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labor and employment lawflash

December 10, 2014

9-0 Supreme Court: Security Screening Time Not Compensable Under FLSA

The Court reversed the Ninth Circuit's decision and found that waiting for and passing through security screening is neither employees' principal activity nor integral and indispensable to their duties.

On December 9, the U.S. Supreme Court issued a landmark 9-0 decision holding that employees' time spent waiting for and undergoing security screening after their shifts have ended is not compensable under the Fair Labor Standards Act (FLSA). Reversing the U.S. Court of Appeals for the Ninth Circuit's decision—and consistent with the Department of Labor's position and decisions from the Second and Eleventh Circuits—the Court held that security screening was neither a "principal activity" that the workers were employed to perform nor "integral and indispensable" to their principal activities. In so holding, the Court for the first time defined what it means for a preliminary or postliminary activity to be "integral and indispensable." Invoking the "ordinary sense" of those words, the Court held that for such activities to be compensable, they must be "an intrinsic element" of the "principal activities that an employee is employed to perform" and "one with which the employee cannot dispense if he is to perform his principal activities."[1]

This decision should effectively end the onslaught of similar claims filed against a variety of companies across the United States that assert causes of action under the FLSA relating to security screening and bag checks, although claims under some states' laws could potentially remain. Furthermore, the Court's sweeping declaration that pre- or postliminary activities are compensable only if they are an "intrinsic element" of an employee's principal job duties is likely to have a broad impact on litigation involving other types of pre- or postliminary activities.

Integrity Staffing Solutions, Inc. v. Busk

Plaintiffs Jesse Busk and Laurie Castro worked for Integrity Staffing Solutions, Inc. (Integrity), which provides warehouse staffing at various Amazon.com (Amazon) fulfillment centers throughout the United States. The plaintiffs had worked as Integrity employees at Amazon fulfillment centers in Nevada. Their responsibilities were to retrieve products from shelves and package them for delivery to Amazon customers.

The plaintiffs alleged that they were required to undergo antitheft security screening after clocking out from their shifts (both before taking their lunch breaks and before leaving at the end of the day). They claimed that they and similarly situated workers were entitled to be paid for this time under the FLSA and Nevada state law. The District Court for the District of Nevada dismissed the plaintiffs' complaint for failure to state a claim, finding that waiting for and undergoing security screening was not an "integral and indispensable" part of the plaintiffs' principal job activities.

The Court of Appeals for the Ninth Circuit reversed in relevant part, finding that the plaintiffs had adequately stated a claim. The Ninth Circuit held that postliminary activities *are* integral and indispensable—and therefore compensable under the FLSA—if they are "necessary to the principal work performed" and "done for the benefit of the employer." The Ninth Circuit concluded that, because the alleged purpose of the security screenings was to

1. *Integrity Staffing Solutions, Inc. v. Busk*, --- S. Ct. ----, 2014 WL 6885951, at *5 (U.S. Dec. 9, 2014).

prevent employee theft, they were "necessary" to the employees' primary work and done for Integrity's benefit and therefore could be compensable under the FLSA.[2] What followed was a rash of copycat cases filed across the country, but especially within the Ninth Circuit, against Amazon and a host of other employers that maintained security clearance procedures.

The Supreme Court now has unanimously reversed the Ninth Circuit's decision. In an opinion by Justice Clarence Thomas, the Court first explained that the Portal-to-Portal Act amendment to the FLSA was a "swift" response by Congress to the "flood of litigation" that had been "provoked" by a prior overly broad judicial interpretation of the FLSA "in disregard of long-established customs, practices, and contracts between employers and employees."[3] The Court then addressed the exemption at issue—that "activities which are preliminary to or postliminary" to the "principal activity or activities which [an] employee is employed to perform" are *not* compensable under the FLSA.[4] Interpreting and applying that exemption, the Court reasoned that

- The words "integral and indispensable" are to be used "in their ordinary sense," announcing, for the first time, a clear test for what is integral and indispensable: "An activity is therefore integral and indispensable to the principal activities that an employee is employed to perform if it is an *intrinsic element* of those activities and one with which the employee cannot dispense if he is to perform his principal activities." (Emphasis added.) Citing dictionary definitions, the Court explained that the activity must be one that "'belong[s] to or mak[es] up an integral whole'" that is "'specifically necessary to the completeness or integrity of the whole.'" The Court distinguished from activities that are an "adjunct or appendage" to the primary job responsibilities.[5]
- The security screenings at issue were not the "principal activity or activities which [the] employee is employed to perform" because Integrity "did not employ its workers to undergo security screenings, but to retrieve products from warehouse shelves and package those products for shipment to Amazon customers."[6]
- The security screenings at issue were also not "integral and indispensable" to the plaintiffs' principal duties. The Court held that "the screenings were not an intrinsic element of retrieving products from warehouse shelves or packaging them for shipment," and Integrity "could have eliminated the screenings altogether without impairing the employees' ability to complete their work."[7]
- "The Court of Appeals erred by focusing on whether an employer *required* a particular activity. . . . If the test could be satisfied merely by the fact that an employer required an activity, it would sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address."[8]

Justice Sonia Sotomayor, joined by Justice Elena Kagan, entered a concurring opinion to state Her Honor's understanding that (i) the security screening activities were not "principal activities" that the employees were "employed to perform" because such activity was "not itself work of consequence that the employees performed for their employer," but rather was "essentially part of the ingress and egress process," and (ii) the security screening activities were not "integral and indispensable" because "employees could skip the screenings altogether without the safety or effectiveness of their principal activities being substantially impaired."[9]

Implications

Busk should effectively end the wave of FLSA litigation triggered by the Ninth Circuit's opinion—not only as to Integrity, Amazon, and related defendants, but also against other employers that conduct employee security screening or bag checks (for example, in the retail store setting). Such an end may not necessarily be complete

2. *Id.* at *3 (citing *Busk v. Integrity Staffing Solutions*, 713 F.3d 525, 530-31 (9th Cir. 2013).

3. *Integrity Staffing Solutions*, 2014 WL 6885951, at *3-4 (citing *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946); 29 U.S.C. § 251(a)-(b)).

4. *Id.* at *4-5 (citing 29 U.S.C. § 254(a)).

5. *Id.*

6. *Id.* at *6.

7. *Id.*

8. *Id.* at *7.

9. *Id.* at *7 (Sotomayor, J., concurring).

as plaintiffs' lawyers will continue to argue that certain states' laws do not follow the FLSA on this issue. Further developments in this space will clarify whether and to what extent any similar state law claims may survive post-*Busk*.

The Court's decision also will extend beyond cases that involve security clearances. It will become a focal point of all litigation that addresses whether preliminary and postliminary activities are compensable under the FLSA. By defining an "integral and indispensable" activity as one that is "an intrinsic element" of the employee's principal activity "with which the employee cannot dispense if he is to perform his principal activities," the Court has provided litigants and lower courts with a clearer standard by which to measure whether activities such as booting up a computer, entering a password, or logging in to a hand-held device to download work assignments remotely are compensable under the FLSA.

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