Morgan Lewis

retail did you know?

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February 2, 2012

Dear Retail Clients and Friends,

In the last few months, we have seen an increase in litigation over whether the time that employees spend undergoing bag checks, X-ray screenings, or other security screenings must be paid under the Fair Labor Standards Act (FLSA) or state labor laws, with loss-prevention measures utilized by retailers at the center of this debate. This edition of ***Morgan Lewis Retail Did You Know?*** briefly explains the existing law on the compensability of security screening, describes the recent security screening litigation in the retail industry, and suggests steps that may limit exposure.

The Law

At least two Circuit Courts of Appeal have held that the time employees spend in preliminary and postliminary security screenings generally is not a "principal activity" and thus does not constitute time worked under the FLSA. These courts have observed that although security checks may be necessary for security purposes, they are not "integral and indispensable" to an employee's job.

In *Gorman v. Consolidated Edison Corp.*, the Second Circuit held that time approximated to be "between ten and thirty minutes a day passing through multiple layers of [government and employer mandated] security" checks upon entry and exit of a nuclear power plant was not compensable work time because the security checks were not principal activities of the job. 488 F.3d 586, 589, 591 (2d Cir. 2007). On the same day the *Gorman* decision was issued, the Eleventh Circuit held in *Bonilla v. Baker Concrete Construction* that construction workers at an airport terminal were not entitled to compensation for time spent going through airport security before their shift because the security screening was required by federal regulation and did not benefit the employer. 487 F.3d 1340 (11th Cir. 2007). More recently, DHL successfully argued in *Sleiman v. DHL Express* that security checks are not compensable, even if required only by an employer as part of its loss-prevention program, rather than by the government or some other authority. No. 09-0414, 2009 U.S. Dist. LEXIS 35812, at *11, 13 (E.D. Pa. Apr. 27, 2009).

Recent Litigation in the Retail Industry

Notwithstanding this favorable caselaw, we have seen a resurgence of security screening litigation, particularly in the retail industry. Last year, employees filed a class and collective action against the Century 21 clothing store, claiming it unlawfully denied them compensation for time spent waiting for and undergoing loss-prevention inspections before leaving the building for meal breaks and at the end of their shifts. *Olmo v. Century 21 Department Stores, LLC*, Case No. 11-CV00253 (E.D.N.Y. 2011). Similarly, CVS is currently defending motions for class and collective action certification in a case involving allegations that the company unlawfully failed to pay employees for time devoted to bag checks. *Palman v. CVS Caremark Corp.*, Case No. 10-cv-2075 (E.D.N.Y. 2010). Earlier this month, employees in California filed a new class action against Forever 21 seeking compensation for unpaid bag inspections that allegedly cut into meal breaks. *Jones v. Forever 21 Retail Inc.*, Case No. CGC-12-517423 (Cal. Super. Ct. San Francisco 2012). Currently, Morgan Lewis is handling two class and collective actions against a clothing retailer involving similar allegations that employees should have been paid for security searches before meal breaks and at the end of their shifts, and another national collective action against a prominent big box retailer related to the compensability of security inspections. We are also advising other clients on this issue.

The recent trend in these cases is for plaintiffs' counsel to include claims regarding security checks both at the end of shifts and before meal breaks. In California, and potentially in other states with meal-period requirements, the focus on meal breaks creates the additional risk that employees will claim their 30-minute meal periods were cut short and that their employers are liable for meal-period penalties. Because a security screening preceding a meal period occurs between an employee's first and last principal work activities, rather than at the beginning of the day or at the end of the day, plaintiffs are arguing that even if a security screening is not itself a principal activity, it should be paid time by virtue of the continuous workday rule that mandates compensation for time between the first and last principal activities other than time spent on a bona fide meal period.

In this new wave of litigation, employers also should be ready for plaintiffs to seek to develop a factual record to support their theory that the employer directly benefits from the security screening due to its role in loss prevention and that the activity is a principal activity for which an employee must be paid. At a minimum, plaintiffs are likely to challenge early motions to dismiss by arguing that a factual record is needed for the court to address the question of whether screening time is integral and indispensable such that it could be paid time. The counter to such an argument is that security screening prior to leaving work for a meal is not integral and indispensable to the performance of work. Rather, it is integral and indispensable to the employee *not* performing work (i.e., leaving work).

Practical Advice

If you are a retail employer, we recommend considering the following:

- Whether bag checks or other security screenings can be limited to no more than a few minutes, which creates an additional argument that the time is de minimus and thus not compensable.
- Whether bag checks or other security screenings must be performed before employees clock out for meal breaks or upon their return from meal breaks.
- If bag checks or other security screenings occur during an unpaid meal period, whether the length of time that the employee is actually relieved of duty (i.e., after the end of the screening) is sufficient to constitute a bona fide meal period under the FLSA and to satisfy California and other state-specific meal-period requirements and, if not, whether to extend meal breaks by a few minutes to ensure a bona fide meal period.

How We Can Help

If we can be of assistance to you in these matters, please feel free to get in touch with your Morgan Lewis contact; our Retail Practice Leaders, Anne Marie Estevez and Gregory T. Parks; or any of the other attorneys listed below:

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About *Morgan Lewis Retail Did You Know?* This message is part of our effort to educate our retail clients and friends about important legal developments. One thing we hear frequently from our retail clients is that it is hard to keep track of new and emerging laws and lawsuit trends that affect retailers. All too frequently, the first notice comes in the form of a lawsuit seeking millions of dollars. To help you be more proactive in managing legal compliance, we are providing these emails.

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