Fenwick Employment Brief

January 12, 2015
Daniel J. McCoy 650.335.7897
Sheeva J. Ghassemi-Vanni 650.335.7191

Fenwick
FENWICK & WEST LLP

Waiting for and Undergoing Security Checks Not Compensable Time

The United States Supreme Court recently held in *Integrity Staffing Solutions, Inc. v. Busk et al.* that time spent waiting for and undergoing post-shift security checks is not compensable under the Fair Labor Standards Act ("FLSA"), as amended by the Portal-to-Portal Act.

Amazon.com subcontractor Integrity employed warehouse workers to retrieve products from warehouse shelves and package them for delivery to Amazon customers. In two Nevada warehouses, employees were required to undergo security checks at the end of their shifts before leaving the premises. During the checks, employees removed items such as wallets and keys and walked through metal detectors. Waiting in line for and undergoing the checks took about twenty-five minutes.

Former warehouse workers filed a putative class action in Nevada District Court on behalf of themselves and other Nevada warehouse workers seeking compensation for the time spent waiting for and undergoing the security checks. They argued that (1) the checks were conducted to prevent theft and thus were solely for the benefit of the employer and its customers and (2) the employer could reduce the time spent waiting for and undergoing the checks to a *de minimis* amount by adding more security screeners or staggering shifts. The District Court dismissed the case, holding that the time was not compensable because the checks occurred after the shift and were not "an integral and indispensable part of the principal activities" the workers were hired to perform.

The Ninth Circuit reversed, holding that although normally the checks would be noncompensable postliminary activities, they were compensable as integral and indispensable to the workers' principal activities if they were necessary to the principal work performed and done for the benefit of the employer.

The focus of the court's analysis was that the checks were required by the employer and for its benefit.

Agreeing with the District Court, the Supreme Court reversed the Ninth Circuit decision and held that the checks were not compensable. Looking at the historical backdrop of and rationale for the Portal-to-Portal Act, the Court noted that Congress created the Act in reaction to Supreme Court rulings in the 1940s that threatened to bankrupt employers by holding that a broad swath of activities were considered compensable time. Thus, it created the Act, in part, to explicitly exempt employers from liability under the FLSA for activities which are preliminary or postliminary to the performance of the principal activities that the employee is hired to perform.

It noted that the security checks were not integral and indispensable to the warehouse workers' duties – i.e., retrieving products from the warehouse shelves or packaging them for shipment. In fact, it stated that Integrity could have eliminated the checks without impairing the workers' ability to carry out their duties. It pointed out that the Ninth Circuit erred in holding that the appropriate test of compensable time is whether the activity (e.g., security checks) was required by or for the benefit of the employer and that such a test would "sweep into 'principal activities' the very activities that the Portal-to-Portal Act was designed to address."

Also, the Court dismissed the argument that Integrity could have reduced the time it took to wait for and undergo the checks, noting that this did not change either "the nature of the activity or its relationship to the principal activities that an employee is employed to perform." Thus, the Court held that an activity such as undergoing a security check is compensable if integral and indispensable to the principal activities that the worker is hired to perform – i.e., "an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

This decision is highly instructive for employers whose employees undergo non-trivial pre and/or postliminary activities. However, the decision interprets federal, not California, law. It does not foreclose a court or agency in California or other states, construing state law, from holding that such security checks constitute compensable time.

NLRB Expands Employees' Use of Email for Protected Activity

The National Labor Relations Board ("NLRB" or the "Board") has yet again expanded employees' rights to discuss the terms and conditions of their employment or otherwise engage in protected activity. In *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*, the NLRB held that employees who already have access to their employers' email systems through work must be allowed to use the email systems to engage in protected communications about the terms and conditions of their employment on nonworking time. This decision overrules the NLRB's 2007 *Register Guard* decision to the extent that it held that employees do not have a right to use their employers' email systems for such purposes.

Purple Communications had an electronic communication policy that, among other things, stated that its email and other electronic systems were to be used for business purposes only and that "engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company" or "sending uninvited email of a personal nature" was prohibited. A dispute arose when a union organizing campaign was afoot and the would-be union challenged the policy as interfering with the employees' freedom of choice in the union election. The Administrative Law Judge upheld the policy under the NLRB's *Register Guard* decision, which held that employers may enforce a policy that prohibits employees from using employer email for "non-job-related solicitations" (including union organizing efforts), so long as they do so in a non-discriminatory manner. The union and the NLRB's General Counsel appealed.

In overruling *Register Guard* – which was issued by an NLRB Board during the Bush administration – the Board noted that its prior decision was "clearly incorrect" for the following reasons: (1) it focused too much on the employers' property rights in its email systems and too little on the importance of email as a way to communicate in the workplace and (2) it failed to adequately protect employees' rights under the National Labor Relations Act and "abdicated its responsibility 'to adapt the Act to the changing patterns of industrial life.'"

According to the NLRB, this new email usage rule is purportedly limited as it only applies to employees who have already been given access to company email and does not require that employers grant such access. Yet given how ubiquitous email has become in the modern workplace, it is hard to see how this limits the Board's ruling in any meaningful way. An employer can justify a total ban on nonwork use of email (including protected activity) by showing that "special circumstances" make a ban necessary to maintain "production or discipline," but the NLRB admitted that "special circumstances" justifying a total ban would be rare. Absent special circumstances, the employer can apply uniform and consistently enforced rules governing email as long as they are necessary to maintain production and discipline.

