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Labor & Employment ADVISORY ■

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U.S. Supreme Court Further Defines the Parameters of Compensable Pre- and Post-Shift Activities; NLRB Reverses Course on Employer Restrictions on Company E-mail

Supreme Court Finds Post-Shift Security Screenings Not Compensable Under FLSA

Last week, the U.S. Supreme Court issued a unanimous decision that limits the types of pre- and post-shift activities that are compensable under federal law. In *Integrity Staffing Solutions, Inc. v. Busk, et al.*, the Court determined that the Fair Labor Standards Act (FLSA) does not require employers to pay workers for time spent waiting for and undergoing post-shift, anti-theft security screenings. 574 U.S. _____ (2014). While the Court's finding is favorable for employers, the opinion's holding regarding compensable time likely changes the wage and hour landscape only in fairly limited circumstances.

The FLSA, enacted in 1938, generally requires employers to pay employees minimum wage for all hours worked and to pay overtime compensation for hours worked in excess of 40 each week. After a flood of litigation ensued over the issue of what constituted "work" under the FLSA, in 1947 Congress passed the Portal-to-Portal Act to amend the FLSA to, among other things, clarify that certain activities including those that are "preliminary to or postliminary to" principal work activities are not compensable under the FLSA. 29 U.S.C. §254(a).

In *Integrity*, warehouse workers were employed to locate, retrieve and package products for delivery to customers. After each shift, employees underwent anti-theft screening, including removing wallets, keys and belts and passing through metal detectors. Workers were not paid for time spent waiting to be screened or time actually undergoing the screening, which allegedly amounted to around 25 minutes per day. In 2010, two employees who worked at a Nevada warehouse filed a putative collective action under the FLSA and putative class action under Nevada state law alleging that their employer was required to pay employees for the time related to post-shift screening. The Nevada District Court dismissed the claims, finding that the waiting and screening time was not compensable time under the FLSA. It reasoned that, since the screenings occurred after employees' shifts and were not "an integral and indispensable part of the principal activity they were employed to perform," payment was not required. The Ninth Circuit Court of Appeals reversed, holding that the screenings were compensable because they were necessary to the principal work performed and were done for the benefit of the employer.

The Supreme Court agreed to hear the case and, after oral argument, issued a 9-0 opinion reversing the Ninth Circuit decision and finding that screenings were not compensable. The issue before the Court was whether the screenings

were "preliminary to or postliminary to" a principal activity that the employees are employed to perform, such that no payment would be required. The Court's previous decisions defined "principal" activities to include duties that are an "integral and indispensable" part of the principal activities, meaning they are "an intrinsic element of [principal] activities and one with which the employee cannot dispense if he is to perform his principal activities." In applying the law to the facts in question, the Court first found that, based on the statutory language of the Portal-to-Portal Act, the screenings were not themselves principal activities that the employees were employed to perform. In other words, employees were not hired in order to undergo security screening. Next, the Court determined that the screenings were not "integral and indispensable" to the work of locating and packing items to ship to customers. The employer could eliminate the screenings entirely, the Court reasoned, and the workers' ability to find and package products would not be affected.

Notably, the Court rejected the workers' contention that the time related to post-shift screening was compensable because it was required by and for the benefit of the employer. The Court explained that classifying all activities that are required by or benefit the employer as compensable would be overbroad and would eviscerate the intent of the Portal-to-Portal Act to limit liability for certain preliminary and postlimiary activities. The Court similarly rejected the argument that workers should be paid for the time because the employer could have reduced the screening time to a *de minimus* amount but chose not to.

Despite the unanimous employer-friendly holding, in a concurring opinion Justice Sotomayor, joined by Justice Kagan, emphasized the narrow nature of the Court's opinion. The concurrence stressed that preliminary and postliminary activities that allow workers to perform principal activities safely and effectively still qualify as compensable work. It differentiates between activities like a battery plant worker donning and doffing protective gear or a butcher sharpening his knives—both compensable activities required for safe and effective work—from the anti-theft screenings that do not impact a worker's safety or efficiency.

For employers, the *Integrity* decision clarifies what kinds of pre- and post-shift activities must be paid as working time and which activities are noncompensable. In making that determination, employers should consider whether activities performed before or after shifts are activities that the employee is employed to perform or if the activity is "integral and indispensable" to an employee's primary work. If the activities in question fall into either category, they are compensable. It is important to remember, however, that some state wage and hour laws do not exclude preliminary and postliminary activities from compensable work, like the Portal-to-Portal Act did in the FLSA. Therefore, payment for certain pre- and post-shift activities may still be required under state law.

NLRB Rules Employers Now Limited in Restricting Employee Use of Company E-mail During Non-Working Hours

On December 11, 2014, the National Labor Relations Board (NLRB) issued a decision finding that employees now have a right to use company email during non-working hours for non-business purposes. The decision—*Purple Communications, Inc. and Communications Workers of America, AFL-CIO*, Case Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584 (December 11, 2014)—reverses NLRB precedent from 2007, which allowed employers to prohibit the use of company email systems for non-job-related solicitations. The *Purple Communications* decision provides employees with a new, unrestricted platform to conduct organizing and other activities covered under Section 7 of the National Labor Relations Act.

Under the NLRB's new decision, if an employer gives employees access to company email systems, the employer must also allow those employees to use the email for statutorily protected communications during non-working hours. According to the NLRB, earlier precedent focused "too much on employers' property rights and too little on

the importance of email as a means of workplace communications." The NLRB justified its shift in position by stating that a lot has changed since 2007 (not to mention the political composition of the NLRB), including an increased prevalence of email use by employees of all levels, as well as a growing acceptance of teleworking, where employees' interactions with coworkers may be limited to the virtual environment. In doing so, the NLRB refused to draw a distinction between a company break room and an electronic space, stating that "[i]n many workplaces, email has effectively become a 'natural gathering place,' pervasively used for employee-to-employee conversations."

While the decision marks a sea change for the NLRB's view of company email policies—effectively requiring employers allow employees to use company email for union organizing and other Section 7 activities—the NLRB attempted to limit the effect of its decision by stating that it applied only to employees who have already been granted access to company email systems and that an employer may demonstrate "special circumstances" to justify a "total ban" on non-work email in the interest of maintaining production or discipline. The specifics of what those circumstances may be, however, are unclear. It is also unclear how the NLRB's new rule affects an employer's ability to monitor the use of email systems for non-union activity, or to limit off-hour use of company email by non-exempt employees to avoid running afoul of wage and hour laws.

What is clear is that a blanket rule restricting employee use of email to work-related subjects is no longer permitted. Importantly, the impact of the NLRB's decision is not limited to employers with a unionized workforce or in the midst of an organizing campaign. All employers should review their existing policies and consult with counsel to ensure compliance with the NLRB's new position.

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