

California Employers: Required Security Screening May Be Compensable Work Time

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Employees must be paid for time spent waiting for, and undergoing, searches of their bags, packages and personal technology devices, the California Supreme Court ruled February 13, 2020, in *Amanda Frlekin, et al. v Apple, Inc.*, Case No. S243805, answering a question posed to it by the U.S. Court of Appeals for the Ninth Circuit in a case involving Apple.

This decision marks a signature departure from the federal Fair Labor Standards Act of 1938, under which time spent undergoing mandatory security screenings is not compensable, the U.S. Supreme Court previously held in *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014). This is yet another example of the greater protection that California state laws typically offer employees.

Pursuant to its "Employee Package and Bag Searches" policy, Apple requires its retail store employees to undergo mandatory searches of their bags, packages, purses, backpacks, briefcases and personal Apple technology devices, such as iPhones, by either a manager or member of the security team, upon exiting the store for any reason, including to take breaks or lunch and before leaving at the end of their shift. The time spent awaiting and undergoing an exit search typically ranges from five to 20 minutes, but can be as high as 45 minutes, depending on manager or security guard availability. Employees must clock out before, and are not compensated for the time spent, undergoing an exit search.

Industrial Welfare Commission (IWC) wage order No. 7-2001 (Wage Order 7), which covers all persons employed in the mercantile industry, requires employers to pay their employees a minimum wage for all "hours worked" (Cal. Code Regs., tit. 8, § 11070, subd. 4(B)), defined as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." *Id.*; § 11070, subd. 2(G).

Citing to its prior decisions – including *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 582 (2000), a case that addressed compulsory employer-provided transportation to and from work – the Court explained that the two phrases of the "hours worked" definition establish "independent factors, each of which defines whether certain time spent is compensable as 'hours worked.'" Thus, an employee

who is *subject to the control* of an employer does not have to be working during that time to be compensated under Wage Order 7. *Id.* Likewise, an employee who is *suffered or permitted to work* does not have to be under the employer's control to be compensated, provided the employer has or should have knowledge of the employee's work. *Id.* at 584-85; *Troester v. Starbucks Corp.*, 5 Cal. 5th 829, 853 (2018); *Hernandez v. Pacific Bell Telephone Co.*, 29 Cal. App. 5th 131, 137 (2018).

The state high court analyzed whether time spent waiting for and undergoing Apple's exit searches is compensable as "hours worked" under the "control standard" only. It reaffirmed its holding in *Morillion* that "[t]he level of the employer's control over its employees, rather than the mere fact that the employer requires the employees' activity, is determinative" concerning whether an activity is compensable under the "hours worked" clause. 22 Cal. 4th at 587. The state high court also explained that in cases like the one before it involving *onsite* employer-controlled activities, courts may and should consider additional relevant factors when determining whether an employee is subject to the employer's control, including whether the activity is mandatory, the location of the activity, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures.

Applying each of these factors to the case before it, the state high court found it was clear that Apple retail store employees were subject to Apple's control while awaiting, and during, Apple's exit searches because the searches are mandatory, occur at the workplace, involve a significant degree of control and are enforced through threat of discipline, up to and including termination. Finally, the searches are imposed mainly for Apple's benefit by serving to detect and deter theft. Thus, according to the "hours worked" control clause, plaintiffs must be paid, the state high court ruled.

The ruling in *Amanda Frlekin, et al. v Apple, Inc.* applies retroactively. California employers requiring similar security screening should immediately review their policies to ensure compliance with California law.

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National Law Review, Volume X, Number 50

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