

SOUND THE ALARM: WHAT CALIFORNIA'S LATEST BAG CHECK CASE MEANS FOR YOU

Insights
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In a unanimous decision, the California Supreme Court just held that the time spent by employees waiting for and undergoing security checks of bags and other personal items is compensable time under California law, even when the policy only applies to employees who choose to bring personal items to work. However, in a bit of good news for employers, the court left some wiggle room rather than craft a bright-line test by providing a multi-factor test as to whether "onsite employer-controlled activities" must be compensated as "hours worked." In any event, this latest well-articulated decision instructs that, under the new multi-factor factor test, the element of employee choice is only one of several issues to consider when determining if the employee is subject to the employer's control for an activity and thus owed compensation for that time (*Frlekin v. Apple, Inc.*).

BAG CHECK CASES AND COMPENSABLE TIME

In California, employees in most industries must be paid for the time they are subject to the control of their employer, not just the time spent doing work. This is so because, since 1947, California has specifically departed from federal law and has provided greater protection to working employees.

Over the last several years, the question of whether the time employees spent having their bags checked at work is compensable has arisen in several different contexts, in California and across the country:

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- In late 2014, [the U.S. Supreme Court held](#) that security checks are not compensable time under federal law because they are not part of the actual workday.
- However, because California law requires employees to be compensated not only when they are working but also when they are subject to their employer's control, the trial court in this case [certified a statewide class](#) on Apple's security check policy in 2015.
- A few months later, the trial court [found in Apple's favor](#) finding that, because employees can choose whether or not to bring a bag into work, the application of the security check policy depended entirely the employees' choice.
- Last year, [the 9th Circuit Court of Appeals found that](#) the time spent on mandatory security checks at Nike and Converse stores was likely compensable under California law, since California law no longer follows the federal "de minimis" doctrine that allows employers to not compensate for tasks that take only a short amount of time.

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These bag check cases are informative because they involve a type of common activity that exists in the grey area of compensable time. Yesterday's decision provides a multi-factor test to answer the issue of bag checks specifically as "onsite employer-controlled activities." This test will help evaluate whether employees should be paid for other activities in that same grey area.

EMPLOYEE CHOICE IS NOT THE ONLY CONSIDERATION: THE NEW TEST

Apple [initially prevailed in this case](#) at the trial court level because the company's mandatory security-check policy only applied when employees chose to bring bags and other personal items into the workplace. In reaching this decision, the lower court looked at a California Court of Appeal opinion that said the time spent on an employee parking lot shuttle is not compensable time because employees have the choice whether or not to use the shuttle. In other words, because employees had a choice, they were not under their employer's control and did not need to be paid.

The California Supreme Court agreed in yesterday's decision that employee choice is *a* consideration but ruled that it was not *the only* consideration. Instead, the court provided a multi-factor test within which to analyze the employee-

choice issue. Particularly with respect to “onsite employer-controlled activities,” whether the time is compensable depends on a number of factors, which include:

- The mandatory nature of the activity;
- The location of the activity;
- The degree of the employer’s control;
- Whether the activity primarily benefits the employee or employer; and
- Whether the activity is enforced through disciplinary measures.

In the specific case before it, the Supreme Court found that the time spent on bag checks at Apple cut in favor of compensable time under several of these factors: it occurred on the employer’s premises, employees subject to the policy were prevented from leaving the premise while waiting for and undergoing the security check; it was enforced through disciplinary measures; and, rejecting Apple’s argument that security checks benefit employees, the court found that the security check policy primarily benefitted the employer as a theft prevention measure. This is a key distinction, because in the parking lot shuttle case the lower court used to justify its decision in favor of Apple, the fact pattern hinged on a service — the employee parking lot shuttle — that *primarily benefited* the employees.

WHAT NOW?

Importantly, the court held that its decision is retroactive. This means that any employers that do not pay employees for time spent on security checks should evaluate their policies under these factors and should understand that you could be facing liability for past actions.

However, employers should also note that this case extends well beyond just bag checks. It provides a key for evaluation of compensable time under California law generally. Although many activities may remain unpaid under the guidance of this decision, employers in California should nonetheless identify and evaluate any and all unpaid activities of their employees that could have any arguable relationship to their work — whether it is on-site or not.

From there, employers should work with legal counsel to evaluate the likelihood that a court could find that time as compensable “hours worked” under the new test. We’ll keep you posted on any legal developments in this area of the law, and you can 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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