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Bag Check Claims: Not Quite Yet in Bag for California Employers

Article By:

Cheryl D. Orr

Jaime D. Walter

California employers that perform bag checks on employees in order to deter theft breathed a sigh of relief in 2015 after a California federal court's ruling in ***Frlekin v. Apple Inc.***, No. C 13-03451, 2015 WL 6851424 (N.D. Cal. Nov. 7, 2015), which provided that state law does not require that Apple compensate hourly employees for time they spend undergoing security checks. The ruling followed another favorable decision in December 2014, when the U.S. Supreme Court held in *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 518 (2014) that security checks do not constitute compensable work activities under federal law. After years of increased attention having been paid to bag check actions, the decisions slightly cooled the plaintiffs' bar's enthusiasm for such actions. But despite the victories, California employers should not let their guard down quite yet. A number of recent high-value settlements continue to make bag check claims attractive.

Busk and *Frlekin*

In *Busk*, the Supreme Court provided that post-shift activities, such as bag checks, were compensable under the Fair Labor Standards Act if they constituted an "integral and indispensable" part of an employee's job responsibilities. Because the bag checks in *Busk* had neither an integral nor indispensable relationship to the employees' responsibilities, which involved retrieving shelved products and packaging them for delivery, they did not constitute compensable activities under federal law. Employees could retrieve and package items without security screenings, reasoned the Court.

As it is difficult to imagine many situations in which a court would deem antitheft security checks to be integral or indispensable to an employee's job, *Busk* allowed employers to more confidently treat security checks as noncompensable. That confidence eroded a bit, however, when a federal district court in California held in *Miranda v. Coach, Inc.*, No. 14-cv-02031-JD, 2015 WL 1788955 (N.D. Cal. Apr. 17, 2015) that *Busk*'s ruling did not apply to California labor law. As a result, when the Northern District of California later held that year that Apple's bag checks did not constitute "work" under California law, employers rejoiced. The *Frlekin* court reasoned that the bag checks did not constitute "hours worked" because, among other things, employees were not "suffered or permitted to work." Echoing the reasoning in *Busk*, the court explained that the bag checks were in no way related to the

employees' job responsibilities and were only "peripheral activities relating to Apple's theft policies." Moreover, the employees did not have to complete any job duties during the bag checks; they simply had to wait passively while other people searched their belongings.

Developments and Takeaways Following *Frlekin*

Although *Busk* essentially closed the door on bag check claims that arise under federal law, *Frlekin* is on appeal and bag check litigation—although not as popular—continues. A suit brought against Macy's last year involves bag check claims, and the Northern District of California granted motions for class certification of bag check actions involving Converse and Nike last year. Coach, Burlington Coat Factory, Old Navy, CVS, and Real Time Staffing Services all settled bag check actions for amounts that ranged from $300,000 to $12.75 million.

The Ninth Circuit will likely hold a hearing in *Frlekin* in May 2017. While we would not be surprised if the court were to affirm the ruling, even if it does, the opinion may not entirely foreclose bag check litigation in California, as employees may attempt to factually distinguish their employers' bag check policies from that imposed by Apple.

To reduce the risk of bag check exposure, employers should consider ways to allow employees to remain clocked in while undergoing bag checks. If practical difficulties make that option too burdensome, employers may want to review *Frlekin* and consider adopting a policy similar to Apple's.

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