PAY FOR REQUIRED TIME SPENT IN SECURITY SCREENING – YES OR NO?

Does an employer have to pay its employees when it requires them to stand in line every day for up to 25 minutes waiting to go through security screening at the end of the day? It seems like that's a lot of time and that it might be fair to compensate those employees for their time. The U. S. Supreme Court considered this question and came down on the side of the employer in this very recent case.

EMPLOYEES CLAIM COMPENSATION FOR EMPLOYER-REQUIRED TIME IN SECURITY SCREENING

In this case, an employment agency supplied warehouse workers to Amazon.com to retrieve products and package them for delivery to Amazon's customers. The agency *required* its hourly warehouse workers to undergo a security screening before leaving the warehouse each day. Those workers were not paid for that time and sued, claiming that they were entitled to compensation because the screening time was required by their employer solely for the employer's benefit to prevent employee theft.

The employees won their case at the court of appeals, which reasoned that the employer's security screening requirement was for its benefit and, therefore, the time involved in the required screening must be compensated. That decision had significant consequences for that employer. Not only was each 25-minute screening time to be compensated, but each 25-minute period would have counted toward the 40-hour threshold for overtime purposes. That would have been nearly 2.5 hours of extra overtime each week for all of the affected hourly employees.

Fortunately for that employer, the Supreme Court in a unanimous opinion authored by Justice Thomas reversed, holding that the screening time was not a "principal activity" nor was the security screening time an "integral and indispensable" part of the employees' principal activity.

EXEMPTION FOR PRELIMINARY AND POSTLIMINARY ACTIVITIES

This outcome is based on the hours of work exemptions established in the Portal-to-Portal Act. The Portal-to-Portal Act was passed by Congress in 1947 in response to what was termed an overly broad judicial interpretation by the Supreme Court given to the FLSA's undefined terms "work" and "workweek." That broad interpretation, in essence, required compensation for any time an employee was *required* to be on an employer's premises primarily for the employer's benefit. That led to over 1,500 law suits in just a few short months claiming billions of dollars in back wages. That flood of lawsuits was not intended or anticipated, and Congress almost immediately reacted with the passage of the Portal-to-Portal Act. That act exempted employers from FLSA liability for claims based on "activities which are preliminary to or postliminary to" the performance of the principal activities that an employee is employed to perform. Examples of preliminary and postliminary activities include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.

In this case, the unanimous court applied the language of the Portal-to-Portal Act and held that the security screenings at issue were noncompensable postliminary activities. The Court reasoned that the screenings were not the "principal activities" the employees were employed to perform. The workers were employed not to undergo security screenings but to retrieve products from warehouse shelves and package them for shipment. The Court also held that the security screens were "integral and indispensable" to those principal activities. The court of appeals got it wrong, the Court said, because it focused on whether the particular activity was *required* by the employer rather than whether it was tied to the productive work that the employee was employed to perform.

INTEGRAL AND INDISPENSABLE ACTIVITIES

An activity is 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. The Supreme Court has in the past identified several activities that meet that definition. For example, *safety* was at issue in considering the time battery-plant employees spent showering and changing clothes because the chemicals in the plant were "*toxic to human beings.*" Additionally, the time meatpacker employees spent sharpening their knives is compensable as an integral part of the job because dull knives would "slow down production" on the assembly line, "affect the appearance of the meat as well as the quality of the hides," "cause waste" and lead to "accidents." However, the Court has held noncompensable the time poultry plant employees spent *waiting* to don protective gear (as opposed to the time actually

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spent putting on and taking off the gear) because such waiting was two steps removed from the productive activity on the assembly line.

LESSONS FOR EMPLOYERS

This case highlights the concept that not all time spent on an employer's premises – required or not – must be counted as compensable hours or work. The questions employers should ask themselves are:

- What was the employee hired to do?;
- Is the preliminary or postliminary activity absolutely necessary to get the job done?; and
- Is the preliminary or postliminary activity being performed to ensure safety of the employee or others?

The answers to these questions must depend on the facts of each case, but it's important to get the answers right. If not, the consequences can be expensive.

Reference: Integrity Staffing Solutions, Inc., v. Jesse Busk et al., (U.S. Supreme Court, December 9, 2014)

If you have any questions, please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.

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