

Security Screenings: Does the Boss Pay the Cost?

Labor & Employment Law Update

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On March 3, 2014, the U.S. Supreme Court announced it will review *Busk v. Integrity Staffing Solutions, Inc.*, in which the Ninth Circuit held that time spent in (and waiting for) post-shift security screenings is compensable under the federal Fair Labor Standards Act ("FLSA"). The employees in *Busk*, who worked in a warehouse filling Amazon.com orders, were screened only at the end of their workdays for the purpose of preventing the theft of Amazon merchandise. Accounting for time spent waiting to be screened, the screening process took approximately 25 minutes for some employees.

The Ninth Circuit Court of Appeals' decision in *Busk* should be particularly concerning to employers because *Busk* is the most recent of only three federal appellate court decisions addressing whether security screening time is compensable under the FLSA. The other two decisions both held that such time was not compensable.

The Ninth Circuit spent few words explaining why it chose not to follow the prior decisions, but two distinctions between *Busk* and the prior decisions are apparent. First, the Ninth Circuit viewed the security screening in *Busk* as one in which only certain employees were subjected to screening. In contrast, the workplaces at issue in the prior cases were an airport and a nuclear power plant, environments in which employees at all levels, along with customers and visitors, were required to be screened.

The second distinction is that the screening in the prior cases was related to broader safety concerns (e.g., preventing terrorists from accessing airplanes and nuclear material), as opposed to the concern in *Busk*, which was limiting employee theft of private property.

Whether the Ninth Circuit properly interpreted the FLSA is now in the Supreme Court's hands. If the Court sides with the plaintiffs, employers who conduct end-of-shift security screenings may have to make dramatic procedural changes. For instance, the start and end times of shifts may have to be staggered so that employees are not required to spend as much as 25 minutes waiting to be screened. Similarly, employers may have to employ additional screeners or implement new technology to ensure that screening is completed as quickly as possible. Even employers with screening procedures much faster than those at issue in *Busk* may face significant exposure as the amounts of uncompensated

time aggregate year after year for each and every shift every hourly employee works.

It is unclear whether the Supreme Court will use *Busk* as an opportunity to create a bright-line rule under which all security screening time is non-compensable, or whether the Court will carve out new rules under which some, or perhaps all, security screening time is compensable. Whichever path the Court takes, it is clear, in light of the Court's decision to hear *Busk*, and the Court's recent decision in *Sandifer v. U.S. Steel Corp.*, that this Court appears determined to leave its mark on the landscape of wage and hour law. While we wait for the Court to rule on *Busk*, employers that use post-shift anti-theft searches may want to explore ways to make those searches more efficient.

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