

California Supreme Court Rules that Employees Must be Paid During Mandatory Security Searches

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Employees must be paid for time spent on their employer's premises waiting for, and undergoing, required searches of bags and other property voluntarily brought to work, according to the California Supreme Court's ruling yesterday.

In *Frlekin v. Apple*, a series of class action lawsuits brought in federal court, Apple retail employees sued their employer alleging that Apple's failure to pay them for time spent waiting for and undergoing mandatory bag and Apple-brand device checks violates various state and federal wage-and-hour laws.

Apple's Bag Search Policy

Apple's bag search policy requires employees to clock out and undergo a mandatory exit search upon exiting the store for any reason. The search includes employees' bags, packages, purses, backpacks, briefcases, and personal Apple technology devices, such as iPhones, to prevent the pilfering of Apple products. Employees who fail to comply with the policy are subject to disciplinary action, up to and including termination. Managers estimated that 30% of Apple employees bring such bags to work; employees estimated that "nearly all" do. Some employees "bring bags to carry Apple-provided apparel, which employees must wear while working but are required to remove or cover up while outside the store. Others bring bags containing their cell phones, food, keys, wallets, or eyeglasses."

In stores where the manager conducted searches, some employees said they had to scour the store to find a manager and wait until that manager finished with other duties, such as assisting a customer. Where security guards performed the searches, some employees had to wait until a security guard became available. Employee estimates of the time spent awaiting and undergoing an exit search ranged from five to 20 minutes, depending on manager or security guard availability.

Plaintiffs asserted that time spent waiting for and undergoing these searches constituted "hours worked" under either prong of the definition. Defendant contended that "control"

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during the search is insufficient to constitute “hours worked,” and the search also must be “required.” Apple argued that the employees could avoid a search by declining to bring a bag or package to work, and thus the search is not “required.”

The district court certified the class, but limited the issue to the compensability of bag searches “based on the most common scenario, that is, an employee who voluntarily brought a bag to work purely for personal convenience.” Thus the certified class did not include those who were required to bring a bag or iPhone to work due to special needs (for example, medication or disability accommodations).

The federal district court granted summary judgment in favor of Apple, holding that waiting for and undergoing bag checks were not considered “hours worked” because the time was not “subject to the control” of the employer nor was it time in which employees were “suffered or permitted to work.” The dispositive fact was that employees had a choice whether to undergo searches because the searches were only done when employees brought bags to work for their personal convenience.

Plaintiffs appealed the district court’s decision, and the Ninth Circuit certified the following question to the California Supreme Court: “Is time spent on the employer’s premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as ‘hours worked’ within the meaning of California Industrial Welfare Commission Wage Order No. 7?”

Supreme Court’s Opinion

Predictably, the California Supreme Court determined that employee time spent on Apple’s premises waiting for, and undergoing, mandatory exit searches of bags, packages, or personal Apple technology devices, such as iPhones, voluntarily brought to work purely for personal convenience is compensable as “hours worked” within the meaning of Wage Order 7.

Industrial Welfare Commission (IWC) wage order No. 7-2001 (Wage Order 7), which applies to Apple’s retail employees, defines “hours worked” 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. In *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 582 (2000), the California Supreme Court interpreted these two phrases as “independent factors, each of which defines whether certain time spent is compensable as ‘hours worked.’” The Court reiterated here that an employee who is *subject to the control* of an employer does not have to be working during that time to be compensated under the applicable wage order. “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.”

With those principles in mind, the Court analyzed whether the time spent waiting for Apple’s exit searches is compensable under the “control” language, and concluded that

Apple employees “are clearly under Apple’s control while awaiting, and during, the exit searches.” The Court rejected Apple’s arguments that the activity must be “required” to be compensable, stating that “[r]edefining the control clause to cover only unavoidably required employer-controlled activities would limit the scope of compensable activities, resulting in a narrow interpretation at odds with the wage order’s fundamental purpose of protecting and benefitting employees.” The Court also looked to the history of the “hours worked” definition in Wage Order 7, which showed that the IWC purposely abandoned the narrower standard of compensating “required” activities.

The Court did not consider the “mandatory/voluntary distinction” that was applied in *Morillion* as dispositive in this context. *Morillion* involved the compensability of commute time on a required employer-provided bus. The case made clear that the mandatory nature of the bus ride was a dispositive fact and that, had the bus ride not been mandatory, the time would not have been compensable. Since *Morillion* was decided, a number of courts have interpreted it and concluded that neither test requires an employer to pay its employees for tasks that are voluntary and non-work related. Here, however, the Court clarified that “there are inherent differences between cases involving time spent traveling to and from work, and time spent *at work*.” Apple’s control of its employees at the workplace, where its interest is deterring theft, is inherently greater than its interest in employee’s timely arrival. Further, Apple’s *level* of control over its employees—the determinative factor in analyzing compensability under the “control” standard—is higher during an onsite search of an employee’s bags, packages and Apple devices.

The Court also explained that the nature of the controlled activity was also distinguishable from *Morillion* and subsequent cases, in that those cases involved “optional services” that primarily benefitted the employee—free transportation. Here, the bag searches are imposed mainly for the employer’s benefit by serving to detect and deter employee theft. The Court noted that the bag searches were, in fact, “an integral part of Apple’s internal theft policy and action plan.” Apple argued that it could have totally prohibited employees from bringing *any* bags or Apple devices to the store altogether, but instead was providing an optional benefit to its employees. The Court found this claim “far-fetched and untenable.”

However, in a footnote, the Court pointed out that “Apple may impose reasonable restrictions on the size, shape, or number of bags that its employees may bring to work, and [] it may require employees to store their personal belongings in offsite locations, such as lockers or break rooms.” The Court took no issue with Apple’s policy prohibiting employees from shipping personal packages to its stores.

The Court concluded that Apple’s exit searches were, as a practical matter, required. It noted that employees may bring a bag to hold any number of ordinary, everyday items, such as a wallet, keys, cell phone, water bottle, food, or eyeglasses. Further, Apple required employees to wear Apple-branded apparel while working, but required their removal when outside the store, making it reasonable to assume that some employees

will carry the uniform or a change of clothes in order to comply with this policy.

In summarizing its opinion, the Court acknowledged that it was reaffirming the holding in *Morillion*:

“[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’ control clause. We also emphasize that whether an activity is required remains probative in determining whether an employee is subject to the employer’s control. But, at least with regard to cases involving onsite employer-controlled activities, the mandatory nature of an activity is not the only factor to consider. We conclude that courts may and should consider additional relevant factors — including, but not limited to, the location of the activity, the degree of the employer’s control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures — when evaluating such employer-controlled conduct.”

Having concluded that the Plaintiffs were entitled to compensation under the “control” clause, the Court declined to consider whether the searches are also compensable under the “suffered or permitted to work” standard. The Court held that its ruling will apply retroactively, in accordance with the general rule that judicial decisions are given retroactive effect. The case will now return to the Ninth Circuit.

Though the Court’s Opinion addressed whether the exit searches are compensable “hours worked” within the meaning of Wage Order 7, the majority of the IWC’s wage orders use the same or similar definition of “hours worked.” In light of the California Supreme Court’s decision, employers should be mindful of their policies regarding employee bag and property searches. As the Court noted, employers may tailor their bag search policy as narrowly or broadly as they desire and may minimize the time required for exit searches by hiring sufficient security personnel, employing adequate security technology or limiting what employees can bring into the workplace. However, employers must compensate those employees for the time spent waiting for and undergoing these searches. Dorsey’s employment attorneys are happy to review your company’s policies and advise on best practices and recommended changes.