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Client Alert Commentary

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4 Key Lessons from *Integrity Staffing Solutions v. Busk*

While helpful to some employers,* Integrity Staffing Solutions v. Busk *does not fundamentally change the law of compensable working time.

On December 9, 2014, the U.S. Supreme Court issued its much-anticipated decision in *Integrity Staffing Solutions, Inc. v. Busk.*[1] In a unanimous decision, the Court held that the time warehouse workers spent undergoing antitheft security screening before leaving each day is not compensable under the Fair Labor Standards Act (FLSA), as amended by the Portal-to-Portal Act. This opinion will limit employers' exposure to wage and hour claims for post-shift security screenings, even if the screenings are conducted for the employer's own protection. However, in many cases, such as where more stringent state law applies or where the activity is more closely related to the work to be performed — such as donning and doffing protective gear or going through decontamination procedures — employers will still be required to compensate employees for these pre- and/or post-work activities.

1. The case is helpful for employers in limited situations.

In *Integrity Staffing Solutions,* the Supreme Court found that under federal law, time spent waiting to undergo and undergoing post-shift security screenings is not compensable, even where such screenings are alleged to have amounted to approximately 25 minutes each day and been conducted to prevent employee theft. Under federal law, employers may now require post-shift security screening for employees at their stores and facilities without compensating employees for the time.

The Supreme Court also gave further guidance on what constitutes activity that is preliminary or postliminary to the employee's principal activity and is therefore noncompensable under the Portal-to-Portal Act. This guidance should enable employers to better predict other types of activities that would be deemed noncompensable under federal law. The Supreme Court has said previously that compensable activities are all activities that are an "integral and indispensable part of the principal activities." The Court elaborated here that 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." In the case at hand, the Court found the security screenings were not the principal activity the employees were employed to perform, and that the screenings also were not integral and indispensable to the employees' duties; the employer could have eliminated them without impairing the employees' ability to complete their work.

2. Post-shift security screenings may still be compensable under state law.

Integrity Staffing Solutions only addressed claims under the FLSA. It did not address state laws that may be more stringent. Thus, before implementing unpaid security screenings, employers must consider the laws of the states in which they operate to determine if they are relieved from compensating employees for time spent waiting for and undergoing security screenings.

In California, for example, time spent waiting for and undergoing security screening may be compensable. The California Supreme Court, interpreting an Industrial Welfare Commission wage order governing agricultural occupations, held that it is enough that an employee be subject to the control of an employer to be entitled to pay, whether or not the employee is also suffered or permitted to work during this time.[2] More specifically, the California Supreme Court held that time employees are required to spend traveling to and from a remote work site on their employers' buses is compensable.[3] In so holding, the court considered and rejected giving deference to the FLSA and related case law, noting that the federal and state statutory schemes differ substantially and recognizing that state law may provide employees with greater protection than the FLSA.[4]

Applying California law and these principles to time employees spent waiting to undergo and undergoing mandatory security screening before entering and exiting their work facility, the Central District of California in *Cervantez v. Celestica Corp.* found that defendant employers could not raise a triable issue of fact that employees were not under their control during pre- and post-shift security screening periods — they were.[5] The court's ruling included the time the employees spent waiting inside the facility for their shift to start after passing through security, recognizing the employees' fear that they would be docked pay if they clocked in even a minute late.[6]

3. Regardless of the governing law, unions may bargain for compensation for time employees spend waiting for and undergoing security screenings.

Even though *Integrity Staffing Solutions* held that post-shift security screening time is noncompensable under federal law, this does not mean that employees may not demand in bargaining that they be compensated for this time. In fact, the Supreme Court invited as much in its opinion, stating, "respondents' claim that the screenings are compensable because Integrity Staffing could have reduced the time to a *de minimis* amount is properly presented at the bargaining table, not to a court as an FLSA claim." Thus, for employers with union workers, the issue may not be resolved, but simply waiting to be presented in another forum.

4. The case did not change federal law with respect to compensability of time spent donning and doffing protective gear.

In its analysis, the Supreme Court cited with approval its prior cases involving donning and doffing protective gear, which it recognized as satisfying the "integral and indispensable to the principal activities" standard. Specifically, it cited *Steiner v. Mitchell*,[7] in which it held compensable the time battery plant employees spent showering and changing clothes, where the chemicals in the plant were toxic to humans and the employer conceded the activities were indispensable and integral to their work; and *Mitchell v. King Packing Co.*,[8] where it held compensable the time meatpackers spent sharpening their knives because dull knives would slow down production, affect the appearance of the meat and quality of the hides, cause waste and lead to accidents.

The Court also cited as consistent with its decision in *Integrity Staffing Solutions* Department of Labor regulations which provide as an illustration that time an employee in a chemical plant spent changing clothes would be compensable if the employee could not perform his principal activities without putting on certain clothes, but such time would not be compensable if changing clothes were merely a convenience to the employee and not directly related to his principal activities.[9]

Thus, the long line of case law in the donning and doffing context remains unaltered.

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Endnotes

[1] *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. __ (2014).

[2] *See Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 578 (2000).

[3] *Id.*

[4] *Id.* at 590, 592.

[5] *Cervantez v. Celestica Corp.*, 618 F. Supp. 2d 1208, 1218, 1219 (C.D. Cal. 2009).

[6] *Id.* at 1214-16, 1218.

[7] *Steiner v. Mitchell*, 350 U.S. 247, 249, 251 (1956).

[8] *Mitchell v. King Packing Co.*, 350 U.S. 260, 262 (1956).

[9] *See* 29 C.F.R. §790.8(c).