security exit checks, you should revisit your security check policies and practices to ensure compliance with the law. You should consider the following:

- Is it possible to move time clocks near store exits and conduct security checks *before* employees clock out?
- May bag checks be conducted by an employee who is not subject to the interruptions inherent in managing a retail establishment, such as a security or loss prevention officer?
- Would an alternative method of clocking in and out, such a cell phone application or paper time sheets, be feasible in your business?

Additionally, while the 9th Circuit entertained the employee's proposal to simply add some amount of time to every employee's workday to account for time spent on the security checks, we caution you to seek legal counsel to determine what compensation strategies would best satisfy a California employer's obligation to pay for all hours worked. To identify the best policies and practices for your business, please contact your Fisher Phillips attorney or one of our attorneys in any of our California offices.

We will continue to monitor further developments and provide updates on this and other labor and employment issues affecting California employers, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information.

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