Morgan Lewis

did you know?

retail

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Dear Retail Clients and Friends,

In February 2012, we reported on an increase in litigation concerning whether employees' time spent undergoing bag checks and other security screenings must be paid under the Fair Labor Standards Act (FLSA) or parallel state laws. We noted that retailers' loss-prevention measures were at the center of the debate. Since then, the debate has continued, with an increasing number of retailers facing class action lawsuits. In this edition of ***Morgan Lewis Retail Did You Know?***, we provide an update on the developing law, including the U.S. Supreme Court's recent grant of certiorari in *Busk v. Integrity Staffing Solutions*, in which the U.S. Court of Appeals for the Ninth Circuit held that workers stated a claim under the FLSA in seeking pay for time spent undergoing security screenings meant to prevent employee theft. We also provide an update on the recent wave of security screening litigation. Finally, we provide practical advice for avoiding litigation and preparing for litigation should it be filed.

The Developing Law

As the Supreme Court recently discussed in *Sandifer v. U.S. Steel Corporation*,[1] the Portal-to-Portal Act[2] amended the FLSA to limit the scope of employers' liability in various ways. One way was by excluding from mandatorily compensable time activities that are "preliminary to" or "postliminary to" the principal activity that an employee is employed to perform and that occur before (or after) the time—on any particular workday—at which the employee commences (or ceases) the principal activity. The Supreme Court further reminded us in *Sandifer* of its statement in *IBP, Inc. v. Alvarez*[3] (based on much older precedent in *Steiner v. Mitchell*[4]) that any activity that is "integral and indispensable" to a "principal activity" is itself a "principal activity" under the FLSA. Appellate courts have applied the Supreme Court's pronouncements regarding which activities are compensable and which are not to security screening activities with varying results.

Two U.S. Courts of Appeals have held that the time employees spend in preliminary and postliminary security screenings generally is not time spent in 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 U.S. Court of Appeals for 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.[5] On the same day the *Gorman* decision was issued, the U.S. Court of Appeals for 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 shifts because the security screenings were not principal activities.[6]

But, on April 12, 2013, the Ninth Circuit departed from these circuits, holding that the plaintiffs in *Busk v. Integrity Staffing Solutions* had stated a plausible claim for relief under the FLSA because they had alleged that their

1. 134 S. Ct. 870 (2014).
2. 29 U.S.C. § 254(a).
3. 546 U.S. 21 (2005).
4. 350 U.S. 247 (1956).
5. 488 F.3d 586, 589, 591 (2d Cir. 2007).
6. 487 F.3d 1340 (11th Cir. 2007).

employer required the security screenings, which had to be conducted at work and were intended to prevent employee theft.[7] Thus, according to the Ninth Circuit, "the security clearances [were] necessary to employees' primary work as warehouse employees and done for [the employer's] benefit" and were therefore integral and indispensible.[8] In October 2013, a petition for writ of certiorari to the U.S. Supreme Court was filed in *Busk*, citing the circuit split and the wide-reaching implications of a failure to address the Ninth Circuit's decision, which represented a dramatic change in this area of law and which caused employers across the United States to face the prospect of massive retroactive liability. On March 3, the Supreme Court granted certiorari in *Busk*. Argument is likely to occur in fall 2014, with a decision expected no later than June 2015.

Increased Litigation against Retailers in the Wake of *Busk*

In the meantime, retailers must continue to defend the wave of class action filings that has increased in the wake of *Busk*. Since that decision, upwards of 40 lawsuits have been filed against retailers and warehouse operators, alleging that they unlawfully failed to pay employees for time spent undergoing security screenings both at the end of shifts and before meal breaks. Most complaints assert multiple causes of action under federal and state law, including for failure to pay proper hourly wages, failure to pay proper overtime, and failure to provide rest periods and/or meal periods. Not surprisingly, in the face of *Busk*, many of the recent filings have been in the Ninth Circuit—in California federal and state courts—against national retailers. Employers sued include discount stores, home goods and specialty stores, superstores, and Internet retailers. Thus far, the defense bar has had success in resisting unfavorable rulings and class certification. Defense-favorable rulings include a denial of class certification, in which the court noted that the retailer's bag check policy was random, only applied to those who had bags, and that the employees' estimates of how long the bag searches lasted ranged from one minute to thirty minutes. To date, public settlements are few. It remains to be seen whether the U.S. Supreme Court's review of the Ninth Circuit's decision in *Busk* will stir up further filings or if it will cause the plaintiffs' bar to wait and see. Plaintiffs' lawyers may divert their focus from the FLSA to state law claims while federal law is being settled.

Practical Advice for Avoiding, Anticipating, and Positioning to Defend Litigation

While it is our strongly held view that time spent passing through security screenings is not compensable working time, employers that conduct security screenings still may wish to review current policies and practices for risk. Things to consider include 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 minimis* 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.
- Whether the configuration of the screening process can be improved or otherwise altered to minimize wait times while still fulfilling business needs.
- How to prepare to respond to arguments that a security screen is undertaken solely for the benefit of the employer.
- 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.

The plaintiffs in these cases are seeking to develop facts to support their theories that employers benefit from the security screenings due to their role in loss prevention and therefore that the screenings are compensable principal activities. They further seek to show uniformity in policies and procedures and that employees consistently were required to wait to undergo security screenings. Employers should consider all sources of documentation that may be used to counter these allegations. Employers, whether operating a retail outlet or a

7. 713 F.3d 525 (9th Cir. 2013).

8. *Id.* at 530–531.

warehouse, can best position themselves for litigation by preparing to present facts to oppose class certification and prove defenses on the merits.

How We Can Help

If we can be of any help in assessing the risks associated with your current policies and practices, identifying the business records on which you may wish to rely if sued, or defending a claim, please contact our Retail Practice Leaders, Anne Marie Estevez and Gregory T. Parks, or any of the other lawyers 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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