The NLRB addressed the concern of unlawful surveillance – i.e., employers monitoring email and therefore being held to have unlawfully surveilled unionizing activity. However, it held that employers can still stake out the ability to monitor their email systems for "legitimate management reasons" without fear of such liability as long as they do not change the monitoring in reaction to unionizing activity or target certain employees who are engaged in such activity. Further, employers can still maintain and communicate to employees that they do not have an expectation of privacy in their use of employer-provided email systems.

The Board noted that its opinion only reaches email systems and not any other type of electronic communications system, yet it would not be surprising if the NLRB attempts in the future to reach instant messaging, Skype, or other electronic communication methods used in the workplace. Although this decision involved union organizing, as with other NLRB decisions, this ruling applies to private, non-unionized employers as well. Accordingly, companies should revisit their email usage and non-solicitation

and distribution policies to ensure compliance with this ruling.

News Bites

Perceived Whistleblower Protected by Labor Code
In *Diego v. Pilgrim United Church of Christ,* a California appellate court held that an employee was protected from retaliation under the California Labor Code (former section 1102.5(b)) when her employer mistakenly believed that she reported violations of state regulations by her employer to a government agency.

Cecilia Diego was a "mentor teacher" at Pilgrim United's preschool. Her supervisor, and director of the preschool, was Anne Lewis. Responding to an anonymous complaint about conditions at the preschool that allegedly violated various California regulations, the Community Care Licensing Division of the California Department of Social Services ("Licensing") made an unannounced visit to the preschool to conduct an inspection. Diego's coworker (Cynthia Saldana) had told Diego before the inspection that she (Saldana) had made the complaint.

A few days after the inspection, Lewis called Diego and discussed the anonymous complaint and inspection. Lewis asked Diego why she was "doing this" and whether she wanted Lewis "gone," informed her that people had been telling her "things," and made other vague references to the complaint and inspection. It soon became clear to Diego that Lewis believed Diego had made the complaint. Later that day, Lewis called Diego again and asked her to attend a meeting the following day. Diego asked to reschedule the meeting due to a planned vacation. A few days later, before the meeting could take place, Lewis called Diego and terminated her employment. Her termination occurred within days of the Licensing inspection.

Diego sued Pilgrim United for wrongful termination in violation of public policy under former section 1102.5 of the California Labor Code, which protects employees from retaliation for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation. The company sought to dismiss the case through summary judgment. The lower court granted its motion on the basis that Diego was not protected by the Labor Code because she did not actually make the complaint to Licensing. Reversing summary judgment for Pilgrim United, the court held that Diego was protected under the Labor Code even though she did not make the complaint because, as she alleged, her employer mistakenly believed she made the complaint and retaliated against her by terminating her employment within days of the Licensing inspection. The court noted that the legislative intent and public policy behind the Labor Code protection of whistleblowers is to encourage employees to report violations and protect those who do. The fact that her employer mistakenly believed she made the complaint was sufficient to afford her this protection.

This decision significantly expands the scope of retaliation protection for employees under Labor Code section 1102.5.

California Paid Sick Leave Law Required Notice January 1; Guidance for Employers with Unlimited or Honor, No-Accrual Time Off Policies
Starting January 1, 2015, employers must post this poster in the workplace informing employees of their rights under California's Healthy Workplaces, Healthy Families Act of 2014, which provides paid sick leave to employees. In addition, employers must provide non-exempt, hourly employees with an individualized Notice to Employee at the time of hire that includes information on the Act. Employers need to check off one of the four ways listed in the Notice in which they provide paid sick leave to employees. For current hourly employees, employers can accomplish such notice via an itemized wage statement (per Labor Code section 226) or through issuing the Notice above. Even though the notice obligations above begin in January, the Act itself goes into effect on July 1, 2015.

The Department of Labor Standards Enforcement ("DLSE") recently issued FAQs on the Act discussing notice, accrual, and other helpful topics. Perhaps the most interesting is an FAQ regarding employers with honor or unlimited, no-accrual time off policies (covering both sick and vacation). The DLSE noted: "Most employers with this new but growing policy do not track how much time employees take off or for what reason. However, the new law requires that employers separately track sick leave accrual and

use." Thus, employers with these policies should ensure that they are complying with such tracking requirements.

See our September edition for more information on the Act.

California Supreme Court Denies Review of Cell Phone Reimbursement Case

In August, a California appellate court held in *Cochran v. Schwan's Home Service, Inc.* that employers must reimburse employees for mandatory use of personal cell phones for business purposes, even if employees have unlimited plans and otherwise incur no additional out-of-pocket expenses for such use. The California Supreme Court refused to grant review of the decision, such that it will stand as established case law. See our September edition for a discussion of this case.

Reminder: Annual Update Breakfast Briefing January 14, 2015

Please join the members of the Employment Practices Group for an informative review of the legal developments over the past year and how they will affect your workplace in the coming year. Click here for more information and to RSVP.

For more information please contact:

Daniel J. McCoy	650.335.7897
Sheeva J. Ghassemi-Vanni	650.335.7191

Follow us on Twitter at:
http://twitter.com/FenwickEmpLaw